In the Matter of the
Arbitration Between

OCSEA, Local 11
AFSCME, AFL-CIO

Union

and

State of Ohio
Department of Rehabilitation
and Corrections

Employer.

Grievance No. 27-02-(91-01-27)-
0146-01-03
Grievant: Scott Shine

Hearing Date: December 3, 1992

Award Date: January 5, 1993

Arbitrator: R. Rivera

For the Employer: Margaret J. Lee
Sharon Hilliard

For the Union: Bob Rowland

Present at the Hearing in addition to the Grievant and Advocates were Blaine G. Hummel, Deputy Warden (witness), Dennis K. Bower, Correctional Supervisor III (witness).

Preliminary Matters

The Arbitrator asked permission to record the hearing for the sole purpose of refreshing her recollection and on condition that the tapes would be destroyed on the date the opinion is rendered. Both the Union and the Employer granted their permission. The Arbitrator asked permission to submit the award for possible publication. Both the Union and the Employer

granted permission. The parties stipulated that the matter was properly before the Arbitrator. Witnesses were sequestered. All witnesses were sworn.

Stipulated Facts

1. Grievant was hired on March 23, 1987, by the Ohio Department of Rehabilitation and Correction as a correction officer at the Allen Correctional Institution.

2. The Grievant received a copy of and training in the Ohio Department of Rehabilitation and Correction's Standards of Employee Conduct (1987 and 1990), Administrative Regulations and the Ohio Administrative Code.

3. The Grievant was terminated from employment on January 10, 1992.

4. The Grievant has the following disciplines in his personnel record:

Rule 2.b. -	Oral Reprimand - (1990 Standards of Employee Conduct)
Rule 45 -	Written Reprimand - (1990 Standards of Employee Conduct)

Joint Issue

Was the removal of Grievant for a violation of Standards of Employee Conduct Rule #39 for just cause? If not, what should the remedy be?

Joint Exhibits

I. Contractual agreement between the State of Ohio and OCSEA, Local 11, AFSCME, 1992-1994

II. State of Ohio Department of Rehabilitation and Correction Standards of Employee Conduct, dated 1987 and 1990

III. Discipline Trail

A. Report of Corrective Action
B. Notice of Pre-Disciplinary Hearing (2 pages)
C. Notice of Representation
D. Notice of Disciplinary Action

IV. Grievance Trail

A. Grievance #27-02-(92/01/27)-146-01-03
B. Step 3 response by Margaret S. Lee, Assistant Chief of Labor Relations
C. Request for arbitration

V. Journal Entry - Common Please Court of Allen County, Ohio

VI. Lima News Articles

VII. Lima Police Department Report (2 pages)

Employer Exhibits

1. The Lima News dated October 29, 1991

2. IOC from Bishop to Hummel dated July 3, 1991

3. a. Written Reprimand dated April 30, 1991
   b. Oral Reprimand dated April 17, 1991

Contract Sections

ARTICLE 5 - MANAGEMENT RIGHTS

Except to the extent expressly abridged only by the specific articles and sections of this Agreement, the Employer reserves, retains and possesses, solely and exclusively, all the inherent rights and authority to manage and operate its facilities and programs. Such rights shall be exercised in a manner which is not inconsistent with this Agreement. The sole and exclusive rights and authority of the Employer include specifically, but are not limited to, the rights listed

in The Ohio Revised Code, Section 4117.08(C), Numbers 1-9.

§ 24.01 - Standard

Disciplinary action shall not be imposed upon an employee except for just cause. The Employer has the burden of proof to establish just cause for any disciplinary action. In cases involving termination, if the arbitrator finds that there has been an abuse of a patient or another in the care or custody of the State of Ohio, the arbitrator does not have authority to modify the termination of an employee committing such abuse. Employees of the Lottery Commission shall be governed by O.R.C. Section 3770.02.

§ 24.02 - Progressive Discipline

The Employer will follow the principles of progressive discipline. Disciplinary action shall be commensurate with the offense. Disciplinary action shall include:

A. One or more verbal reprimand(s) (with appropriate notation in employee's file);
B. One or more written reprimand(s);
C. One or more suspension(s);
D. Termination.

Disciplinary action taken may not be referred to in an employee's performance evaluation report. The event or action giving rise to the disciplinary action may be referred to in an employee's performance evaluation report without indicating the fact that disciplinary action was taken.

Disciplinary action shall be initiated as soon as reasonably possible consistent with the requirements of the other provisions of this Article. An arbitrator deciding a discipline grievance must consider the timeliness of the Employer's decision to begin the disciplinary process.

§ 25.03 - Arbitration Procedures

Both parties agree to attempt to arrive at a joint stipulation of the facts and issues to be submitted to the arbitrator.

The Union and/or Employer may make requests for specific documents, books, papers or witnesses reasonably available from the other party and relevant to the grievance under consideration. Such requests will not be unreasonably denied.

The Employer or Union shall have the right to request the arbitrator to require the presence of witnesses and/or documents. Such requests shall be made no later than three work days prior to the start of the arbitration hearing, except under unusual circumstances where the Union or the Employer has been unaware of the need for subpoena of such witnesses or documents, in which case the request shall be made as soon as practicable. Each party shall bear the expense of its own witnesses who are not employees of the Employer.

Questions of arbitrability shall be decided by the arbitrator. Once a determination is made that a matter is arbitrable, or if such preliminary determination cannot be reasonably made, the arbitrator shall then proceed to determine the merits of the dispute.

The expenses and fees of the arbitrator shall be shared equally by the parties.

The decision and award of the arbitrator shall be final and binding on the parties. The arbitrator shall render his/her decision in writing as soon as possible, but no later than thirty (30) days after the conclusion of the hearing, unless the parties agree otherwise.

Only disputes involving the interpretation, application or alleged violation of a provision of the Agreement shall be subject to arbitration. The arbitrator shall have no power to add to, subtract from or modify any of the terms of this Agreement, nor shall he/she impose on either party a limitation or obligation not specifically required by the expressed language of this Agreement.

If either party desires a verbatim record of the proceeding, it may cause such a record to be made provided it pays for the record. If the other party desires a copy, the cost shall be shared.

§ 44.03 - Work Rules

After the effective date of this Agreement, agency work rules or institutional rules and directives must

not be in violation of this Agreement. Such work rules shall be reasonable. The Union shall be notified prior to the implementation of any new work rules and shall have the opportunity to discuss them. Likewise, after the effective date of this Agreement, all past practices and precedents may not be considered as binding authority in any proceeding arising under this Agreement.

Facts

The Grievant in this case was a Corrections Officer at Allen Correctional Institution, a medium security penal institution. The Grievant had been employed there approximately four years. His prior discipline consisted of an oral reprimand for tardiness (Rule 2(b)) issued April 17, 1991 and a written reprimand for Giving Preferential Treatment to an inmate (Rule 45) issued April 30, 1991.

Allen Correctional Institution houses 1,100 inmates convicted of a variety of felonies. Many of these inmates are incarcerated for drug-related offenses. The Grievant, as a Corrections Officer is charged with and responsible for supervision of inmates, maintaining discipline among inmates, providing a safe and humane environment for the inmates, and, last but not least, keeping inmates from posing a danger to public safety.

The record shows that on July 31, 1987, the Grievant received the Ohio Department of Rehabilitation and Correction's Standards of Employee Conduct (Joint Exhibit 2(c)) and on June 22, 1990 the Grievant received (and promised to read) the Revised Standards of Employee Conduct effective June 17, 1990 (Joint

Exhibit 2(d)). Other documents show that the Grievant received inservice training on Employee Conduct and Responsibility on March 8, 1991 (Joint Exhibit 2(e)), on Ethics and Inmate-staff relations on March 29, 1990 (Joint Exhibit 2(f)), on Employee Conduct and Responsibility on April 12, 1989 (Joint Exhibit 2(g)) and on Employee Conduct and Responsibility on March 8, 1988 (Joint Exhibit 2(h)).

Both the 1987 Standards of Employee Conduct (Joint Exhibit 2(a)) and the 1990 Standards of Employee Conduct (Joint Exhibit 2(b)) discuss in detail the standards of conduct which the ODRC seek to impose on their employees.

The Section entitled Personal Conduct in the 1990 Standards reads as follows (in pertinent part):

> In general, the Ohio Department of Rehabilitation and Correction expects its employees to conduct themselves in such a manner that their activities both on and off duty will not adversely affect their ability to perform their duties for the Department.
>
> Employees shall recognize the limitations of their authority and at no time use the power of their position for their own personal advantages.
>
> It is essential to the orderly operation of a correctional system that employees conduct themselves in a professional manner. Below are several types of behavior that cannot be tolerated within a correctional environment. (This is not intended to be an all inclusive list.)
>
> 1. The use, possession, conveyance, or unauthorized distribution of illegal drugs, narcotics, or controlled substances is strictly prohibited at any time. Use of alcoholic beverages while on duty or being under the influence of alcohol or drugs while on duty are prohibited.

The Section entitled Illegal Activities reads (in part) as follows:

> A. The Department of Rehabilitation and Correction is responsible for containing and supervising adult offenders until their release from custody in order to perpetuate social order and public safety. The very nature and purpose of the Department's existence demands that its employees be held to the highest standards of conduct in their personal and business affairs. An employee's visibility to the public and to those persons entrusted to the Department's supervision requires the display of exemplary conduct at all times. Illegal activities on the part of any employee, in addition to being unlawful, reflect on the integrity of the Department of Rehabilitation and Correction and betray the trust and confidence placed in it by the public. It is expected that employees will obey not only the letter of the law, but the spirit of the law wither engaged in personal or official activities. Should an employee be arrested for, charged with, or convicted of any felony or degreed misdemeanor (except for a minor misdemeanor), or is required to be a defendant in any court, that employee shall immediately inform the appropriate Appointing Authority. The Employer must establish a reasonable nexus (tie) to job performance.

The Discipline Grid follows the narrative part of the Standards of Conduct. This Grid lists 46 possible infractions. Some of these infractions are marked with an asterisk (*). The * denotes "rule violation for 'on' or 'off' duty conduct." Rule 39 reads as follows: "Other actions that could compromise or impair the ability of the employee to effectively carry out his/her duties as a public employee." This infraction is marked with an asterisk (*).

On June 30, 1991, the Grievant was arrested on a drug charge (Joint Exhibit 7). On July 3, 1991, he was arraigned in Lima Municipal Court for a felony of drug abuse (cocaine) (Joint Exhibit 6(c)). On August 19, 1991, the Grievant was indicted on the same count. On October 29, 1991, the Grievant pleaded No Contest to the felony count, and the judge then found him Guilty of Attempted Drug Abuse, a misdemeanor. The Grievant was sentenced to six (6) months in the county jail; the jail sentence was suspended, and he was fined $250 and ordered to do 100 hours of community service (Joint Exhibit 6(a)).

The Grievant's arrest and arraignment were brought to the attention of his superior (Employer's Exhibit 2). His superiors re-assigned the Grievant to duty which did not involve direct contact with inmates. After the Grievant's conviction, the Grievant was given notice of a pre-disciplinary conference to be held November 20, 1991 (Joint Exhibit 3(b)). After that conference, the Grievant was notified that he was removed as of November 22, 1991 for a violation of Rule 39 (Joint Exhibit 3(d)).

The Grievant filed a grievance on January 24, 1992. A Step 3 was held. The hearing officer upheld the removal. The hearing officer noted that the Grievant did not appear at the Step 3 to offer mitigating evidence. The hearing officer also noted that the Grievant had failed to pursue alleged earlier efforts to seek treatment and/or utilize EAP (Joint Exhibit 4(b)). On April 3, 1992 the Union requested arbitration (Joint Exhibit 4(c)).

Pursuant to that request an arbitration hearing was held December 3, 1992.

At that hearing, the above enumerated facts were adduced. In addition, the Employer produced evidence (Employer Exhibit 1) that the Grievant's arrest, arraignment, indictment and conviction were all incidents reported in the local press. None of these newspaper reports indicated the Grievant's place of employment. Only the police report indicated the Grievant's place of employment (Joint Exhibit 7). The Employer also introduced testimony that these newspaper reports were available to inmates. Employer witnesses spelled out the Employer's concerns:

1. Many of the inmates are incarcerated for crimes which the Grievant was either indicted or convicted. He cannot serve as a role model nor command their respect.

2. Since the Grievant was convicted of a crime for which others are incarcerated at Allen, he cannot command the respect of his fellow officers nor can his fellow officers trust him. In a dangerous situation, such lack of respect can cause "back up" to fail.

3. The institution is a "drug free" institution as a matter of state law and state policy. Grievant's conviction of a drug offense indicates his lack of respect not only for the law he is sworn to uphold, but for the policy. His credibility is destroyed.

4. Drugs are contraband in prison. Grievant is a convicted possessor of such contraband. One of his jobs is to check for such contraband. How can he now be trusted in this area?

5. The Grievant's conduct is negative to the whole profession; essentially he is unworthy to guard others who are incarcerated for same offense.

The Grievant testified in his own behalf. The essentials of his defense were as follows:

1. He only plea bargained because his attorney promised him he would not loose his job.

2. His removal was unfair because other correctional employees who had similar convictions did not loose their jobs.

3. He should have never "gotten involved" . . . he "didn't realize that he would loose his job" . . . he will "change my ways," and he is "now very willing" to attend programs.

4. The grievant also testified that a) he had reported the episode himself to his captain and that b) he never had been offered EAP.

Employer's Position

Management may "discharge an employee for conduct away from the plant depending upon the effect of that conduct upon plant operations." (Elkouri and Elkouri, How Arbitration Works, Fourth Edition.) When a correction officer commits an offense as serious as a drug-related offense in his/her off duty hours,

nexus is evident. The officer serves as a role model to felony offenders. The interest of the State is also particularly great in employing law-abiding personnel. The officer places himself in a compromising situation as inmates become aware of the offense, and those results could bring about a serious breach of security for the institution. The outcome of the charges relative to Grievant were publicized through the local news media, and the inmates had access to these publications.

The Union argued that Grievant was permitted to plead no contest to a misdemeanor. The Union argued the plea should mitigate the penalty as well as the egregious nature of the offense. The Union would have you believe that the misdemeanor conviction regarding the highly addictive substance crack cocaine should not be cause for removal.

The Arbitrator must look at the mission of the Department, its effort in preserving the security of the institution and the safety of the community at large. The Grievant's criminal conviction directly relates to the duties with which he is charged to perform as a correction officer. Serious consideration must be given to the nexus which is associated with this conviction as a drug offense. The Employer has evaluated this situation on its merits and determined it had just cause to remove the Grievant. The Employer requests that the Grievance be denied in its entirety.

Union's Position

The Employer claims that the Grievant's situation would prevent him from performing his job. Yet, he did his job quite well for the six months prior to the discipline. Moreover, the application of Rule 39 was not progressive. The officer's prior discipline only involved an oral and a written reprimand. Removal was not proper nor commensurate. The Grievant could not take up the Step 3 offer of EAP as he had no insurance to pay for the program. Lastly, the removal is an example of disparate treatment and, hence, unfair.

Discussion

Before turning to what the Arbitrator regards as the major issue in this case, a number of sub-issues must be addressed.

1. The issue of disparate treatment was not properly raised in this case. The burden of proof lies with the Union. The only evidence offered of disparate treatment accorded when the Grievant attempted to place into evidence a Judgment Entry. The Grievant claimed that his lawyer had given him the Entry and that his lawyer had told him that the defendant named in the Entry was also a corrections officer and that she had not been removed.

While evidentiary rules are more flexible in Arbitrations than in Court trials, these rules are not flexible enough to admit such "evidence." If the Union wished to present disparate treatment evidence, the union could have sought evidence in

advance from the Employer proving that the person in question was a corrections officer and could have sought evidence of her alleged discipline. The Union could have put the Personnel Officer on the stand as a hostile witness and examined him or her about this alleged disparate treatment. The attempt to place into evidence a Judgment Entry in the fashion done in this case was properly denied. Hence, no evidence was presented to support defense of disparate treatment.

2. The Grievant was convicted of a crime, albeit, a misdemeanor. He pled no contest to the original felony charge but, as the Entry clearly reveals, he was found guilty of a lessor offense.

3. The Grievant's attorney had no authority to promise (allegedly) that the Grievant would not loose his job. Any statements that the attorney may have made are irrelevant in this hearing.

4. The Union's contention that the Grievant did his job during the period between arraignment and conviction is not correct. During that period, the Grievant was on limited duty (no inmate contact). The essential element of a Corrections Officer job involves inmate contact.

5. The Arbitrator also notes that during the period from arraignment to conviction the defendant was employed and had full benefits. During that period, he could have entered EAP and sought any treatment that was appropriate. The Arbitrator is unmoved by assertions first heard at the Arbitration Hearing that

the Grievant will now "mend his ways" and is "very willing to enter any treatment."

The real issue before this Arbitrator is whether discipline can be given in the employment situation for an employee's off-duty conduct. The ORDC has promulgated standards of conduct which clearly warn employees that their off-duty conduct may be a source of discipline. In the grid, the employee is clearly on notice (by the asterisk) that the Employer regards some off-duty behavior as the subject of discipline.

Just because ODRC has promulgated these rules does not mean they are "reasonable" rules which meet the standards of just cause. That ultimate decision rests with the Arbitrator in the case at issue.

Rule 39 <u>as stated</u> in the Grid is certainly susceptible of challenge as too vague to provide proper notice. Every employee subject to discipline must have notice in advance that the conduct at issue in the discipline was prohibited. Rule 39 provides discipline for "other actions that could comprise or impair the ability of the employee to effectively carry out his/her duties as a public employee." This alleged infraction could mean different things in the eyes of different people. For example, if an employee commits adultery some might argue that this action fits the rubric of Rule 39. Rule 39 is simply too vague, too over-inclusive to be a fair warning to an employee.

However, the case is not over because this Arbitrator finds Rule 39 so vague as to be both dangerous and misleading.

Employees can be "fairly" warned about a particular conduct in some rare cases without an explicit rule. Arbitrators have held that certain very serious or egregious actions -- whether violative of specific rules or not -- are capable of causing fair discipline. For example, if the employee had brought crack cocaine into the prison on his body, this Arbitrator believes that any employee in a prison would be on fair notice that such conduct would merit discipline even without a specific rule to that effect. However, fairness itself requires that such constructive notice be used rarely.

If one reads the Rules of Conduct (the narrative prior to the grid), the reader is clearly on notice of ODRC expectation that prison guards (CO's) are expected to be 1) law abiding, 2) drug-free, and 3) exemplars. This Arbitrator believes that the Grievant knew or should have known that a drug related crime was an off-duty conduct subject to discipline, i.e., notice is not the issue here.

The real issue is whether the State may discipline its employees for off-duty conduct. The Standards of Conduct and various prison officials call corrections officers "role models" for prisoners. Does this categorization require that corrections officers be paragons of morality? Can they be divorced, get drunk, smoke cigarettes, dance wantonly, swear, use obscene language in public? The list of caveats could be endless! The concept of "role model" must be a very limited one. The public employee must be able to conduct his or her life off-duty for

better or worse with as much personal freedom as the private employee whenever possible. Just because the salary is paid by the taxpayers (remember the employee is a taxpayer as well) does not justify unfair intrusions into the off-duty conduct of the public employee. The case law (and the Standards of Conduct) use the phrase "rational nexus" as the standard, that is, a rational nexus must exist between the questioned conduct and the employee's ability to do the job. However, as used by U.S. courts a "rational" relationship test is the easiest test to satisfy. Recently, courts have held that a rational nexus test cannot be based merely on stereotypes or prejudices; rationality requires something more. Only by the most narrow application can a rational relationship test protect the public employee from unwarranted government intrusion into his or her off-duty conduct.

What of the current case? The Grievant was convicted of a drug related misdemeanor. This crime carried the possibility of jail time, i.e., he could have been incarcerated (in fact, his jail time was suspended). Giving the "role model" requirement its most narrow reading, the Arbitrator holds that the prison employer can show a rational relationship between the job of corrections officer and off duty criminal conduct which could lead to imprisonment. A rational nexus exists between a correction officer's off-duty criminal behavior and his ability to function as a correction officer. A correction officer's job essentially consists of confining criminals. If he or she is

also a criminal, a direct conflict of interest exists, and such a conflict of interest can seriously undermine the ability to do the job. Of course, as in every disciplinary matter, mitigating factors may diminish the discipline actually applied.

In this case, the Arbitrator finds that just cause existed to discipline the Grievant who committed and was convicted of a drug-related crime while off-duty. While the Grievant had only minor discipline up to this point in his career, the nature of the crime was serious. Given the drug problems in our prisons and our society, the Arbitrator finds drug offenses to be crimes that seriously affect the role of a correction officer. The Grievant was hardly a long term employee as he had only 4 years in service. Moreover, he offered no mitigation evidence. This Arbitrator is not impressed by "reform" during the Arbitration Hearing. Therefore, removal was with just cause.

Award

Grievance is denied in its entirety.

January 5, 1993
Date

Rhonda R Rivera
Arbitrator