

IN THE MATTER OF ARBITRATION BETWEEN
STATE OF OHIO DEPARTMENT OF REHABILITATION AND CORRECTIONS

AND

STATE COUNCIL OF PROFESSIONAL EDUCATORS - OEA

Grievance Numbers 27-26-(8/24/92)-335-06-10

27-26-(6/26/92)-327-06-10

MARCUS HART SANDVER, Ph.D.

ARBITRATOR

Hearing Date: January 26, 1993

Decision Date: March 8, 1993

I. BACKGROUND AND ISSUE

This case arises from the discipline of grievant William Gardner, a teacher at the Warren Correctional Facility, on March 17, 1992 and June 11, 1992. The grievances have been processed through the appropriate steps of the grievance procedure and are now at Arbitration. The issue in these cases as stipulated by the parties in Joint Exhibit # 2 is: "Was Mr. Gardner disciplined for just cause? If not, what shall the remedy be?"

II. THE HEARING

The hearing was convened by Arbitrator Marcus Hart Sandver at 9:00 A.M. in the conference room of the Warren Correctional Facility. In attendance at the hearing were:

For the State of Ohio -

<u>Name</u>	<u>Title</u>
1. Edith Ballar	OCB Arbitration Advocate
2. Rachel Livengood	OCB Asst. Chief of Arbitration Svs.
3. Stephen Huffman	W.C.I. Deputy Warden
4. Tim Shelton	W.C.I. Training Officer
5. Douglas Simpson	W.C.I. Corrections Officer
6. Richard Cain	Deputy Warden T.I.E.
7. Lisa Beckman-Crider	School Administrator

For the State Council of Professional Educators -

1. William Gardner	W.C.I. Instructor/Grievant
2. Henry Stevens	S.C.O.P.E. Representative
3. Ellen Delaney	W.C.I. Instructor
4. Jenny Wemmer	W.C.I. Instructor

The following exhibits were introduced during the hearing:

Joint Exhibit # 1	Agreement Between the State of Ohio and State Council of Professional Educators 1989-1992
Joint Exhibit # 2	Statement of Issue
Union Exhibit # 1	Employee Grievance Form
Union Exhibit # 2	Employee Performance Review
Union Exhibit # 3	Position Description
Union Exhibit # 4	Association Pre-Hearing Brief Grievance # 27-26-(8/24/92)-335-06-10 (one day suspension)
Union Exhibit # 5	Association Pre-Hearing Brief Grievance # 27-26-(6/26/92)-327-06-10 (three day suspension)
Employer Exhibit # 1	State of Ohio Opening Statement
Employer Exhibit # 2	Standards of Employee Conduct Effective June 17, 1990
Employer Exhibit # 3	One day suspension grievance trial
Employer Exhibit # 4	Three day suspension grievance trial
Employer Exhibit # 5	Employee Training File Card
Employer Exhibit # 6	Pre Service Orientation Attendance Roster from 11-13-90 to 11-16-90
Employer Exhibit # 7	Inservice Attendance Roster from 9-23-91 to 9-27-91
Employer Exhibit # 8	Inservice Course Outline "Handling Critical Incidents"
Employer Exhibit # 9	Post Orders. Security and Control, Effective Date: June 29, 1992
Employer Exhibit # 10	Time Log. 1st shift. March 17, 1992

Employer Exhibit # 11 Ohio Central School System
In-Service Training for William
Gardner from 8-12-91 to 5-13-92
(objected to by the Union)

Employer Exhibit # 12 Signed statement by William Gardner
acknowledging that he had received
and that he will read the Revised
Standards of Employee Conduct for
the Department of Rehabilitation
and Corrections.
Dated: October 22, 1990
(objected to by the Union)

The hearing began with an opening statement from the State's representative, Ms. Ballar. In her opening, Ms. Ballar began by explaining to the Arbitrator that this case involves the use of a warning device called a "man down" alarm (MDA). Ms. Ballar went on to explain the basic functioning and use of the MDA at the Warren Correctional Institution. Ms. Ballar went on to review for the Arbitrator the basic facts (from the State's point of view) surrounding the incident which occurred on March 17, 1992 and the events which followed the incident leading to Mr. Gardner's one day suspension.

Ms. Ballar next recounted for the Arbitrator the State's view of the facts which surrounded the incident on June 11, 1992 and the events which followed leading to Mr. Gardner's three day suspension. Ms. Ballar concluded her opening remarks by stating that she felt that the discipline given to Mr. Gardner was commensurate with the infraction that had occurred.

The first witness called by the State was Mr. Steve Huffman, Deputy Warden of Programs at W.C.I. The witness was sworn-in by

the Arbitrator. Mr. Huffman began his testimony by explaining to the Arbitrator the procedure for the issuance and the use of the MDA. Mr. Huffman next discussed Work Rule 30 in the Standards of Employee Conduct and explained to the Arbitrator his definition of the term "loss of control". Mr. Huffman next related to the Arbitrator his recollection of the events which transpired on March 17, 1992. On direct examination, Ms. Ballar asked Mr. Huffman if he believed that a one day suspension was commensurate discipline for this incident and Mr. Huffman testified that in his opinion it was.

On cross examination, Mr. Stevens asked Mr. Huffman if there was a written policy on how MDA's are distributed and Mr. Huffman testified that there was not. Next, Mr. Stevens engaged Mr. Huffman in a conversation at some length regarding the concept of "loss of control". Finally, Mr. Stevens asked Mr. Huffman a few more questions about the events which occurred on March 17, 1992. At this point the witness was excused.

The next witness called by the State was Mr. Timothy Shelton, Training Officer at the Warren Correctional Institution. The Union representative objected to Mr. Shelton being allowed to testify and the Arbitrator overruled the objection. In his testimony, Mr. Shelton described to the Arbitrator the type of training relating to the MDA that new employees of W.C.I. would receive during orientation. Mr. Shelton directed the Arbitrator's attention to Employer Exhibit # 7 which shows that Mr. Gardner attended the Critical Incidents course. Next, Mr.

Shelton directed the Arbitrator's attention to Employer Exhibit # 8 which outlined the contents of the course. Finally, Ms. Ballar asked Mr. Gardner if the MDA is effective if it is not worn and Mr. Shelton testified that it would not be effective unless worn.

On cross examination, Mr. Stevens asked Mr. Shelton if he wears a MDA and Mr. Shelton testified that he does not. When asked why, Mr. Shelton testified that he does not need an MDA because he has limited contact with inmates. Mr. Stevens next asked Mr. Shelton if he was familiar with the facts of this particular case and Mr. Shelton testified that he was not. Finally, Mr. Stevens asked Mr. Shelton if there are other employees, besides him, at W.C.I. who are not required to wear an MDA and Mr. Shelton testified that there were several employees besides him who did not wear MDA's at W.C.I. After a very brief redirect and recross examination, the witness was excused.

The next witness called by the State was Mr. Doug Simpson, Corrections Officer. The witness was sworn in by the Arbitrator. On direct examination, Ms. Ballar asked Mr. Simpson to describe his duties as a Corrections Officer. Mr. Simpson testified that among other things, it was his responsibility on a daily basis to issue the MDA's to those assigned to wear them. Mr. Simpson testified that he tested each of the MDA's two or three times a day. Mr. Simpson testified that he was on duty on March 17, 1992 and that he had logged the MDA false alarm on that day (Employer Exhibit # 10).

On cross examination Mr. Stevens asked Mr. Simpson if he

wears a MDA, Mr. Simpson testified that he did not. Mr. Stevens asked Mr. Simpson if sometimes one person will check out an MDA for an area in the morning and then a different person will return it in the evening and Mr. Simpson testified that this did occur. Mr. Stevens asked Mr. Simpson several questions about the Holst incident but Mr. Simpson testified that he had limited knowledge about the Holst incident. After a brief exchange of redirect and recross questions the witness was excused.

The next witness called by the State was Mr. Richard Cain, Deputy Warden for T.I.E. Mr. Cain began his testimony by describing his duties as T.I.E. Deputy Warden to the Arbitrator. Next, Mr. Cain described his recollection of the events of March 17, 1992. Mr. Cain described in detail his conversation with Mr. Gardner regarding the MDA. Mr. Cain described previous incidents with Mr. Gardner regarding the MDA and several false alarms which had occurred. Mr. Cain described a meeting he had with Mr. Gardner, Ms. Crider, and Ms. Cass (on or about March 1, 1992) at which time a general concern with Mr. Gardner's orientation toward security was shared with Mr. Gardner by all those in attendance at the meeting.

On cross examination, Mr. Stevens asked Mr. Cain if he had ever given Mr. Gardner a written work rule or policy which described his obligation to wear an MDA and Mr. Cain testified that he had not. Mr. Stevens asked Mr. Cain a few questions about the pre-disciplinary hearing and Mr. Cain testified that Ms. Crider conducted the pre-disciplinary investigation and

hearing. Mr. Stevens asked Mr. Cain if school was in session on March 17, 1992 and Mr. Cain testified that there were students in the building on that day although school was not officially in session. After a brief series of questions on redirect and recross the witness was excused.

The next witness called by the State was Lisa Beckman-Crider (also referred to as Ms. Crider). On direct examination, Ms. Ballar began by asking Ms. Crider some questions about her duties as School Administrator. Ms. Crider testified that she was Mr. Garner's immediate supervisor. Ms. Crider described to the Arbitrator the lay-out of the classroom building and discussed briefly the daily schedule of the educational programs at W.C.I. Ms. Crider discussed her recollection of the meeting on March 1 at which time she and Mr. Cain and Ms. Cass shared their security concerns with Mr. Gardner. Ms. Crider described her investigation of the March 17 incident at some length to the Arbitrator.

Next, Ms. Ballar asked Ms. Crider to describe her recollection of the events of June 11, the date of the second incident for which Mr. Gardner received a three day suspension. Ms. Crider described her talk with Ms. Delaney after the incident in which Mr. Gardner left the MDA in the staff restroom. Ms. Crider testified that after her conversation with Ms. Delaney she made the decision to rotate the assignment of the MDA among the teaching staff rather than have Mr. Garner wear the MDA exclusively.

On cross examination, Mr. Stevens asked Ms. Crider about the rotation schedule for the MDA. Ms. Crider testified that the MDA is now assigned on a rotating basis and that all staff in the vocational building wear the MDA from time to time. Mr. Stevens asked Ms. Crider if she suggested to Ms. Delaney that she write up the facts of the June 11 incident and she testified that she did suggest that Ms. Delaney write up this report.

Mr. Stevens asked Ms. Crider if she had ever given Mr. Gardner a written policy on the wearing of the MDA and she testified that she had not. Next, Mr. Stevens asked Ms. Crider to go through Union Exhibit # 2 (Mr. Garner's performance evaluation for 1991-92). Ms. Crider described Mr. Gardner's performance as a teacher as average to above average. Mr. Stevens asked Ms. Crider if there were any negative comments made about Mr. Gardner's performance in either Mr. Cain's evaluation letter of 11/17/92 or in Mr. Brigano's evaluation letter of 12/3/92 and she testified that there were none. At this point the witness was excused and the State rested its case.

The Union began its presentation with a brief opening statement by Mr. Stevens. After his opening, Mr. Stevens called the grievant, William Gardner to the witness stand. The witness was sworn in by the Arbitrator. On direct examination, Mr. Gardner gave his recollection of the events of March 17, 1992. Mr. Gardner testified that right after lunch, about 12:30 P.M., he met with his new student assistant in the classroom adjacent to his office. Mr. Gardner testified that the MDA was locked in

his office while he was in the classroom with the student. Briefly, Mr. Gardner described his conversation with Mr. Huffman and Mr. Cain on March 17.

Next, Mr. Stevens asked Mr. Gardner to describe the events of June 11, 1992. Mr. Gardner testified that he was using the restroom and that he had taken the MDA off in the restroom. While he was in the restroom a student porter knocked on the door and asked Mr. Gardner to open the supply closet for him. Mr. Gardner testified that he went to the supply closet with the student and unlocked the door. On his way back down the hallway, Mr. Gardner testified that he met Ms. Delaney who had gone into the staff restroom and had found the MDA that Mr. Gardner had left there. Mr. Stevens asked Mr. Gardner if an investigation was conducted on this matter prior to the pre-disciplinary hearing and he testified that no investigation was conducted.

On cross examination, Ms. Ballar asked Mr. Gardner several questions about his meeting at 12:30 P.M. on March 17, 1992 with his student aide, Mr. Carrick. Mr. Gardner testified that he knew the student and that he trusted him. Mr. Gardner testified that the meeting with the student was pre-scheduled and that he felt safe not wearing the MDA.

Next, Ms. Ballar asked Mr. Gardner a series of questions about the June 11 incident. Ms. Ballar asked Mr. Gardner if he knew a student porter was in the building at the time and he testified that he did not. Ms. Ballar asked Mr. Gardner if he knew the porter and Mr. Gardner testified that he did know the

person. Ms. Ballar asked Mr. Gardner if he felt comfortable being around the student porter without the MDA in his possession and Mr. Gardner testified that he did feel comfortable around this person without the MDA. At this point the witness was excused.

The next witness called by the Union was Ms. Ellen Delaney, a teacher at W.C.I. The witness was sworn in by the Arbitrator. Mr. Stevens asked Ms. Delaney if she wore the MDA prior to March 17, 1992 and she testified that she did not. Mr. Stevens asked Ms. Delaney who wore the MDA and she testified that Mr. Gardner wore it because he was the man in the building. Mr. Stevens asked Ms. Delaney why only men wore the MDA and Ms. Delaney testified that it was her understanding that this was the way the Warden wanted things done.

On cross examination, Ms. Ballar asked Ms. Delaney if she was concerned about safety in the Vocational Building and Ms. Delaney testified that she was. Ms. Ballar asked Ms. Delaney what she would do if a fight broke out in the Vocational Building and she did not have an MDA and she testified that she would call security on the telephone. At this point the witness was excused.

The next witness called by the Union was Ms. Jenny Wemmer also a teacher at W.C.I. The witness was sworn in by the Arbitrator. Mr. Stevens began by asking Ms. Wemmer if she ever wore the MDA prior to the incident of March 17 and she testified that she had not. Mr. Stevens asked Ms. Wemmer if she had ever

asked to wear the MDA and she testified that she had. Ms. Wemmer testified that she felt more comfortable with the MDA than without it and that she felt that all teachers should have an equal responsibility to wear the MDA. After a brief exchange of questions on recross and redirect the witness was excused. At this point the union rested its case.

In her closing statement, Ms. Ballar briefly reviewed the events which led to the one day and the three day suspensions of Mr. Gardner. Ms. Ballar stated her view that Mr. Gardner was well trained in the use of the MDA and that he had an obligation to wear the MDA due to his responsibility for the security of the employees and inmates in the Vocational Building. Ms. Ballar stated her view that Mr. Gardner lost control of the MDA on both occasions when he left the MDA in a locked office on one occasion and in a locked restroom on another.

In his closing statement, Mr. Stevens reviewed the facts of the case in light of Dougherty's "seven tests of just cause". Mr. Stevens stated his view that Mr. Gardner was not warned in advance or notified prior to March 17 that leaving the MDA in a locked office could be considered loss of control. Mr. Stevens emphasized strongly his view that the grievant was not aware of any policies that related to the use of the MDA's. Mr. Stevens questioned if there was a fair investigation of the incidents of March 17 and June 11 and in fact questioned if an investigation was conducted at all. Mr. Stevens pointed out to the Arbitrator that in his opinion because only men were required to wear the

MDA, that this constituted disparate treatment for male employees. Finally, Mr. Stevens stated his view that the penalty given to the grievant was not commensurate with the seriousness of the infraction which is alleged to have occurred. At this point both parties rested their case and the hearing was closed

III. DISCUSSION

I have carefully looked over all the exhibits produced at the hearing and have reviewed several times my notes of the testimony. I feel that I understand the essential facts that relate to the events of March 17 and June 11, 1992.

From the beginning, the incidents need to be differentiated and discussed separately because they are quite different from each other in my opinion. First I will discuss, the March 17 incident.

On March 17, Mr. Gardner was in his classroom with a student with whom he had a pre-scheduled meeting. Mr. Gardner was assigned the MDA on March 17, but he was not wearing it. Mr. Gardner left the MDA in his office to conduct a training session with a student aide who he knew and trusted. When Ms. Cass, Mr. Cain and Mr. Huffman dropped in on Mr. Gardner, to his surprise, he became angry and hostile when questioned about the MDA. A confrontation ensued in Mr. Gardner's office; angry words were exchanged, doors were slammed and articles were knocked off the desk.

The incident was unpleasant and unfortunate and could have

been avoided; had Mr. Gardner been wearing the MDA nothing of the sort would have occurred. Ms. Cass, Mr. Huffman and Mr. Cain all witnessed the incident and testified credibly about the events which occurred. Mr. Cain testified that he had met with Mr. Gardner sometime earlier in the month of March to review with him security procedures and the use of the MDA. Mr. Cain was understandably frustrated and angry regarding Mr. Gardner's flouting of the rules regarding the use of the MDA. I believe the one day suspension on March 17, 1992 was justified.

The incident of June 11, 1992, however, is quite a different matter in my opinion. First and foremost, Mr. Gardner was wearing the MDA on June 11; he even took it with him to the restroom on a day when school was not in session and when no students were in the building. To his surprise, while he was washing his hands, a student porter asks him to open the supply closet. Mr. Gardner leaves the restroom (without the MDA) goes to unlock the supply closet and then goes back to the restroom to retrieve the MDA and he sees Ms. Delaney walking down the hall with it.

After this incident took place, Ms. Delaney shared her concern for security and the use of the MDA with Ms. Cass. Ms. Cass suggested that Ms. Delaney file a complaint against Mr. Gardner. After a cursory investigation, and with no corroborating witnesses, Mr. Gardner was issued a three day suspension. This I find very difficult to justify. Add to this the fact that Mr. Gardner bore sole responsibility for carrying

the MDA in the Vocational Building prior to June 11 and the situation becomes even more unjust. I find the incident of June 11 to be an act of forgetfulness and a matter of coincidence that Ms. Delaney should be entering the restroom at just the time that Mr. Gardner was coming back down the hall to retrieve the MDA.

The key fact that distinguishes the two incidents is that on March 17, Mr. Gardner was not wearing the MDA and he apparently had no intention of wearing it during his meeting with his student aide. On June 11, by way of contrast, Mr. Gardner was wearing the MDA but left it in the restroom by accident. The incident of March 17 was a breach of the W.C.I. security procedures and should not go unpunished. Add to this the prior counseling by Mr. Cain on March 1 and the confrontation in the office and the incident becomes that much worse. The June 11 incident was much less serious, in my view, and did not warrant the level of discipline which was given.

IV. AWARD

The grievance regarding the one day suspension (# 27-26-(8/24/92)-335-06-10) is denied.

The grievance regarding the three day suspension (3 27-26-(6/26/92)-327-06-10) is sustained. Grievant is to be awarded three days back pay and the discipline reduced to a written reprimand.

V. CERTIFICATION

The decision and awards in this case are based on evidence and testimony presented to me at a hearing conducted on January 26, 1993 at the Warren Correctional Institute.

A handwritten signature in cursive script, reading "Marcus Hart Sandver", is written over a horizontal line.

Marcus Hart Sandver, Ph.D.
Arbitrator

March 8, 1993