

**STATE OF OHIO
VOLUNTARY RIGHTS ARBITRATION**

In the Matter of Arbitration Between:

**STATE OF OHIO, DEPARTMENT OF REHABILITATION AND
CORRECTION,**

Employer,

And

OCSEA/AFSCME, LOCAL 11,

Union.

**GRIEVANT: JEFFREY WHITAKER (TERMINATION)
GRIEVANCE NO.: 27-20-20050819-6819-01-03**

Arbitrator's Opinion and Award

Arbitrator: Dr. David M. Pincus

Date: March 14, 2006

Appearances

For the Employer

Beth A. Lewis	Advocate, LRA1
Ray Nussio	2 nd Chair, LRS-OCB
Janet Tobin	LRO-MANCI
Michelle Burrows	Admin. Asst. 4-CO
Sir Scott Savage, DO, FACEP	Asst. Medical Director
Sharlene Blevins, RN	Nurse
Harold Cope	Captain, NCCI
Jonathan A. Clay	Corrections Officer
Richard Knowlton	Corrections Officer
James Reber	Corrections Officer
Michael E. Downs	Corrections Officer

For the Union

Billy Stevens
Jeffery Whitaker
Douglas W. Mosier
Jim McElvain
Stewart D. Ryckman
Paul E. Jones
James D. Clark

Chief Steward
Grievant
President
OCSEA-Staff
County Coroner
County Coroner
Corrections Officer

I. Introduction

This is a proceeding pursuant to the grievance procedure, of the Agreement between the State of Ohio, Department of Rehabilitation and Correction (the Employer) and the OCSEA/AFSCME, Local 11 (the Union). At the arbitration hearing, the parties were given the opportunity to present their respective positions on the grievance, to offer evidence, to present witnesses, and to cross-examine witnesses. At the conclusion of the hearing, the parties were asked by the Arbitrator if they planned to submit post-hearing briefs. The parties submitted post-hearing briefs in accordance with the guidelines agreed to at the hearing.

II. Joint Issue

Was the grievant, Jeffrey Whitaker, removed for just cause? If not, what shall the remedy be?

III. Joint Stipulations

1. Grievant was hired by the Department of Rehabilitation and Correction on July 1, 2002.
2. Grievant's prior discipline record includes a one-day fine issued on March 15, 2005, for violation of Rule 7 – failure to follow post orders, administrative regulations, policies or directives; and Rule 11 – Inattention to duty.
3. Grievant was removed on August 18, 2005. Grievant was charged with violating Rule 7 – failure to follow post orders, administrative regulations, policies or directives; Rule 24 – Interfering with, failing to cooperate in, or lying in an official investigation or inquiry; and Rule 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 member of the general public.
4. The parties agree the log book entries reflecting calls made to A building are accurate and that the calls were made to A building as indicated.
5. The parties agree that the thermometer inserted in the inmate's body as depicted in UX1 shows a temperature of 98°F.

IV. Relevant Work Rules and Directives

Rule 7. Failure to follow post orders, administrative regulations, policies or directives.

(1st Offense WR/1 Day; 2nd Offense 2 Day; 3rd Offense 5 Day; 4th Offense Removal)

Rule 24. Interfering with, failing to cooperate in, or lying in an official investigation or inquiry.

(1st Offense 2 Day/Removal; 2nd Offense 5 Day/Removal; 3rd Offense Removal)

Rule 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 member of the general public.

(1st Offense 2 Day/Removal; 2nd Offense 5 Day/Removal; 3rd Offense Removal)

V. Case History

The grievant, Jeffrey Whitaker, was a correctional officer assigned to the Death Row (DR) unit of the Mansfield Correctional Institution. The DR unit is considered maximum security. It is a twenty-four hours a day, seven days a week post.

As a fundamental component of his job, the grievant was required to remain alert and attentive at all times. It was imperative that he complied with all procedures outlined in the Post Order and not take short cuts. His failure to follow procedure was a violation of Rule 7 of the Standards for Employee Conduct. The Employer's Rules and Regulations underscored that it is essential that all security procedures be strictly followed.

Correctional Institutions are required to conduct no less than five formal counts each twenty-four hour period. At the Mansfield DR, on the third shift, those counts occurred at 11:00 p.m., 2:00 a.m., and 4:00 a.m. In addition, as admitted by the grievant, a corrections officer on the third shift in the DR was required to check each inmate's cell at least twice per hour and to log that activity. In the event a correctional officer discovered an inmate hanging in his cell, the officer was required to immediately activate his man-down alarm, then report to the PCO and request that he/she be given the seat belt cutter.

On May 7, 2005, the grievant discovered inmate Martin Koliser in a condition that led the grievant to believe that Koliser had committed suicide. The grievant alleged that he did not notice anything amiss in Koliser's cell until his security check at 5:30 a.m. The grievant stated that at the earlier security checks and counts, nothing existed out of

the ordinary in inmate Koliser's cell. The grievant alleged that at the 5:10 a.m. check, Koliser was sitting on his bunk watching television.

Koliser had died from massive bleeding and asphyxiation from having hung himself. Koliser apparently tied tourniquets made of ripped up material around the biceps of both of his arms and cut the brachial veins in his arms. He leaned on to the head of his bed as he bled a massive amount of blood that eventually soaked a significant part of his mattress.

To hasten the dying process, Koliser hung a noose from a hook on his bed. While kneeling on the floor and bleeding in that position, Koliser put his head through the noose and leaned into it and then ultimately died from asphyxiation.

When the grievant and the corrections officers entered Koliser's cell between 5:45 a.m. and 6:00 a.m., he was flat on his back with his knees bent up. His hands were cold and stiff and officers had to force his arms together to apply handcuffs. His fingers were curled and his thumb extended, indicating a tightening of the small muscles. His cell reeked of death and feces. It was a struggle to put him in the body bag.

A registered nurse, Nurse Blevins, attempted to perform CPR on Koliser but his face was fixed and she could not fit the breathing mask around his mouth.

As a result of this incident, the Employer conducted an investigation on June 2, 3, and 8, 2005. The investigation was conducted by Michelle L. Burrows, Administrative Assistant 4 for the North Region, and Charlotte E. Owens, Security Administrator of the Southwest Region. They conducted tape recorded interviews with approximately thirty-two witnesses and submitted their report on June 28, 2005. Excerpts from the relevant witnesses' testimony are summarized as follows.

Grievant Whittaker. Upon discovering Koliser, Whittaker immediately went downstairs to the Perimeter Correction Officer and informed him of the situation. Prior to opening the door to the inmate's cell, Whittaker alleged that he observed the inmate sitting on the floor and observed blood on the inmate's left arm. He conceded that he was supposed to do two rounds per hour and stagger them at different times in accordance with Post Orders. He stated that he did his rounds and did not try to let them go over thirty-five to forty minutes between rounds. His security checks involved checking windows, doors, anything out of the normal, unusual behavior with inmates, etc.

In a second interview with Whittaker, he stated that the man down alarm was for personal protection and should not be used for inmates. He could not justify why he did not hit his man down alarm.

Upon doing his inspection, he said that he made sure that the inmates were in their cells and were not in any sort of distress. He stated that at approximately 5:00 a.m., he saw Koliser sitting on the bunk watching television. He said Koliser was seated on the bottom bunk with the television on and the inmate did not say anything to him. He shined his flashlight in the room and Koliser did not respond to him. He did not see any blood so he went on checking the other inmates. He did not recall seeing Koliser lying down at all throughout the night. He stated that he never smelled anything or saw anything after the door was opened.

Nurse Blevins. Nurse Blevins arrived with the team of individuals that entered into Koliser's cell at approximately 5:45 a.m. She stated that the inmate was cold to touch and that his pupils were fixed and dilated indicating that he was deceased. She said that the inmate was stiff and his body was hard to manipulate.

Corrections Officer J. D. Clark. Clark stated that the grievant informed him that a nurse was needed because inmate Koliser had cut himself. He stated that the last round prior to finding inmate Koliser was done by the grievant at around 5:00 a.m., but he did not see the grievant do the check. He stated that when he led the grievant into the DR to do his inspection, that he did not detect any type of odor when the door was opened. He confirmed that rounds were done

approximately two times per hour and that whatever the log book stated for the morning of the May 7th was what happened.

Corrections Officer James Reber. Reber said that the first thing he noticed upon entering the DR was the stench. He stated that he was surprised at the feces on the wall, the condition of the cell, and the condition of the inmate. The stench made it very difficult not to vomit. He stated that the inmate was stiff and that there was so much blood in the room that it appeared that someone had "gutted a hog in there."

Corrections Officer Knowlton. Knowlton went into the DR at approximately 5:45 a.m. He stated he had been a paramedic for fifteen years and that the inmate was stiff and had bled out excessively. He also stated that the whole pod smelled of feces. He stated that the bed was completely covered in blood and it was a solid red color and it appeared to have soaked into the mattress.

Correction Officer Hicks, Jr. Hicks stated that as soon as he walked into the DR unit it smelled of feces. He stated that he looked into the cell and that there were feces on the wall and a lot of blood all over the bottom bunk and on the floor. He said there was difficulty manipulating the inmate's body as it was pretty stiff. He stated that the inmate's legs were bent up and stiff and that the majority of the blood was towards the top of the bed and that it was dark red.

Lt. G. Gilbert. Lt. Gilbert said that he observed an excessive amount of blood in the cell. He stated Koliser's body was stiff when it was put into the body bag and that the coroner had to push the legs down before zipping it up.

Nurse D. Burson. Burson approached the cell at approximately 6:00 a.m. She stated that Koliser's pupils were fixed and dilated, he had no pulse, was not breathing, and his color was a dusky blue. She stated that breathing into the inmate was very difficult. She also observed an excessive amount of blood in the room that was clotted. She indicated that clotted blood is older blood because it has dried out. She again emphasized that it was very difficult to breathe into Koliser.

Lt. Harold Cope. Cope said that immediately upon entering the pod, he smelled feces and what appeared to be an embalming room smell. He said that the death smell was apparent to him as soon as he walked into the pod. He believed that Koliser could have been discovered three to five hours earlier and it would not have done any good. He based this on his experience as an advanced EMT. He admitted that he is not a doctor but, based on his experience, rigor mortis takes six to eight hours to set in and this inmate was fully set. He said that there was levity at the bottom Koliser's neck. In Lt. Cope's opinion, he believed the inmate had been dead five to six plus hours.

Corrections Officer J. H. Clark. Clark said there was a "funny smell" in the room. He indicated that the Koliser's body was cold and pretty well stiff.

Corrections Officer Michael Downs. Downs said that when the cell was open, and he entered it with C.O. Clark, there was blood everywhere. He stated that when he unsnapped the belt around the inmate's neck, the inmate's head did not even move, and when the inmate was laid down, his waist did not move. He said that the entire cell smelled of death.

Corrections Officer Moyer. Moyer arrived the DR at approximately 5:50 a.m. and she said there was an overwhelming smell when you opened the door to the DR. She said that the inmate's room was filthy and covered with dark blood everywhere.

Corrections Officer Comstock. Comstock said that he arrived at the DR at approximately 6:00 a.m. and he said that there was an odor that smelled like blood and excrement.

Corrections Officer Parsons. Parsons observed a lot of blood on the bed and said that the odor was a strong bathroom kind of smell. He stated that Koliser was kneeling when they entered the room and that his knees remained in that position when they laid the inmate down. He said that the inmate was very stiff.

Inmate Brinkley. Inmate Brinkley stated that he was up all night and that the grievant made rounds at 10:15 p.m., 1:30 a.m. and 5:20 a.m. He stated that this was the grievant's normal routine and that he does not make two rounds per hour. He said that when the grievant found Koliser, the grievant continued to knock on the door and then pace the floor for approximately five minutes prior to going downstairs. He said that the grievant seemed very nervous. He also said that he heard Koliser cut himself and that it was around 1:30 a.m. He said that Koliser chose this time because he knew that the grievant was not going to come back until about 5:30 a.m.

Inmate Lorraine. Lorraine said that when the grievant came on duty he made his rounds, and then he made two others at 1:30 a.m. and 5:00 a.m. He confirmed that the grievant only made three rounds that night, just like on most nights.

Inmate Group. Group stated that the grievant did his checks at 10:15 p.m. and that he did not see him again until 5:30 a.m.

VI. Merits of the Grievance

The Employer's Position

1. The Union's grievance is meritless and must be dismissed.

2. The condition of Koliser's body indicates that the grievant did not make all of his security checks on the third shift of May 6 – 7, 2005.
 - a) The inmate's body was in, or had begun, the process of rigor mortis,
 - b) The inmate's body showed signs of livor mortis,
 - c) The temperature reading of the inmate's body cannot be relied upon to determine the time of death.
3. The amount of blood at the scene of Koliser's suicide indicates that the grievant did not properly complete all of his security checks.
4. The totality of the evidence indicates that the grievant did not complete all of his security checks on May 7, 2005
 - a) The grievant failed to make at least five security checks and at least one count on May 7, 2005,
 - b) Allegations made by the Union do not outweigh the totality of the evidence in this case.
5. Removal is the only appropriate form of discipline for the grievant.

The Union's Position

1. The grievance has merit and should be sustained.

2. The State failed to prove its burden that the grievant was discharged for just cause on any of the three rule violations.
3. Rule 7 was not violated because this Post Order only applies if the grievant had discovered an inmate hanging in his cell. No evidence existed that the grievant saw the inmate hanging in his cell. The grievant followed all applicable Post Orders upon discovering Koliser in his cell.
4. The grievant performed his proper rounds. C.O.J.D. Clark testified credibly that the grievant logged the times and made his rounds in accordance with the Employer's policy.
5. No proof exists that the grievant violated Rule 24 with regard to interfering with, failing to cooperate in, or lying in an official investigation. The Employer's claims of the grievant's alleged lying is only based on unfounded allegations during the investigation.
6. No evidence exists that the grievant violated Rule 38 regarding any act or commission not otherwise outlined in the rules that constitutes a threat to the security of the facility, staff, or any individual under the supervision of the department or member of the general public. This is only a catchall rule that was thrown in to add weight to the Employer's allegations against the grievant. The Employer is

only looking for scapegoats to alleviate its missteps in this incident. The Department did not even contact the medical authorities about their findings in this incident before bringing charges against the grievant.

7. Too many inconsistencies and contradictions in the evidence exist, especially as to whether rigor mortis or livor mortis had set in, or the temperature of the inmate's body when he was examined. Even the exact time of the inmate's death is in question which is critical to determining whether the grievant had properly done his rounds.

VI. The Arbitrator's Opinion and Award Regarding the Merits of the Grievance

From the evidence and testimony introduced at the hearing, including pertinent contract provisions, work rules, the parties' exhibits, and the transcript of the arbitration proceeding, it is this Arbitrator's opinion that the grievant was terminated for just cause. In this Arbitrator's view, under the totality of the circumstances, the Employer met its quantum of proof to sustain the grievant's termination.

When all is said and done here, as argued by the Employer, it is simply unlikely that the inmate posted his suicidal notes, wrote

messages in feces on the wall, hung his t-shirt on the end of his bed, tied tourniquets around his biceps, cut his arms, bled copious amounts of bright red blood which soaked through his mattress, hung a noose on his top bunk, and knelt on the floor and hung himself, all within a twenty minute period.

Indeed, given Koliser's condition and the filthy condition of his cell, and the present sense impressions of over twenty witnesses, it is more likely that Koliser had several hours in to which to accomplish his suicide. Given these facts, the grievant should have discovered the inmate much sooner and his failure to do so raises compelling inferences that he did not make all of his rounds on May 7, 2005.

VII. Analysis

The quantum of proof required in discharge cases for employee misconduct is unsettled. In some cases, proof beyond a reasonable doubt has been required. *Vista Chem Co*, 104 LA 818 (Nicholas, 1995). Some arbitrators also have used a "preponderance of the evidence standard," *Wholesale Produce Supply Co.*, 101 LA 1101 (Bognanno, 1993), while others have required evidence "sufficient to convince a reasonable mind of guilt." *Stockman Pipefittings Co.*, 1 ALAA ¶ 67,460 (1946).

In the end, the overall determination of just cause is whether the punishment fits the crime. *S.K. Handtool Corp.*, 98 LA 643 (Hodgson, 1992). This Arbitrator will review the record in a discharge case to determine if sufficient evidence exists to convince a reasonable mind of guilt. In this Arbitrator's view, this means more than a preponderance of the evidence. Substantial evidence must support the Employer's termination of an employee for misconduct. Substantial evidence exists here to convince this Arbitrator's reasonable mind of the grievant's guilt.

The overwhelming sense that this Arbitrator gleans from the totality of the facts here is the intuitive absurdity of the Union's argument that Koliser's elaborate suicide could only take twenty minutes to one-half hour. The Arbitrator is hard pressed to believe that nothing occurred prior to 5:30 a.m. that would have alerted the grievant's sensory perceptions that something was wrong. As noted in the Case History above, the Employer interviewed approximately thirty-two people as part of its investigation of this matter. The common threads of their testimony simply cannot be ignored.

One common theme, which was highly dispositive in this Arbitrator's decision to deny the grievance, was the obvious stench and the filthy condition of Koliser's cell. Almost without exception, every person who was in the DR unit said that you could smell some

strong odor of feces that became overwhelming when you approached Koliser's cell and ultimately went into the cell. In addition, there were vulgar notes on the cell wall written in feces. Almost all of the witnesses describe the "smell of death." It is simply inconceivable that the grievant would not have noticed these conditions in his earlier cell checks had he actually done them.

These undisputed facts raise strong and credible inferences that conditions existed before 5:30 a.m. that would have alerted the grievant that something was seriously wrong with Koliser. The grievant would have been aware of Koliser's condition had he done his proper rounds.

This is especially true with regard to the massive amount of blood that was found soaked through Koliser's mattress and all around his bunk. Significantly, as noted by Nurse Burson in her interview, much of the blood was clotted, indicating that it was older blood that had been there for a reasonable period of time. This undisputed evidence again raises strong inferences that Koliser's condition, and the condition of his cell, was not created in twenty minutes. It therefore corroborates the grievant's failure to have checked Koliser's cell at 5:00 a.m. as he alleges.

Although there was some conflicting evidence about the degree of rigor mortis that had set in and the relevance of Koliser's body

temperature, a number of the witnesses who were interviewed consistently confirmed the "stiffness" of Koliser's body. The graphic pictures submitted with the Employer's brief clearly indicate a bluing around Koliser's ear and face, which establish that rigor mortis had significantly been settled in at least by 6:00 a.m.

As noted by Lt. Gilbert, it was difficult to fit Koliser into the body bag because his legs and arms were stiff and had to be manipulated. It was also impossible for Nurse Blevins to administer CPR on Koliser because his face had already tightened up, which is the first area where rigor mortis sets in. And no set time could be credibly established, in this Arbitrator's view, based on Koliser's body temperature.

Even considering the Union's evidence, which outlines that rigor mortis can settle in up to an hour or two after a person's death, Koliser's condition raises strong inferences in this Arbitrator's mind that he had been dead for at least a couple of hours. This, in turn, demonstrates that the grievant did not, as alleged, make his rounds at 5:00 a.m.

The grievant's failure to complete all of his rounds was further corroborated by the interview testimony of inmates Brinkley, Lorraine and Group. Significantly, other than noting that these individuals are death row inmates that cannot be trusted, the Union did not present

any evidence of their motives to lie about the grievant. And neither did the Union present any evidence that these inmates were given any opportunity to orchestrate their testimony.

So this Arbitrator is presented with the testimony of three inmates in the DR unit who all consistently testified that the grievant did not make any further rounds in that unit past 1:30 a.m. Inmate Brinkley testified that Koliser cut himself as early as 1:00 a.m., which would seem logical given the condition of Koliser's body at 5:30 a.m. No persuasive evidence has been presented to this Arbitrator to discredit the inmates' testimony that the grievant did not do all of his rounds.

With regard to the cover-up, this Arbitrator agrees with the Employer's argument that J. D. Clark would confirm the log to protect himself. Clark's interview comments about the log book also were somewhat cryptic and evasive in that Clark would only say that the log book "says what it says." Clark did not offer any detailed explanations for the entries in the log book and rather attempted to distance himself from them to apparently avoid incrimination and liability for his own complicity. In the final analysis, based on the facts, this Arbitrator simply was not convinced that Clark was being truthful and accurate with regard to the log entries.

The grievant's prior discipline also is dispositive here. The parties have stipulated that his disciplinary record includes a one-day fine issued on March 15, 2005 for a violation of Rule 7 for the grievant's inattention to duty. Given that the grievant has a prior disciplinary record, and that he is a short-term employee, no compelling mitigating circumstances exist here, in this Arbitrator's view, to reduce the termination to a long suspension or other form of discipline.

As noted above, based on what this Arbitrator believes to be a thorough investigation by the Employer of this incident, the totality of the circumstances create an overwhelming impression that Koliser's suicide was not accomplished in just twenty minutes. Conditions existed where someone who actually did their two rounds per hour in accordance with department rules would have discovered Koliser's suicide attempt much earlier.

This substantial evidence convinces this Arbitrator that the grievant did not perform his duties and attempted to finesse the record to mitigate his guilt. In the highly vulnerable context of the Death Row Unit of a correctional institution, this cannot be tolerated, especially from such a short term employee.

VIII. The Award

The Union's grievance is denied in total.

March 14, 2006
Moreland Hills, Ohio

Dr. David M. Pincus