#913

ARBITRATION DECISION

October 11, 1993

In the Matter of:

Ohio Civil Service Employees Association, AFSCME Local 11	)	
	)	Case No.
and	)	27-12-(92-12-15)-0047-01-03
	)	Matt Turner, Grievant
State of Ohio, Department of Rehabilitation and Correction	)	

APPEARANCES

For the Union:

Bob J. Rowland, Staff Representative
Matt Turner, Grievant

For the State:

Teri Decker, Management Advocate, OCB
Colleen Wise, Second Chair, OCB
Harry Russell, Warden, Lima Correctional Institution
Jerry Dunnigan, Labor Relations Officer, LCI
David Burrus, Agency Observer, DR&C
Noel R. Myers, Correction Officer
Frank Fisher, Correction Officer
Brett Hammer, Correction Officer
Merwyn Hastings, Captain
Paul Custer, Institution Investigator
Michael Bowers, Parole Officer

Arbitrator:

Nels E. Nelson

BACKGROUND

The grievant, Matt Turner, was hired by the Department of Rehabilitation and Correction on May 16, 1988. He worked as a correction officer at the Lima Correctional Institution. It is a medium security facility housing more than 1900 felons.

The grievant was removed on December 3, 1992. The events giving rise to his removal began on August 2, 1992. On that date Noel Myers, a correction officer, was working at the front gate when a woman and James Irons, an ex-inmate, drove up to the gate. The woman came into the lobby area with a pizza for the grievant. Myers accepted the pizza and the woman returned to the car. She and Irons then drove into the adjacent employee parking lot. Myers, who observed them drive into the lot, called the outer area patrol to investigate why they were in the lot.

Correction Officer Frank Fisher responded. As he arrived, Irons was getting into the grievant's car. When Irons was questioned, he stated that he was picking up the grievant's car to take it for repairs. Since Irons had a key to the car, Fisher allowed him to take the car. He left the lot and was followed out by the woman in the other car.

Fisher then went to the front gate. He called the grievant who indicated that it was all right for Irons to take his car and that it was being taken for a tune-up. The grievant asked Fisher who brought attention to the incident over the radio but Fisher refused to say.

When Myers learned that the grievant wanted to know who was responsible for the report, he called the grievant. He told the grievant that he had called the outer area patrol and that he would do the same thing in the future if he saw an ex-inmate getting in a staff member's car. Myers claims that the grievant stated "you all sound like a bunch of bitches out there and it makes me want to go in your mouth." The grievant testified that Myers was argumentative. After a brief exchange, the grievant hung up.

Myers spoke to Captain Shivers and Captain Hunt about the incident. They advised him to write it up. Myers subsequently submitted a statement indicating that Irons had come to LCI and picked up the grievant's car. He also reported the telephone conversation with the grievant.

On August 3, 1992 Paul Custer, the institution investigator, was told by Captain Hunt that he should talk to Myers about an incident involving the grievant and ex-inmate Irons. Custer contacted the Adult Parole Authority and learned that Irons was still on parole. When Myers returned to work on August 5, 1992, Custer confirmed that it was Irons who visited LCI on August 2, 1992, by having him identify Irons from among six photographs of current inmates.

On August 7 Custer and Michael Bowers, Irons's parole officer, interviewed Irons. He stated that on August 2, 1992 Dink, the grievant's cousin, was supposed to deliver a pizza to the grievant and pick up the grievant's car so that he could do a tune-up. Irons said that Dink was being lazy so

he and his girlfriend delivered the pizza and picked up the car. In response to a question he indicated that he had visited the grievant and Dink at their house approximately eight times since his release from prison. Irons offered that he had picked up the grievant's car on one previous occasion and that the grievant had told him that its was "not too cool" for him to come to LCI to get his car. He claimed that on that occasion the grievant paid him $10 for doing an oil change.

On August 20, 1992, Captain Merwyn Hastings interviewed the grievant regarding August 2, 1992. The grievant stated that Ricky Martin, his cousin, was supposed to drop off a pizza and pick up his car for a tune-up. He denied that Irons had been at his house and stated that Irons had visited a neighbor. The grievant also denied paying Irons for any work and insisted that he paid Martin for any work done. When he was asked Dink's name, he said Dink was his cousin but refused to give his name because it was personal. Hastings explained that Dink's name appeared in several reports and that he needed to know his identity. The grievant responded that it was no one's business who he lives with but he did indicate that Dink was not an ex-inmate. Hastings felt that the grievant was evasive and had violated rules 26 and 43(e) of the Standards of Employee Conduct. On that basis he requested further action be taken.

On September 5, 1992, another incident occurred. Myers testified that while he was walking to the parking lot with

Brent Hammer, another correction officer, the grievant came up to him and said "you'd better keep my name out of your motherfucking mouth or I'm going to go in your mouth" and stated that "I'll fuck you up." Myers indicated that when he replied "no you won't," the grievant continued to threaten him. The grievant testified that an inmate told him that Myers had said that if he wanted to get him heated up, he should mention his name. He claims that he asked Myers why he wanted to keep the dispute going and that Myers responded that if he did not like it, that they could go to the BP gas station.

The confrontation did not end. Myers testified that when he left the parking lot, the grievant was right on his bumper until he pulled into the BP gas station to gas up. He asserts that the grievant again threatened that he would "fuck him up." The grievant denied saying that he was going to" fuck up" Myers but claimed that he did not know what he said because it happened one year ago. In any event the confrontation soon ended and both individuals left the gas station.

Myers went back to LCI. He spoke to Captain Hastings and later to Warden Russell both of whom told him to write a report. Myers subsequently did write a statement regarding the incident. He also filed a report alleging menacing with the Allen County Sheriff's Department but did not press charges.

Two pre-disciplinary hearings were held on October 15,

1992. A hearing was conducted at 9:00 A.M. relating to the incident on August 2, 1992 for which the grievant was charged with failing to cooperate in an official investigation or inquiry in violation of rule 26 of the Standards of Employee Conduct and engaging in an unauthorized personal or business relationship with an ex-inmate in violation of rule 46(e). The second hearing was at 11:00 A.M. and related to the events of September 5, 1992. In this instance the grievant was charged with threatening, intimidating, or coercing another employee in violation of rule 20. Warden Russell was the hearing officer in both cases and in both cases he found just cause for disciplinary action.

On November 9, 1992, Russell recommended that the grievant be removed. His recommendation was accepted by Reginald Wilkinson, the Director of the Department of Rehabilitation and Correction, and the grievant was removed December 3, 1992 for the violation of rules 20, 26, 46(e) of the Standards of Employee Conduct in the events of August 2, 1992 and September 5, 1992.

On December 12, 1992 the grievant filed a grievance. It charges that the state violated Articles 24.01 and 24.02 of the collective bargaining agreement. The grievance requests that the grievant's removal be expunged from his record and that he be made whole.

The step three grievance hearing took place on March 18, 1993. The grievance was denied on April 22, 1993 and the case was appealed to arbitration on May 26, 1993. The

arbitration hearing was held on August 27, 1993 and the record was closed at the conclusion of the hearing.

ISSUE

The issue as agreed to by the parties is as follows:

Was there just cause to remove the grievant? If not, what should the remedy be?

RELEVANT CONTRACT PROVISIONS

ARTICLE 24 - DISCIPLINE

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.

* * *

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

* * *

STATE POSITION

The state argues that the grievant committed three serious violations of the Standards of Employee Conduct. It contends that he violated rule 46(e) which prohibits unauthorized business or personal relationships with ex-inmates by associating with Irons. The state maintains that it is uncontested that Irons did deliver a pizza to the

grievant and picked up his car. It points out that Custer testified that Irons stated he was going to tune up the grievant's car. The state notes that the grievant conceded that Irons had picked up his car on one previous occasion.

The state asserts that unauthorized business or personal relationships cannot be tolerated in the correctional system. It indicates that such relationships give the impression of worng-doing, leave an employee open to manipulation by inmates and create distrust among co-workers. The state claims that unauthorized relationships can lead to extortion, undue influence, contraband, and even escape.

The state stresses that the grievant previously had been warned about his relationship with Irons. It observes that on February 8, 1991 he received a written reprimand for talking to Irons for 45 minutes while Irons was still incarcerated. The state points out that the reprimand indicated that associating with an inmate can only lead to problems and gives the appearance of an on-going unauthorized relationship. It claims that the grievant learned little from the incident and continued to be involved with Irons.

The state charges that the grievant also violated rule 26 which requires employees to cooperate in official investigations. It states that the grievant acknowledges that Custer asked him Dink's name and that he refused to give it. The state claims that even after Hastings explained that Dink's name appeared in a number of reports the grievant stated that who he lived with was his personal business. It

points out that Hastings indicated that the grievant's testimony was evasive and that he characterized the grievant as behaving as though he had something to hide.

The state argues that it is important for employees to cooperate in investigations. It contends that it needs to know what is going on. The state stresses that communication and trust are essential because the inmates outnumber the correction officers.

The state accuses the grievant of violating rule 20 which prohibits an employee from threatening or coercing another employee. It points out that Myers testified that on September 5, 1992, in the employee parking lot the grievant threatened to do bodily harm to him. The state notes that he also stated that the grievant followed him to a BP gas station where he repeated the threats.

The state indicates that Myers's testimony is supported by the testimony of Hammer. It observes that he testified that the grievant approached Myers in the employee parking lot and that he heard the grievant say that if he heard his name come out of Myers mouth again he would "kick his ass." The state notes that Hammer indicated that he thought that there might be a fight because of the way the grievant was standing and waving his arms.

The state acknowledges that Hammer submitted his written statement nearly one year after the incident. It points out, however, that at the time of the incident he was interviewed by Custer and told him what he observed. The state notes

that Custer indicated that he did not feel that he needed a written report from Hammer.

The state contends that rule 20, like the other two rules, is essential. It maintains that employees must work together to insure their safety and that of the inmates. The state claims that inmates cannot be allowed to use one employee agaist another. It stresses that employees must be able to rely upon each other.

The state argues that the grievant was aware of the Standards of Employee Conduct. It points out that they are discussed in the training academy and during pre-service and in-service workshops. The state notes that the grievant signed acknowledgements indicating that he received training in the Standards of Employee Conduct and received a copy of them.

The state indicates that Russell considered the grievant's disciplinary record in recommending his removal. It observes that in addition to the written reprimand for associating with Irons, the grievant had eleven disciplinary actions on file. The state notes that the grievant received six oral and written reprimands and was suspended five times for a variety of offenses.

The state asserts that the grievant provided little defense to the charges against him. It claims that he admitted to some of the charges against him. The state points out that the grievant testified that he knew of no reason why Hammer would make up anything and that there was

no reason for Myers to lie except perhaps to facilitate a transfer to an institution closer to his home. It emphasizes that Dink and Martin were not called to testify in support of the grievant.

The state maintains that prior arbitration decisions support its position. It points out that in State of Ohio, Ohio Department of Rehabilitation and Correction, Lima Correctional Institution and Ohio Civil Service Employees Association, Local 11, AFSCME, AFL-CIO, OCB Case No. 27-12-89-02-0030-01-03 Arbitrator David Pincus upheld the discharge of a food service worker for an unauthorized relationship with a parolee. The state notes that in State of Ohio, Department of Rehabilitation and Corrections and Ohio Civil Service Employees Association, Local 11, A.F.S.C.M.E., AFL-CIO, Case No. 27-15-900515-98-01-03 a correction officer was removed for having an unauthorized relationship with an inmate relating to the purchase of a boat for $100 but was reinstated by Arbitrator Anna D. Smith. It stresses, however, that there was no concealment involved and the grievant had no prior discipline.

The state asks the Arbitrator to deny the grievance and rule in the state's favor.

UNION POSITION

The union argues that on August 2, 1992, the grievant needed to have his car tuned up. It contends that he arranged to have Martin pick up his car and do the work. The union maintains that the grievant had no control over the

fact that Irons picked up his car.

The union concedes that Irons picked up the grievant's car on one other occasion. It points out, however, that after that incident the grievant told Irons that it was "not too cool" for him to pick up his car. The union notes that the grievant also instructed Martin not to send Irons to get his car. The union stresses that there was no more that the grievant could have done.

The union states that the grievant was upset by the radio traffic that an ex-inmate was taking his car. It indicates that Ora Simpson called the grievant from the control center to tell him that she had heard on the radio about an ex-inmate taking his car. The union asserts that inmates can hear radio calls and recognize the correction officers' numbers which are used on the radio. It notes that the grievant testified that he thought that someone was trying to slam him.

The union acknowledges that the grievant talked to Myers about the radio transmission. It points out that Myers indicated that if he saw an ex-inmate taking an employee's car, he would do the same thing again. The union notes that the grievant characterized Myers as argumentative.

The union agrees that the grievant was interviewed by Hastings on August 20, 1992. It contends that he answered all of the relevant questions put to him. The union maintains that it is not relevant who the grievant lives with. It notes that the grievant testified that he

cooperated "as much as he felt cause for."

The union charges that on September 2, 1992, an inmate told the grievant that Myers had told him that if he wanted to blow up the grievant, he only needed to mention his name. It claims that such a statement raises security questions. The union claims that such a comment to an inmate is grounds for discipline.

The union states that the grievant acknowledges that he later asked Myers why he wanted to keep the dispute going. It contends that Myers said that if the grievant did not like it, they could go to the BP gas station. The union maintains that words were exchanged and then the grievant and Myers got in their vehicles and left. It claims that at the pre-disciplinary hearing Hammer and two other correction officers testified that they did not hear anything.

The union questions the testimony of Hammer at the arbitration hearing. It points out that he is a friend of Myers and would be expected to support him. The union notes that Hammer's statement is dated nearly one year after the incident. It asserts that it is simply a case of the grievant's word against Myers's word.

The union concludes that the state failed to prove its case. It further notes that the state imposed the most extreme penalty even though the Standards of Employee Conduct suggest penalties ranging from a written reprimand to removal for a first offense under rules 20, 26, and 46(e). The union requests the Arbitrator to return the grievant to work with

full pay and benefits.

ANALYSIS

The state charges the grievant with the violation of three rules of the Standards of Employee Conduct. First, it contends that the grievant violated rule 46(e) by associating with ex-inmate Irons. The state points out that Irons came to LCI on August 2, 1992, to deliver a pizza to the grievant and to pick up his car to do a tune-up on it. The grievant claims that Martin was supposed to deliver the pizza and pick up his car and that he had no control over the fact that Irons came to LCI.

The Arbitrator believes that the testimony and evidence establish that the grievant did violate rule 46(e). First, the grievant admitted that on one occasion prior to August 2, 1992, Irons came to LCI to pick up his car. The fact that Irons felt that he could come to LCI and pick up the grievant's car establishes that some kind of relationship existed between the grievant and Irons. Second, after the first time Irons came to pick up his car, the grievant should have made it entirely clear to Irons and Martin that under no circumstance was Irons to pick up his car or work on his car. A remark that it is "not too cool" to come to LCI is not sufficient. Third, even if the incident of August 2, 1992, is disregarded, there is evidence of an association between the grievant and Irons. Irons told Custer and Bowers that the grievant asked him if he still worked on cars; that he paid him $10 for doing an oil change; and that he visited the

grievant and Dink at their home approximately eight times since his release from LCI. Bowers testified that he felt that Irons was being honest because of his pending completion of parole. The union failed to call Dink, Irons, or Martin to rebut any of these statements.

The grievant's association with Irons is especially serious because of a prior incident. On February 8, 1991, the grievant received a written reprimand. It states:

> ...on November 26th, while assigned to the East Area Patrol you left your vehicle for a period of approximately 45 mins. and walked the East Area Fence. In doing so you called an inmate over to the fence and the two of you walked back and forth along the fence, involved in conversation. You admittedly did so on several prior occasions with the same inmate.

The grievant was warned:

> This type of association with one particular inmate can only lead to problems for yourself, inmates, and the institution. You give the appearance of an on-going unauthorized relationship with this inmate.

The inmate in question was Irons. The continuing relationship between the grievant and Irons after his release raises significant concerns.

The second charge against the grievant is that he violated rule 26 by failing to cooperate in an investigation of the August 2, 1992, incident. The grievant acknowledges that he refused to give Dink's name even after Captain Hastings explained that he needed to know who he was because he was mentioned in a number of reports. It is not up to the grievant to decide what questions are relevant. The rule requires employees to cooperate. He cannot cooperate "as much as he felt cause for."

The third charge against the grievant is that he violated rule 20 by threatening Myers on September 5, 1992. Myers testified that the grievant threatened him with bodily harm in the parking lot at LCI and again at the BP gas station near the institution. The grievant acknowledges that there was a confrontation but claims that threats went both ways and in any event maintains that it is a case of one man's word against another man's word.

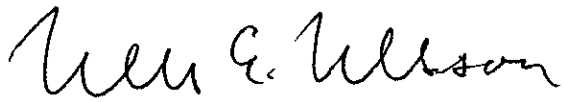
The Arbitrator must disagree. He feels that it is clear that it is the grievant who did the threatening. First, Myers testimony that the grievant approached him in the parking lot at LCI and threatened him is clearly supported by the testimony of Hammer. The grievant admitted that he knew of no reason why Hammer would lie. The fact that Hammer's written statement was not obtained until nearly one year after the incident does not undermine the credibility of his testimony at the hearing. One would expect an individual to remember a confrontation such as he described long after it took place. Second, the grievant followed Myers to the BP gas station. Myers pulled up to a gas pump to get gas but the grievant did not pull up to a pump. He was there simply to confront Myers and to continue his threats.

The Arbitrator acknowledges that the grievant testified that an inmate told him that Myers said that if he wanted him to blow up, he should mention his name. If such is true, the grievant had every right to be angry. However, he should have spoken to a supervisor and/or filed a written report.

Clearly, it would be inappropriate to take matters into his own hands and resort to the tactics used by those he is paid to guard.

The Arbitrator recognizes that discharge is the most severe penalty that can be imposed but he believes that the penalty must be upheld. First, the grievant committed three serious offenses. For all three offenses removal may be deemed appropriate for a first occurrence. Second, one of the offenses -- association with an ex-inmate -- was a second occurrence. The Standards of Employee Conduct indicates that the penslty for a second offense is removal. Third, the grievant's record is very poor. From September 18, 1990, through his removal, he received discipline twelve times including six suspensions. Many of the disciplinary actions were related to being absent without leave. However, his record also includes a ten-day suspension for sleeping while on duty with his weapon lying on the front seat of his vehicle and a one-day suspension for carelessness and inattention to duty.

Based upon the above analysis, the Arbitrator must deny the grievance.



Nels E. Nelson
Arbitrator

October 11, 1993
Russell Township
Geauga County, Ohio