

IN THE MATTER OF ARBITRATION
UNDER THE 1986 CONTRACT

Between:

State of Ohio
Department of Rehabilitation
and Correction

THE EMPLOYER

-and-

The Ohio Civil Service
Employees Association,
Local No. 11, AFSCME,
AFL-CIO

THE UNION

Union Grievance No. OSR-M-215

OCB Grievance No. G-86-0630

ND 531

Grievant: Jacqueline S. Tenney

Before: NICHOLAS DUDA, JR., ARBITRATOR

OPINION AND AWARD:

SEPTEMBER 25, 1987

CASE DATA**SUBJECT**

Five day suspension for alleged insubordination.

APPEARANCES**FOR THE UNION**

Brenda Persinger, Staff Representative, Presenting the Case

John Porter, Attorney, Assisting

Jacqueline Sue Tenney, Correction Officer 2, Grievant

Dennis J. Cowell, Local Union Steward

FOR THE STATE

Nicholas G. Menedis, Department Chief of Labor Relations, Presenting the Case

Richard Hall, OSR Labor Relations Representative, Assisting

Felicia Bernardin, Labor Relations Specialist, DRC

Dean Millhone, MCI Labor Relations Representative

Jack Burgess, Chief, Arbitration Services, Ohio Office of Collective Bargaining

Eric G. Dahlberg, Superintendent, Ohio State Reformatory at Mansfield

FACTS

One of the facilities maintained by the Department of Rehabilitation and Correction is the Ohio State Reformatory (OSR) at Mansfield, Ohio. Grievant, a Correction Officer 2, has been employed at OSR since April 15, 1985.

When Correction Officers report for work, they enter the facility at the Security Building which is normally manned by a security officer. Reporting employees pass through security into the facility to the time clock station

and then to the "line-up" for assignment.

For a number of months before the incident involved in this case and subsequently thereto, Grievant was assigned to the "Farm Patrol". After clocking in and reporting each day, she would take her tote bag, lunch pail, and thermos to a state vehicle she used to patrol various grounds.

Effective June 25, 1985, the Employer promulgated a "Visitor and Employee Search Security Policy No. 1100". The policy was explained to all supervisors and employees including Grievant. Grievant admits that she was aware of the provisions of the search policy. Before the incident in this case she had been involved in one application of that search policy. On that occasion, some months before August, 1986, she, and all other employees reporting for the third shift, were searched in the Security Building as soon as they entered the Security Building.

Supervision decided to have another search of employees on August 30, 1986. This time, however, supervision located the search inside the facility rather than in the Security Building because of their belief that at the prior search persons approaching the Security Building had been alerted that a search was being conducted because of employee congestion in the area. The Administration reasoned that a reporting employee would not discover the search until he or she passed through the Security Building into the facility and thus could not leave the facility because a supervisor would be stationed in the Security Building to prevent exit from the facility.

Grievant was one of the third shift employees who entered the security building on August 30, 1986. In accordance with her normal procedure, she placed here tote bag, lunch and thermos in an office in the security building and then attempted to enter the facility. (She testified and the arbitrator accepts that she intended to retrieve those items from the office after she had reported at the line up inside and released to perform her farm patrol.)

As she tried to leave the Security Building a sergeant stopped her from entering the facility. He said she was not to leave her bag in the Security Building office; he said "take it inside" (the facility). She became angry, claiming she always left her items in the office until she returned to begin her patrol. However the sergeant insisted that she take the bag inside. She said, "Fuck it, I'll just take it to my car". He did not expressly say a search was in progress or that she was subject to discipline for her action. He did say "you are making a mistake" but she took the items to her car in the parking lot outside the Security Building.

After leaving the bag, etc. at her car she returned, passed through security and was searched inside the facility at the time clock area. Later she told her lieutenant that she hadn't known about the search when she first entered security; she also invited the lieutenant or other supervision to search her car and bag but none was made.

Effective September 26, 1986, Grievant was suspended for five consecutive days with the following explanation:

The reason for this action is that you have been guilty of Insubordination in the following particulars, to wit: On August 30, 1986 you did refuse to allow your personal property to be searched prior to entering the institution. Searches of person and property are conditions of entrance into the institution and therefore conditions of employment. Your failure to permit a search is a very serious case of misconduct. In addition on the same date you did act in a disorderly and insubordinate manner when you told a supervisor "Fuck it, I'll just take the bag to my car". With mitigating factors taken into account your actions warrant a suspension of five (5) days.

ISSUE

Whether Grievant was suspended for just cause and if so whether the degree of discipline was appropriate.

EVALUATION

Grievant was charged with two kinds of misconduct or insubordination. Major reliance was placed on the claim that she " did refuse to allow your personal property to be searched prior to entering the institution...Your failure to permit a search is a fairly serious case of misconduct. In addition...on the same day you did act in a disorderly and insubordinate manner...."

The "Visitor and Employee Search Security Policy" contains certain protections as well as duties to the employee and certain requirements on the employer. Although the Employer has the authority to search an employee and his or her property while the employee is on the grounds, "an employee may refuse to submit to a search". Refusal by an employee to submit to a search does not entitle the Employer to discipline unless the refusing "employee shall be informed that refusal to submit to such a search shall constitute grounds for disciplinary action up to and including removal." In other words notice of possible discipline for an alleged instance of refusal to submit to the search is a necessary condition precedent to imposition of discipline for that incident.

In this case there was no such express notice or warning.

Grievant did two things that were improper. First she disobeyed what she recognized or should have recognized as a direct order by a supervisor to take the bag inside; second she was disrespectful in word and demeanor to the sergeant who was politely performing his duties. In response to her obvious misconduct the sergeant said "You are making a mistake." He was correct. Her conduct was clearly insubordinate and was just cause for discipline without any further warning. However his statement fell far short of saying that her actions subjected her to discipline for refusal to submit to a search pursuant

to the Search Policy. Furthermore, no search was being conducted in the security building of her or anyone else. In this respect supervision did not want any employees approaching or entering the security building to know about the search being conducted inside the facility beyond the security building.

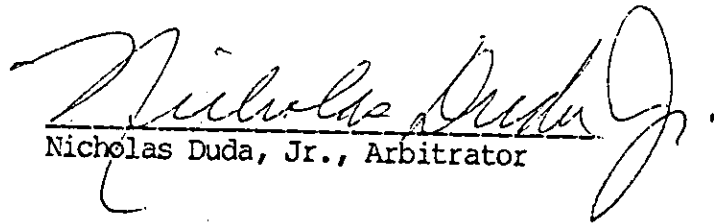
Before a person can refuse to be searched they must know from either the circumstances and/or from express notice that a search is being conducted; That information was not available to Grievant. In addition, the Employer must warn that discipline may be considered for the refusal. In this case the Employer has not satisfied the burden of showing the refusal to allow search despite warning of possible disciplinary consequences.

The Arbitrator recognizes that the search policy is important for the security and safety of the employees and inmates. In this arbitrator's view here the Employer demonstrates clearly and convincingly that an employee knowingly violated a proper application of the policy this arbitrator would not find imposition of a five day suspension to be inappropriate, even for an employee with a good record, such as Grievant.

As explained above, in this case the Employer did not prove the basis for the major reason for issuing the five day suspension. The evidence did show that Grievant committed a lesser violation by being insubordinate to the sergeant. While that misconduct was more than trivial, the arbitrator cannot find that it would warrant a five day suspension, particularly in view of Grievant's good prior record, consistent with the principle of progressive discipline, to which the Employer is committed.

AWARD

The grievance is sustained. The Department is directed to convert the five day suspension issued effective September 26, 1986, to a written reprimand for "insubordination". Furthermore the Employer is directed to make Grievant whole by providing her pay and any fringe benefits she lost for the subject five day period.


Nicholas Duda, Jr., Arbitrator