

#435

IN THE MATTER OF ARBITRATION

BETWEEN

OHIO DEPARTMENT OF REHABILITATION AND CORRECTION

AND

OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION  
LOCAL 11, AFSCME

ARBITRATION AWARD

CASE NUMBER: #27-20-(89/09/14)-336-01-05  
ARBITRATOR: John E. Drotning

## I. HEARING

The undersigned Arbitrator conducted a Hearing on May 10, 1990 at the Office of Collective Bargaining, 65 State St., Columbus, Ohio. Appearing for the Employer were: Thomas "Ted" Durkee, Egdillo Morales, Eric Dahlberg, Dan LeClair, Rick Fisher, Robert Jackson, M. Richmond, and Tim Dula. Appearing for the Union were: Robert W. Steele, Yvonne Powers, Esq., Joe Clark, Bruce Wynngard, Henry Coleman, Scott McLaughlin, Lawrence Thompson, and the grievant, Robert Kreiling.

The parties were given full opportunity to examine and cross examine witnesses and to submit written documents and evidence supporting their respective positions. No post hearing briefs were filed and the case was closed on May 10, 1990. The discussion and award are based solely on the record described above.

## II. ISSUE

The parties jointly asked:

Was the discharge of Robert Kreiling on September 6, 1989 for just cause? If not, what should the remedy be?

## III. STIPULATIONS

The parties jointly submitted the exhibits marked Joint Exhibits #1, #2, #3, and #4.

The parties also stipulated facts as follows:

Stipulated Facts:

1. Grievant was appointed April 2, 1984 as a Food Service Supervisor 2 at Ohio State Reformatory. On November 9, 1985 grievant went on a military leave of absence and was subsequently reinstated on June 9, 1988 as a Correctional Food Service Coordinator 1 at Ohio State Reformatory.
2. Grievant's prior disciplinary record is:  
     January 4, 1989 - Rule 1a - Early Departures  
     No physicians statement - WR  
     April 4, 1989 - Rule 4 - Carelessness - WR
3. Grievant received the Standards of Employee Conduct promulgated effective October 23, 1987.
4. The grievance is properly before the Arbitrator to make a determination on the matters.
5. The alleged violation of Rule #1a is expunged from consideration at this arbitration. The Arbitrator shall only render a decision on the remaining charges.
6. A predisciplinary conference on Officer Jo Medini was postponed until after a return from leave.
7. OSR management had five inmates polygraphed as part of its investigatory process to determine the credibility of the inmates.

IV. TESTIMONY, EVIDENCE, AND ARGUMENT

A. EMPLOYER

1. TESTIMONY AND EVIDENCE

Mr. Dan LeClair testified that he worked as a Food Service Manager in the Ohio State Reformatory for thirteen years. He said he serves 2300 meals two times a day and he has five employees who work with him from about 10:30 a.m. to 7:00 p.m.. In May of 1989, they worked from 4:00 a.m. to 12:30 p.m..

LeClair said he worked with Kreiling five years on first and second shifts. He went on to say that in May of 1989, Kreiling was on the bakery crew from 10:30 p.m. to 6:00 a.m. in the morning.

LeClair testified he found contraband at 5:45 a.m. on May 5, 1989 and that contained bags of jelly, a bag of peanut butter, a cake wrapped in saran, and some coffee in the dining room and the bakery. LeClair said he collected the contraband and put it on a desk.

LeClair said that Kreiling was the only person on duty on the third shift and he had to have goods baked and he had to start breakfast. LeClair said that Kreiling had ten inmates under his supervision and he had access to all the food products.

LeClair said the inmates liked "hot" items because they can use them to make wine. For example, they could use tomato puree to make wine. He went on to say that Kreiling was the only individual with a M-26 key. LeClair said that inmates cannot have access to the M-26 key or access to the storeroom.

LeClair said that an inmate is assigned to an employee if the inmate is assigned to get food. He went on to say that inmate Fisher came to him on May 5th and said that Kreiling told him to keep his mouth shut. LeClair said he told Fisher to tell the right story and he said that Fisher was rattled and bit frantic.

On redirect, LeClair said that the contraband could have been left on the third shift or even on an earlier shift. He went on to say the items he found were breakfast items.

Mr. Eric Dahlberg, Warden at the Ohio State Reformatory, testified that he knew Kreiling and he was apprised of the allegations and the facts and was aware of the difficulty in scheduling a hearing. He went on to say that after a preliminary hearing, he discharged Kreiling.

Dahlberg said there is a potential possibility of abuse and inmates do complain at times and there is an Office of Inspector General. He went on to say that all allegations by inmates are suspect and their allegations about or towards employees is suspect so one has to distinguish between lies and the truth. Dahlberg said that Management tries to corroborate inmate allegations with other evidence and even uses polygraph tests.

In this case, Dahlberg said that he had physical evidence and he noted that yeast is essential for making hooch. Dahlberg said the inmates complained and Kreiling walked out of the institution for no reason on May 5th.

Dahlberg said that inmates are very poor and, therefore, jelly, peanut butter, etc. are things that the inmates want. They also want cake, but yeast is serious contraband whereas jelly is not.

Dahlberg said that the allegation is that Kreiling conspired with the inmates to steal food. He went on to say that traffic in contraband is serious. He noted that if employees and inmates

work together, the inmate then owns the employee. He noted that inmates fight over possession for goods and they fight for keeps.

Robert Jackson, an inmate at WCI in Lebanon, Ohio, testified that he was sentenced for burglary and was sentenced from five to fifteen years on June 6, 1987. He testified that he first went to Mansfield for twenty months and then went to WCI in August 1989.

He said that in May of 1989, he worked on the third shift bakery as well as breakfast and his boss was Kreiling.

Jackson testified that he wrote Employer Exhibit #2 on 5/12/89. He testified that Kreiling left him alone and he also said he observed Kreiling outside the food service area in the west block.

The officer supervising might have been near his desk.

Jackson said he observed Kreiling go upstairs to Fisher's cell.

On redirect, Jackson said that some of what he wrote on Employer Exhibit #2 is true and some is not, but the part of being left alone was true.

Michael Richmond, an inmate at the Lorain Correctional Facility in Grafton, Ohio testified that he was incarcerated for aggravated robbery and was sentenced from thirteen to fifty years on 4/14/88. Richmond testified that he worked on the third shift bakery as a baker's assistant.

Richmond said that he wrote Employer Exhibit #3 on 5/12/89.

Richmond testified that he has a right not to say anything and that is a right he wants to utilize. He testified that he took a polygraph and that he told the truth sometimes and sometimes he did not. He would not comment on the truth of Employer Exhibit #3.

Rick Fisher testified he was incarcerated at OSI and sentenced on 12/30/87. He testified that he was going to college full time and is working for associates degree in criminal justice.

Fisher testified his supervisor was Bob Kreiling. He also stated he signed the statement identified as Employer Exhibit #4 and he wrote it.

Tim Dula testified that he went to prison in June of 1982 and stayed there until March of 1986 and then was released and apparently violated parole and went back in March of 1988. He said that he was a third shift baker in May of 1989 and that he wrote Employer Exhibit #5 and it is true. He went on to say that he also took a polygraph and in that examination he lied about one or two things. He also testified that he was asked a lot more questions than is noted on Employer Exhibit #1 which is the result of the polygraph.

Dula testified that inmates took food from the kitchen. He went on to say that Kreiling did not say that he could take food, but it was easy to take things when Kreiling was present because he just simply let him take food.

Dula said that Kreiling opens the door to the cooler and inmates scheme as to how to get foodstuffs out of the coolers or storage rooms. He said that he has seen hooch and while Kreiling did not give him permission to drink hooch, he did not forbid it. Dula said that Kreiling shook him down for hooch and he admitted that he looked for hooch while in prison.

Dula said that he observed blocks of yeast but none of that was available in May of 1989.

Dula said that he heard that Fisher got yeast from Kreiling. He went on to say that he brewed hooch in the kitchen area while Kreiling was supervising. He also testified he has no grudge against Kreiling.

On redirect, Dula said that he observed inmates making hooch while Kreiling was present but whether Kreiling knew what they were doing, he could not say. Dula said that he believed Kreiling saw the materials and that he thought that Kreiling stopped them from brewing hooch once in a while.

The Employer also cross examined Union witnesses. Mr. Scott McLaughlin testified that he could attest to what went on from 10:00 p.m. to 6:00 a.m.. He also said that if he saw people making hooch, he would write it up.

Mr. Lawrence Thompson testified on cross that he makes the walk on one tier and there are two ranges. He said that anyone coming on the range including a staff member or a maintenance person must log in. He went on to say it is possible that he might not observe another person on the range. He went on to say



that on May 5th, he logged no one in. He continued by saying he could not recall if he was in the control room on May 5th. He testified it was possible for someone to come on the range without him seeing them.

Mr. Joe Clark, on cross, testified that he received the predisciplinary documents on August 16th. He went on to say the case was moved to arbitration within thirty-one days. He also testified that a grievant can advance a case to arbitration if the employer does not respond.

Mr. Robert Kreiling was not cross examined.

## 2. ARGUMENT

Management argues that the case turns on credibility and it notes that Kreiling has more to lose than any witnesses. The witnesses are scared about testifying because of the possibility of retribution. However, both Jackson and Dula testified that Kreiling never stopped the inmates from taking food. These two inmates are now assigned to prisons at opposite ends of the State.

The Employer goes on to say that McLaughlin testified that Kreiling should have written up the contraband and that he is a threat to the institution by allowing inmates to consume hooch. The use of hooch means that there could be threats to life and limb as a result of an inmate's consumption of that product.

The Employer argues that Kreiling observed the hooch ingredients but did nothing about the situation.

The Employer notes that Thompson's testimony was not consistent in that he did not remember or did not observe Kreiling yet Jackson said he saw Kreiling on May 5th.

The procedural problems raised by the Union are irrelevant, notes the Employer. It goes on to say there was a pre-disciplinary hearing on 8/25/89 and Kreiling and Clark were present and discipline was imposed.

The Union's argument that somehow the Employer did not move fast enough is not the basis for the Union to win this decision. The issue is whether or not there was just cause for termination and in this case, the evidence indicates that Kreiling showed preferential treatment and allowed inmates to eat and drink and for these reasons, he must be terminated.

## B. UNION

### 1. TESTIMONY AND EVIDENCE

Scott McLaughlin, a Food Service Cook 2 for six and one-half years, testified that he had worked with Kreiling and the latter did his job and was strict with inmates. He also testified that he has left inmates locked in the kitchen.

McLaughlin also testified that at times he might take

inmates upstairs. He went on to say that inmates can steal food without the supervisor knowing it because when the supervisor is doing one thing, the inmates may be in another area and are stealing.

McLaughlin said that he has been on numerous shake-downs with Kreiling.

On redirect, McLaughlin noted that shift one runs from 4:00 a.m. to 12:30 p.m. and shift three is from 10:00 p.m. to 6:00 a.m. and he worked with Kreiling on a shift for six months.

Mr. Henry Coleman testified that he is in the food department and operates the officer's dining room and had worked with Kreiling off and on over the past two or three years. He testified he has joined with Kreiling in searches for hooch.

Coleman said that he observed Kreiling shake down inmates in order to find contraband.

Coleman also testified that if contraband is found, there is no way he can determine the shift in which that contraband was found. It could have been there for days, said Coleman.

Mr. Lawrence Thompson, Corrections Officer, testified that in May of 1989, he was in the west cell block range and he identified Union Exhibit #1 which talked about post orders, log books, and his signature. He went on to say that he walked the ranges to make sure no inmates are on the range and that 7:45 is after he completed his work. He testified that all inmates are either locked in the cell or in a particular job in some other location.

Thompson said that he shakes down inmates upon their return and he thinks it is necessary.

Thompson testified that he would have seen anyone coming in on the range after 7:45 a.m.. He testified that if Kreiling went to cell 29, he would have seen him.

Mr. Joe Clark, a Correction Officer, testified that he was Chief Steward and he received the discipline and he went on to say that he got a hearing officer report on August 2, 1989. Clark testified that he filed a grievance on behalf of Kreiling.

Kreiling, said Clark, had a pre-disciplinary meeting on 8/25/89 and he noted that the latter had been off on leave since May. He also said that normally, the pre-disciplinary conference is held in abeyance if the employee is on leave.

Clark said that he attended the 8/25/89 meeting and that he asked for a continuance and asked for another hearing officer. Clark went on to say that he asked to interview candidates and they wanted a postponement to review the interviews of the various witnesses.

Clark said there was a step three hearing on 11/14/89 and Durkee was the hearing officer.

Mr. Robert Kreiling testified that he worked the third shift bakery from around 12:00 midnight to 8:30 a.m.. He testified that he is presently employed at WW Schmidt and Associates. He went on to say that between May 9, 1989 and August 15, 1989, he was in Wooster, Ohio. He said that he took off on May 9th and went to doctor and was told to stay off work. He testified that

he notified the control room on that date and gave his name, his work, and his reason and he was given a call-off.

Kreiling also testified that he sent the employer a letter indicating that he was off work.

Kreiling testified that he read the statements of all the inmates and none of it is true. He testified he never allowed inmates to steal food or gave them hooch. He testified that he has left inmates without supervision when he was either on the phone or checking the mailbox. He went on to say that he supervised twelve inmates and they could be in four different areas. Thus, he could not surveil each and every inmate.

Kreiling said he did not threaten Fisher and he did not bring in contraband yeast nor has he offered employees marijuana. Kreiling testified that he never asked inmates to watch while he went upstairs nor did he allow inmates to steal.

Kreiling testified that he thought the inmates did not like him because he enforced the rules and he noted he had been in the military for a number of years. Moreover, he testified that he was a Union steward and in that capacity, he had filed grievances on health and sanitation and safety hazards. For example, he noted that there were greasy floors, smelly areas, water on the floor, and electrical problems and greasy stairwells and he filed grievances on those situations. He went on to say that he contacted OSHA and he thought they might have come out, at least to look at the ovens and the problem of carbon monoxide in the cook area.

On redirect, Kreiling said that he filled out numerous contraband and conduct reports on inmates.

The Union cross examined Management witnesses. Mr. Daniel LeClair testified that he found food upstairs and downstairs and he noted that the food he found could have been left there a week earlier. He also testified that inmates can get a hold of "hot" items. He noted that if three inmates are loading and he looks at one, the other two could be stealing.

LeClair indicated that he has found contraband before.

LeClair said that inmate Fisher told him that Kreiling told Fisher not to say anything.

LeClair said that he has found jelly, coffee, and cake on all three shifts. He went on to say that he has found additional contraband since Kreiling has been gone even though security is more rigid now.

Mr. Dahlberg, on cross, testified that hooch can be made from bread, but yeast is better because it is faster and more efficient. He said that he knew Kreiling was off sick as of May 9th.

Dahlberg said that inmates are normally polygraphed but what is unusual in these cases are the allegations by five inmates as to what happened.

Robert Jackson, an inmate, testified on cross that he explained Employer Exhibit #2, but that he could not remember who asked him to write it. He testified that if he did not write up Employer Exhibit #2, he said he would go to the hole.

Jackson said he saw Kreiling go to Fisher's cell on 5/5/89 at 8:00 a.m..

Jackson testified that Kreiling did not allow him to steal food.

Jackson said that at times Kreiling locked him and other inmates in the kitchen and apparently went upstairs.

Jackson said that he saw Kreiling come from Fisher's cell which he knew was a four man cell.

On recross, Jackson said that when he left the kitchen, Kreiling always shook him down and the guard also did the same.

Inmate Michael Richmond and Inmate Rich Fisher were not cross examined.

Parolee Tim Dula testified that he made hooch on every shift and he said that he did not think Kreiling knew he was making the hooch.

Dula testified that Kreiling wanted to get Campbell. He went on to say that LeClair and Kreiling have a feud.

Dula testified that he wrote Employer Exhibit #5 in order to get out of the hole. He went on to say that he was asked a series of questions and he did not want to answer them so he was put in the hole.

On recross, Dula said that he never brought marijuana in because he did not trust anybody and he didn't want to be set up.

## 2. ARGUMENT

The Union asserts that Management claimed that the main thrust of its case would be the testimony of the inmates, yet all but two refused to testify.

Jackson's testimony was half-hearted and none of the inmates were credible. The inmate testimony needs strong support. Otherwise the employee always loses.

The Union points out that Management uses polygraphs but they are not scientific and, in any event, the inmates said that they lied about the polygraph tests.

The Union asserts that Management violated Article 24.02. Moreover, the Union notes that Arbitrator Rivera once said that stacking charges is unfair.

The Union asserts that Management never gave the Union a third step answer and it goes on to say that the grievant has been a good employee.

Kreiling testified that he had to leave the inmates at various times and one witness testified that Kreiling was a tough supervisor. Moreover, both Jackson and Dula testified that they wrote their statements because of possible threats to them by the Employer.

The procedural objections are important for the reason that the Union requests reinstatement with back pay and all benefits.



## V. DISCUSSION AND AWARD

The parties agreed that the question is whether Robert Kreiling was justly terminated on 9/6/89? The thrust of the Employer's argument is that:

Inmate testimony is the primary evidence against the grievant.

Therefore, it is important to consider the testimony of the witnesses brought forward by the Employer as well as their written statements.

Robert Jackson, an inmate at CWI in Lebanon, Ohio, testified he wrote Employer Exhibit #2 on 5/12/89. Jackson testified that he observed Kreiling, the grievant, go upstairs to Fisher's cell. On redirect, Jackson testified that some of what he wrote on 5/12/89 was true and some was not true (see Employer Exhibit #2). The only part that was true, said Jackson, was the part about being left alone in the bakery while Kreiling was absent (see Employer Exhibit #2). Jackson, on cross, testified that he could not remember who required him to write up Employer Exhibit #2, but he said that if he refused, he would go to the "hole".

Michael Richmond, an inmate at Lorain Correctional Facility, testified he wrote Employer Exhibit #3 on 5/12/89. He testified that he has a right not to answer any question and, in addition, he said he took a polygraph and at times he told the truth and at times he did not.

Richmond would not testify about the truth or falsity of his statement written on 5/12/89 (see Employer Exhibit #3).

Rick Fisher, called by the Employer, testified that he was incarcerated at OSI and that he wrote the exhibit dated 5/8/89 (see Employer Exhibit #4) and he signed it. He stated he would answer no questions on direct or cross.

Tim Dula testified he was a third shift baker in May of 1989 and he wrote Employer Exhibit #5 dated 5/12/89. He also said he took a polygraph and in that examination, he lied about one or two things.

Dula testified that inmates took food from the kitchen and it was easy to do so because Kreiling simply let them. He also testified that he observed inmates making hooch while Kreiling was present, but he also said he was not sure that Kreiling was aware of what was going on. However, he also noted that at one time or another Kreiling stopped prisoners from brewing hooch.

Thus, the testimony of the Employer witnesses was extremely limited. Moreover, Fisher simply refused to answer any questions asked him by the Employer and he had been called as an Employer witness.

In this case, the burden is with the Employer and it is incumbent upon the Employer to demonstrate that Kreiling's behavior while working as a cook or baker was such as to justify termination. In short, the Employer asserts that Kreiling did not prohibit employees from eating and drinking and from making hooch.

It is also clear from testimony that food was found upstairs and downstairs and there was no way to determine how long the food was in place. Moreover, Daniel LeClair testified that inmates are able to steal food since all work at the same time but they are not all in the same place at the same time. Thus, it is impossible for Kreiling to watch all prisoners all the time.

In this case, it is crucial that inmates' testimony be supported and it important to distinguish between lies and the truth as noted by Warden Eric Dahlberg of the Ohio State Reformatory. Obviously, there is little if any basis to corroborate the testimony of the witnesses. In fact, their testimony is minimal. Thus, it is almost impossible to conclude that the Employer's primary evidence supports the assertion that Kreiling allowed employees to make hooch and steal food from the kitchen.

However, there are written statements by the witnesses which are bothersome; specifically, the written statement of Rick Fisher (see Employer Exhibit #4). The statements of Jackson, Richmond, and Dula are fairly short. Moreover, Jackson asserted he was forced to write his statement so it is reasonable to conclude that Jackson's written testimony is of minimal use.

Richmond, as noted did not provide any significant testimony. However, his statement (see Employer Exhibit #3) indicates that Kreiling offered him marijuana and even indicated that he (Richmond) was asked to beat up another employee. He also commented about hooch in the bakery, but again it is not

clear that his written statement is the basis to fire Mr. Kreiling. If he had testified in such a way as to support the statement, one might conclude that it was true and find against Kreiling. However, his refusal to testify makes it impossible for an arbitrator to utilize that statement dated 5/12/89 as support for firing Kreiling.

The written statements of Rick Fisher (see Employer Exhibit #4) are significant. There is a two and one-half page document dated 5/8/89 and a half-page document dated 5/10/89. If Fisher were forced to make the statement noted on Employer Exhibit #4, it is difficult to believe he would have provided so much information if he really felt that his statement would result in harm to himself. Fisher, in the statement dated 5/8/89, stated that he had been given one and one-quarter ounces of yeast from Kreiling which apparently could be used to make hooch. He also stated in the statement that he had been offered "weed" if he could beat up a certain inmate by the name of Fowler.

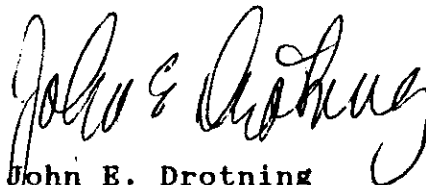
Fisher indicated that Kreiling let him and other prisoners drink hooch. Fisher testified Kreiling gave him a five gallon bucket of juice and sugar and bread to make hooch and told him how to hide it while Fisher was off duty.

Fisher, in his written statement, stated that Kreiling appeared nervous and had asked him about why two of his (Kreiling's) workers were in the hole.

On 5/10/89, Fisher wrote that Kreiling again came to him to try to find out about a wire tapped employee. Fisher went on to say in his statement that Kreiling said that he would show the "son-of-bitches here at OSR staff to play him off the wall." Fisher's statement also asserted that Kreiling said he would take a very long sick leave.

This case is difficult because the testimony of the witnesses called by the Employer were woefully short of what one would have expected. At the same time, Fisher's written statements raise doubts about Kreiling's behavior. Fisher did not testify on direct examination and thus, the only available information is Employer Exhibit #4.

Thus, there is no significant basis to discharge Kreiling. But, given Fisher's written statement there is a reasonable basis to rule against any back pay. Thus, the arbitrator finds that Kreiling shall be reinstated without back pay.

  
John E. Drotning  
Arbitrator

June 8, 1990