

VOLUNTARY LABOR ARBITRATION TRIBUNAL

#1651

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- 020422-0098-01-03 and *
* Lynn McCoy, 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 18 months when she was terminated for her 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 her record.

The incident occurred on February 27, 2002, when the Grievant was working second shift in the segregation unit control center. Working with her that evening was Officer Wesley D. Mong. At approximately 7:40-7:45 p.m. two officers on the floor, Beining and Griswold, 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. A third officer on the floor, Cole Tipton,

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. Tipton 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 at which point an investigation ensued. Beining and Griswold were later terminated for their roles in the incident, as was Officer Tipton.

Officer Mong admitted on February 28 that he had witnessed the incident but did not document it in his log book, write a report or call a supervisor. On March 6 he was again interviewed and gave a written statement in which he states that both he and the Grievant observed the incident from the control booth. In the interview he placed her as "standing right next to me" at the panel between the SC and DC pods and estimated the time as being "around 1940 hours or anywhere from like 1930 to 1945." Officer Mong was subsequently charged with Rule 25 (failure to immediately report a violation of any work rule, law, or regulation) for which he received a five-day working suspension. In the instant arbitration he testified he was "very sure" the Grievant saw what was going on because she was there beside him facing in that direction and that they spoke about it. On cross he was "fairly sure" she saw but he did not see her eyes because she was wearing dark prescription glasses. She was on break when Tipton entered the SC pod because he, Officer Mong, had to release the door to let Tipton in, but when

the incident occurred she was back from break, standing beside him. He testified she left for her break around 7:25 p.m., but it could have been 7:35 p.m., and she was gone for 10-15 minutes. The incident, itself, lasted only 30 seconds to a minute. He further testified everything he said on cross was true "give or take on the time frames."

Officer Tipton also testified about the Grievant's role, saying that when he looked up at the booth he did not see the Grievant with Officer Mong. He saw her in the lighted stairwell instead. On cross he affirmed what he had said in his investigatory interview and written statement that he had seen the two control officers "standing in the window." But on redirect he testified that Mong was standing there alone.

The Grievant was interviewed on March 5. After asking for and being given the Garrity Warning, she denied any knowledge of two inmates being placed in the cage together or of seeing a fight between them. On March 13 she was charged with violating Rule 24 (interfering with, failing to cooperate in, or lying in an official investigation or inquiry) and Rule 25 (failure to immediately report a violation of any work rule, law, or regulation). At her pre-disciplinary hearing she testified that she did not witness the incident because she was not in the control room at the time the incident occurred. The hearing officer found this claim was contradicted by Officers Tipton and Mong, that there was just cause for discipline, and no mitigating factors. 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 explained that on the evening in question she went on break

about 7:35 p.m. and was gone from the control room about fifteen minutes, returning at approximately 7:50. A few minutes later she was called to relieve another officer on perimeter and left the booth. At no time, she said, did she observe the incident on the SC side, nor did Officer Mong mention it. The first time she heard anything about it was two days later when she came back on duty and heard some officers had been reprimanded. She asserted that had she seen what transpired, she would have reported it.

The State argues it had just cause to terminate the Grievant. Her story, it claims, makes no sense when compared with Tipton's second interview and written statement, and with Officer Mong's. How could she be in the lighted staircase and in the SC/DC control window at the same time? Officer Mong is credible. He was consistent throughout the case and his testimony was corroborated by Tipton's statement and second interview. He received less discipline than the others in the case because he was differently situated than the others. Officer Tipton's surprise testimony in arbitration is not credible. It is uncommon for a witness's memory to improve as time passes. The sole purpose of Tipton's testimony in arbitration was to undermine Mong's and to cover for the Grievant. The State submits that the Grievant turned a blind eye to what took place and then lied about it. Even her investigatory interviews show a blatant attempt to cover up in order to protect herself and others. Rule 24 permits removal on a first offense. This low-seniority employee of unremarkable performance participated in a cover-up, breaking the employment bond of trust, so removal is justified. The State asks that the Arbitrator not substitute her judgment for that of management, but deny the grievance in its entirety.

The Union contends that the State had no just cause to discipline the Grievant because she was not in the control room at the time the incident occurred and did not see it. Mong's

testimony cannot be relied upon for he did not report that the Grievant was working with him until March 6. In addition, he testified that it was he, not the Grievant, who let Tipton into the SC pod. Since Tipton entered from the Grievant's side, the Grievant would have been the one to let him in had she been present. Since she did not, one must conclude she was not there. Mong also testified that McCoy was wearing dark prescription glasses in the darkened control room and then later admitted he could not see her eyes or what she was looking at. Tipton, too, undermined the State's case when he testified that he saw the Grievant standing inside the door of the control room stairwell, not beside Mong. The Union reminds the Arbitrator that the State has the burden of proof and submits that it failed to carry that burden. It asks that the grievance be sustained in its entirety and that the Grievant be reinstated with no loss of pay or other benefits.

III. OPINION OF THE ARBITRATOR

This case turns on the credibility of the witnesses. The Union would have me believe the Grievant's claim that she was not in the control center during the critical moments and so saw nothing to report or lie about. It would have me disbelieve Mong and interpret Tipton's statements, interviews and testimony to support the Grievant. The State would have me believe Mong, interpret Tipton to support him and disbelieve the Grievant.

Looking at Mong first, his credibility is not undermined by not having mentioned the Grievant's presence until March 6. Even Tipton, who lied on February 28, told the truth on March 6. Mong had nothing to gain by placing the Grievant where she was not. I am persuaded he told the truth on March 6 and in arbitration as he did on February 28. His testimony in arbitration was consistent with what he said before and specific about where they were standing

together and what he said to her. The times at which the various events happened are but estimates. Nothing was logged as it occurred. It is true that Mong let Tipton through to the SC pod, but there was enough time for the Grievant to get out of the stairwell and stand beside Mong at the SC/DC panel in time for someone in the pod to notice her and remark on it and then for Tipton to look up and see her.

In contrast, Tipton's testimony on these matters is worthless. He demonstrated his willingness to lie to protect himself and others in his first investigatory interview. He would have the Arbitrator believe he told the truth in his second interview and statement, and those have "C/O Mong and C/O McCoy standing in the window of the control booth," not Mong at the panel and McCoy at the stairwell door. For these reasons, Tipton's testimony is not helpful to the Union's case and his March 6 interview and statement are weighed as corroboration of Mong's testimony.

Finally, I am puzzled by the dark glasses. If the Union submits that they prove Mong could not see where the Grievant was looking then it is admitting she was there to see. Yet not once has the Grievant claimed she was present but did not see what happened.

In short, the evidence convincingly establishes that the Grievant is guilty as charged. Without mitigating circumstances there is no reason to reduce the penalty for the Grievant has shown she cannot be trusted.

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