VOLUNTARY LABOR ARBITRATION TRIBUNAL

#1650

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In the Matter of Arbitration * Between * * OPINION AND AWARD OHIO CIVIL SERVICE * EMPLOYEES ASSOCIATION * Anna DuVal Smith, Arbitrator LOCAL 11, AFSCME, AFL/CIO * * Case No. 27-35- 020422-0099-01-03 and * * Cole Tipton, Grievant OHIO DEPARTMENT OF * REHABILITATION & CORRECTION * Removal *

APPEARANCES

For the Ohio Civil Service Employees Association/AFSCME Local 11/AFL-CIO:

Michael Hill, Staff Representative
Ohio Civil Service Employees Association/AFSCME Local 11/AFL-CIO

For the Ohio Department of Rehabilitation & Correction:

David Burrus, Labor Relations Officer
Ohio Department of Rehabilitation & Correction

Nemi Valentine, Labor Relations Specialist
Ohio Office of Corrective Bargaining

I. HEARING

A hearing on this matter was held at 10:00 a.m. on January 8, 2002, before Anna DuVal Smith, Arbitrator, who was mutually selected by the parties, pursuant to the procedures of their collective bargaining agreement. Two grievances were consolidated for the purpose of hearing only, with the parties requesting a separate opinion for each. The parties stipulated the matter is properly before the Arbitrator and presented one issue on the merits, which is set forth below. They were given a full opportunity to present written evidence and documentation, to examine and cross-examine witnesses, who were sworn or affirmed and excluded, and to argue their respective positions. Testifying for the Ohio Department of Rehabilitation & Correction (the "State") were Maj. Keith Smith, and Correction Officer Wesley D. Mong (by subpoena). Also present was Ruth Rittichier, Labor Relations Officer. Testifying for the Ohio Civil Service Employees Association/AFSCME Local 11/AFL-CIO (the "Union") were the Grievants, Lynn McCoy and Cole Tipton. Also in attendance were Patty Rich, Classification/Arbitrator Coordinator, and David Sealscott, Chapter Representative. A number of documents were entered into evidence: Joint Exhibits 1-12 and Union Exhibits 1-2. The oral hearing was concluded at 12:40 p.m. on January 8, 2002. Written closing statements were timely filed and exchanged by the Arbitrator on February 18, 2003, whereupon the record was closed. This opinion and award are based solely on the record as described herein.

II. STATEMENT OF THE CASE

The Grievant had been a correction officer at the Toledo Correctional Institution for 27 months when he was terminated for his conduct as a witness to an incident involving two other officers and two inmates. At the time of the incident the Grievant was informed on the Department's Standards of Employee Conduct and had no active discipline on his record.

The incident occurred on February 27, 2002, when the Grievant was working second shift as an extra officer in the segregation unit, assigned to a 15-minute inmate watch in the LC pod. At approximately 7:40-7:45 p.m. Officers Beining and Griswold (who were junior to the Grievant in seniority) put two unsecured segregation inmates together in a recreation cage in the SC pod for the purpose of allowing them to work out their differences. Institutional policy and post orders prohibit placing two unsecured inmates in the same recreation cage. The Grievant

walked in as the second inmate was being uncuffed. He asked what was going on and received a smile from Officer Beining as a reply. Unsecured, both inmates drew up in a fighting stance. The Grievant turned to walk away in order not to see what he thought was about to transpire. According to a statement he gave during the investigation he heard someone say, "You know McCoy is in the booth." As he exited he looked up at the control center ("booth") and saw Officers Mong and McCoy.

No officer reported this incident, but it did come to the attention of management the next morning, February 28, by a confidential statement from one of the inmates. When the Grievant was first interviewed later that afternoon he denied knowing that inmates were placed in a segregation recreation cage together, that he had seen inmates fight or engage in horseplay, or that he had seen anything unusual in the area. But by March 8 he had changed his mind, for on that date he gave a written statement and interview, admitting to what he had observed.

Both Beining and Griswold were later terminated for their roles in the incident. The two officers working the control room that evening were also charged. One, Officer Mong, received a five-day working suspension. The other, Officer McCoy, was terminated. The Grievant was charged with violating Rule 24 (interfering with, failing to cooperate in, or lying in an official investigation or in query), 38 (any act or commission not otherwise set forth herein which constitutes a threat to the security of the facility, staff, any individual under the supervision of the Department, or a general member of the public) and 41 (unauthorized actions that could harm any individual under the supervision of the Department). The pre-disciplinary hearing officer found just cause for discipline, no mitigating circumstances, and aggravating circumstances in that the Grievant was the most senior officer in the unit at the time yet failed to stop the incident.

Further, that his decision not to report it and then to lie about it frustrated management's investigation. The Grievant was subsequently terminated on April 22, 2002.

A grievance protesting this action was filed that same day and subsequently fully processed to arbitration where the issue is: *Was the Grievant terminated for just cause? If not, what is the remedy?*

In arbitration the Grievant admitted what he did was wrong and that he knew he could be disciplined for it. He admitted he lied in his first investigatory interview but said he came forward later to set the record straight.

The State submits that what the Grievant did was not a simple failure to report what he witnessed. This is more than a simple omission. The Grievant's lies interfered with management's investigation of a serious incident. His later recantation does not absolve him of guilt or make removal unreasonable. The State continues that the Grievant's failure to intercede the evening of the incident allowed something that goes completely against the basic tenets of security in a prison environment. The State points out that removal is within the range of discipline for a first infraction of each of the rules specified and that the Grievant is but a two year employee of unremarkable performance. It asks that the Arbitrator not substitute her judgment for management's and that she uphold the removal.

The Union submits that the State has clearly stacked the charges against the Grievant and is now trying to base its case on yet another rule, failure to report, although the State did not terminate him for that. What the Grievant did was to witness an incident and then not report it. Officer Mong did the same thing, but he received only five days though he saw the fight and the Grievant did not. What is more, the Grievant fully cooperated in the investigation after his first

interview. A careful reading of the transcript will show he was telling the truth: he saw something suspicious and left. Should he have cooperated fully at the initial interview? Yes, and he admits it. However, he did cooperate fully after that.

The Union contends there was no violation of Rule 38 or 41. The Grievant did not plan or participate in any actions that constituted a threat to the facility, staff or any individual or that could harm any individual. It was Officers Beining and Griswold, not the Grievant, who put the inmates into the cage and let them fight. Had their statements been included in the pre-discipline, the Grievant would have been exonerated of these charges.

Finally, the Union argues that termination is not commensurate with the offense. The Standards of Employee Conduct allow a two-day suspension or fine for a first offense. Yet the Grievant was terminated though he saw less than Officer Mong and had a clean record. The Union asks that the grievance be sustained in its entirety, that the Grievant be reinstated to his former position with all back pay and benefits, and made whole.

III. OPINION OF THE ARBITRATOR

Although the hearing officer's report and the removal notice refer to the Grievant's failure to report the infraction he observed, he was not charged with violating the Rule 25. What he was terminated for was failing to intervene when he knew two other officers were putting inmates and staff in harm's way, and then lying about it. These are individually and collectively terminable acts, whether the charge cites two or three rules. Yes, the other two officers were the ones who had the idea and carried it out, but the Grievant's inaction also threatened security and the well-being of the inmates.

The Grievant cannot be compared to Officer Mong. Officer Mong was not in a position to intervene and he was honest from the beginning of the investigation. While it is true the Grievant did eventually come clean and should be given credit for it, by itself this is not enough to mitigate the penalty.

IV. AWARD

The Grievant was terminated for just cause. The grievance is denied in its entirety.

Anna DuVal Smith, Ph.D.
Arbitrator

Cuyahoga County, Ohio
May 6, 2003