

In the Matter of the
Arbitration Between

OCSEA, Local 11
AFSCME, AFL-CIO

Union

and

OCB for Ohio Department
of Rehabilitation and
Corrections

Employer.

Grievance Nos. 27-26-(91-3-13)-
0181-01-03 and

27-26-(91-3-13)-0180-01-03
Grievants: Sampson and Lawson

Hearing Date: January 14, 1993

Closing Arguments Received:
2/20/93 & 2/25/93

Award Date: March 18, 1993

For the Union: Michael Temple
Ron Sixt

For the Employer: Rodney Sampson
Louis Kitchen

Present at the Hearing in addition to the Grievants and the
Advocates were Ernie Moore, Investigator (witness), Virginia
Angier, Corrections Officer (witness), Rickie Helton, Corrections
Officer (witness), Captain Vaughn (witness), Curtis Witherow,
Inmate (witness), Keith Lawson, Corrections Officer (witness),
Charles Corbin, Corrections Officer (witness), Linda Brown
(witness), Stanley Rice (witness), Tony Ward (witness).

ISSUE

Were the ten (10) day suspensions issued to the Grievants
for just cause? If not, what shall the remedy be?

JOINT EXHIBITS

1. Contract
2. Revised Standards of Employee Conduct (6/1/90)
3. Investigation Report (in binder)
4. Grievance Trail
5. Grievance Trail
6. Special duty shift rosters
7. Special duty and shift rosters

JOINT STIPULATIONS

1. Management recognizes for the purpose of these cases, that Reassignments/Transfers are not a form of discipline.
2. Management agrees to abide by Article 2 - Non-discrimination. Management agrees not to discriminate against any employee due to their Union Affiliation position or activity.

FACTS

The Warren Correctional Institution (WCI) houses approximately 1400 close and minimum security inmates. The main compound houses approximately 1250 close and minimum security inmates, while the Warren Correctional Camp houses an additional 150 minimum security inmates. The institution is a multi-unit facility with one of the four units being the correction camp.

The institution relies on the staff to deliver goods, services, and programs to the inmates as a means of effectively

managing the facility. One of the most important services is the delivery of mail to inmates. The American Correctional Association ("ACA") reports that one of the most important factors in preventing inmate disturbances is an efficient mail operation. In turn, the ACA recommends that all mail be handled carefully to ensure delivery in good condition to the proper party.

The effective and efficient processing of mail is pivotal to the orderly operation of the institution and to the on-going business conducted with outside entities (e.g., the Courts, corrections institutions, businesses, etc.). Inmates are permitted to receive correspondence from their relatives and loved ones in the form of cards and letters on a regular basis. Additionally, all incoming money orders and cashiers checks, which are posted to an inmate commissary account, are initially processed in the mail room. WCI staff members are assigned to the mail room and are responsible for processing all incoming and outgoing mail for both inmates and staff members.

PROCEDURAL FACTS

On January 4, 1991, both Grievants (CO "S" and CO "L") were notified of a Pre-disciplinary Conference on January 9, 1991. The Grievants were notified that allegedly they had violated Rule #1 -- any violation of ORC 124-34, Rule #6 -- Destruction, damage, or misuse of State Property, property of visitors, etc., and Rule #9 -- Failure to Carry Out a Work Assignment or the

exercise of poor judgment in carrying out an assignment. Subsequently on January 9, 1991, the Pre-disciplinary Conference was held. On January 18, 1991, the Hearing Officer found that the Grievants had violated the above enumerated Rules and that just cause existed for discipline. On February 27, 1991, both Grievants were given a 10 day suspension. The matter reached arbitration on January 14, 1993 when a hearing de novo was held.

EVIDENCE

Correction Officer (CO) Angier testified. CO Angier, at the time of the hearing, had been in ODRC employ for seven years. Her prior service consisted of three years at Lebanon Correctional Institution (LCI). She had been at Warren for four years and had served for three years in the Mail Room. On November 30, 1990, she was approached by an Inmate, Mr. Witherow, who was the porter for the building. Mr. Witherow asked her to step into the trash closet where he showed her a first class envelope that contained a money order lying on top of the trash. The money order was for an inmate. CO Angier took the money order to CO "S," the senior CO in the mail room and showed it to him, telling him that the money order had been found in the trash. CO Angier said that when she showed the money order to CO "S," he only laughed and in her words "seemed totally indifferent" to the error.

The Officer in charge of the mail room Lt. Moore was not at the Institution that day. However, on December 11, 1990, CO

Angier reported the incident to Lt. Moore. Lt. Moore questioned her, and she told him that on days when he (Lt. Moore) was not on duty that CO "S" and CO "L" often referred to "file 13 days." (The Arbitrator will take notice that "file 13" is term of general usage that refers to a wastebasket as the 13th file.) CO Angier when questioned said that she had seen both CO "S" and CO "L" throw mail into wastebaskets and that the amount seemed greater on the days that Lt. Moore was absent. (The Arbitrator notes for the record that both Grievants were supposed to throw away "bulk mail" and that CO Angier stated clearly that from the distance at which she saw the mail thrown away she could not distinguish between first class mail and bulk mail.) CO Angier further testified that on December 17th, at the direct request of Lt. Moore, she checked the trash and gave the first class mail that she found to Lt. Moore. CO Angier said that CO "S" had processed mail at Station #1 on December 17th and that CO "L" had also worked the mail room that day. (See Joint Exhibit 3 for Statement of CO Angier.) (See also Joint Exhibit 4: Special Duty Roster Shift which shows that Lt. Moore was off on December 17th and that both Grievants were on duty as well as CO Angier.)

Inmate Witherow also testified. He said that he was the porter for the building which contained the mail room. He said that on November 30th he had found the money order and its envelope in the trash and had shown the items to CO Angier. He also said that he had seen first class mail in the trash on prior occasions. (See Joint Exhibit 3 for the statement of Inmate

Witherow.)

Lt. Moore testified that he was now an Inspector but, at the time of the incidents in question, he was a Lt. and was the supervisor of the mail room. He described the mail process: The mail is handled according to type. Letters are handled preliminarily at station #1 while magazines and newspapers are handled primarily at Station #3. Letters are first sorted, i.e., pitched, into bins at station #1. The bins correspond to various inmate numbers; the letters are often addressed by those numbers. When the item was not addressed by the inmate's number, the person at station #1 had to stop and look up the inmate's number. The person at Station #1 was to sort all first class mail but was directed to throw any bulk mail away. "Legal Mail" was placed aside from the regular mail. (Legal mail is privileged correspondence for the inmate and is opened in his presence.) The newspapers and magazines were sorted at station #3. After the mail is sorted at Station #1, bundles of sorted mail are removed, opened by machine, and searched for contraband. If money orders are found for prisoners, they are set aside at Station #4 to be subsequently recorded and then deposited to the Inmate's account. Opened mail is then taped closed, stamped with the stamp of the individual who examined the letter for contraband (every person has an individual stamp), and is then sorted by living area for subsequent delivery.

Lt. Moore stated that Grievant "S" worked at Station #1 when he was on duty because he was the most senior person and the most

knowledgeable. Grievant "L" usually worked station #3, although on occasions when both Grievant "S" and Lt. Moore were unavailable, "L" worked Station #1. Lt. Moore stated that he himself often worked station #1 when Grievant "S" was unavailable.

Lt. Moore said that he was approached on December 11, 1990 by CO Angier who told him that on November 30, 1990 she had been approached by Inmate Witherow and that subsequently she had found the money order in the trash, showed them to CO "S," and that CO "S" had seemed indifferent to the problem. Lt. Moore indicated that, as a consequence, he undertook an investigation. He was asked on cross examination why he did not approach the Grievants first and ask them. He explained that he did not want to say anything until he determined the extent of the problem. Then Lt. Moore testified that on December 12, 13, 14th, he performed the Station #1 task and that when he checked no first class mail was found in the trash. On December 17th, Lt. Moore was off, and he asked CO Angier to check the trash. She did and retrieved 33 pieces of First Class Mail. She turned this mail over to Lt. Moore on December 18th. (See Joint Exhibit 3 behind the tab marked 12/17/91 for the mail found that day.) Lt. Moore noted that on December 17, 1990, CO "S" had sorted the mail at station #1. On December 18th, Lt. Moore sorted the mail, and no mail was found in the trash. On December 19th both Moore and CO "S" were at work (See Joint Exhibit 4). Moore testified that every time the porter took trash to the trash room, he (Lt. Moore) followed

him, never letting him out of his sight. After the trash was dumped, Lt. Moore made the porter leave the room and searched the trash. On December 19th, he found 15 pieces of first class mail including 4 pieces of first class mail directed to the prison administration rather than to inmates. (See Joint Exhibit #3 behind the tab marked 12/18/90.) On December 20, 1990, both Moore and CO "S" were on duty, Moore again checked the trash and this time found 51 pieces of first class mail (including one piece of "legal" mail). (See Joint Exhibit #3 behind the tab marked 12/20/90.) Moore testified that CO "S" did the work at Station #1 on that day. (See Joint Exhibit 4.)

On December 21, Moore and CO "S" were again on duty, CO "S" was the Station #1 sorter. Moore again checked the trash and on this day found 14 pieces of first class mail. (See Joint Exhibit 4 for duty rosters.) (See Joint Exhibit #3 behind tab marked 12/21/90.) On December 28, 1990 Moore was going to be absent. He testified that he asked CO Helton if she would check the trash for him. On that day, CO Helton found 12 pieces of first class mail in the trash. (See Joint Exhibit 3 behind the tab marked 12/28/90.) On December 31, Moore was again off. Moore asked CO Angier to check the trash for him. CO "S" called off sick, and CO "L" sorted at Station #1. On that day, CO Angier found 33 pieces of first class mail. (See Joint Exhibit 3 behind the tab marked 12/31/90.) (See also Joint Exhibit 4 Duty Rosters.)

On January 2, 1990, Lt. Moore submitted his report to the Warden. In addition to the collection of First Class mail, he

also stated that he too had heard both Grievants refer to "File 13" when he was out of the room but still within ear shot. He also stated that both Grievants complained that they were over worked and needed help. (See Exhibit 3 for Lt. Moore's report.)

Lt. Moore said that numerous people had access to the mail room in addition to the mail staff, including the visiting staff, case managers, entry personnel, correctional counselors, executive staff and the porter (in the presence of guards). Moreover, he admitted that on a few occasions he had sent new CO's down to the mail room to help out. However, he stated that 95% of the time in December Grievant CO "S" did the work at station #1 and CO "L" did Station #3. Moreover, on the days when first class mail was found, he knew who had sorted mail based on his own observation and, in the other cases, on the observations of CO Angier and CO Helton. He said that no formal training had ever been given to the mail staff to his knowledge nor were post orders posted. However, he said all mail personnel knew that they could throw away bulk mail. He said bulk mail was readily ascertainable because each piece had "bulk mail" on it.

The Union, during its case, called Stanley Rice. Officer Rice stated that he had worked for the prison system for 18 years as a CO. He had done the mail at Lebanon Correctional Institution (LCI) for a long time. On direct examination, he said that "bulk mail" was easy to discern "because it says bulk mail right on it." On cross examination, he said that it was NOT difficult to distinguish bulk mail from first class mail. "I can

distinguish them all quite easily," he said. He said that visiting room personnel and new officers are sometimes used to supplement mail room staff when mail room staff are off or when the mail is particularly heavy, i.e., December. However, he said he had no knowledge of who worked in December 1990.

Officer Helton also testified. She stated that was normally assigned to the Visiting staff and that she helped out with the mail when she could. She said on those occasions when she helped out, CO "S" was at Station #1 sorting mail and that CO "L" was next to him. She said that she helped at station #3 with sorting magazines and newspapers. She said that on one occasion she was sorting and had set aside a pile of mail about which she was unsure. When she was done, she took the pile to CO "L" and asked him to look at it and tell her what to do with it. She testified that without looking at each piece, he just took the whole pile and threw it in the trash. She said that on December 28th, Lt. Moore told her he had to leave early and asked her to check the trash that afternoon. She did so and found a lot of first class mail which she turned over to Lt. Moore. CO Helton testified that she was a union member and a union officer and that she was afraid to testify because she would be regarded as a snitch and harassed. She said that she had testified because she "wanted to do what was right." She also said that she personally had never seen anyone except "S" & "L" and Lt. Moore sort mail at station #1; however, she could not swear to it that no one else had. She said that when CO Angier was off, she helped by doing the money

orders at Station #3 which was work she enjoyed because she used to do accounting work.

CO "S" testified in his own behalf. He said he had been a CO for 9-1/2 years and that he started in the mail room at Warren (WCI) and that he was trained by CO Rice. He said however, that CO Rice had never shown him how to distinguish "Bulk mail" from First Class mail. He said that he may have referred to "file 13 day" but that he did not mean that phrase to refer to throwing away first class mail. He said that he had never thrown away first class mail. He said that numerous people had helped with the mail in December, almost every day, and these persons once in the mail room were never assigned any particular job. He also said he did not know how they got there or who assigned them. They did not have their own "stamps," but he said they probably used other people's stamps. He said that a Mr. Krum, a case manager, used to come in and "pitch" mail right next to him (i.e., "S"). He said other people came in and looked at the magazines. He admitted he had never reported these incidents. CO "S" also claimed that Inmate Witherow, the porter, was alone in the mail room on numerous occasions. However, he also admitted that he had never reported Witherow for "out of place" violations. He swore that he never threw away first class mail or legal mail.

CO "L" also testified. He said that he had worked for ODRC for 8 years and had been at Lebanon before coming to Warren. He said that the only training he had was from CO "S." He said that

on December 31, 1990 that CO "S" had been off and that he processed the mail with CO Ward and that they both did Station #1. He said that once Helton had sent 4 new officers who did most everything, pitched in and helped out wherever they could. On cross examination, he said he did not know when the 4 new officers had been sent over and admitted it could have been in October. He said that he knew bulk mail because it said "bulk mail" in the corner. He said that he never had thrown away first class mail.

Officer Ward testified and said that, on occasion, he had worked in the mail room. He said he did remember the 31st. He said that whenever helpers are used they pitch in wherever they can. He said he did do Station #1 with CO "L" on December 31st.

Officer Brown also testified. She said that she was normally assigned to Visiting that worked out of the mail room. She said that usually CO "L" and CO "S" did the mail, especially the sorting into bins. She said that she had helped out on occasion and what she usually did was slice open the letters and search for contraband. She said she was shown what was bulk mail and, on occasion, she had thrown bulk mail away.

Officer Sixt said that he had started at Warren in July of 1989. He said since that time he had worked varying posts including he had helped out with the mail. However, he said he could not remember working in December 1990. He said he had discovered bulk rate mail at all stations and had thrown it away. He indicated that prior to working at the prison he had worked at

a post office.

DISCUSSION

The evidence of the Employer in this case relies in part on a legal maxim, i.e. *res ipsa loquitur*, "the thing speaks for itself." Upon receiving information that first class mail was being thrown away, Lt. Moore set up a system to monitor the trash. This system revealed that, on those days when CO "S" operated station #1, first class mail was regularly found in the trash. On one occasion when CO "L" worked with CO Ward on station #1, first class mail was found in the trash. Moreover, when Lt. Moore worked station #1, no first class mail was found. These results were not only determined by Lt. Moore but by CO's Angier and Helton, as well.

The rebuttal of the Union is based on the following premises:

1. No one actually saw the Grievants throw away mail that was clearly first class mail.
2. Many people beside the Grievants pitched mail; therefore, if first class mail was found in the trash, it was not put there by the Grievants.
3. Even if first class mail was found in the trash, it's presence was not the Grievants' fault, because CO "S" had never been trained in recognizing bulk mail by either CO Rice or Lt. Moore.
4. That even if first class mail was found in the trash,

no post orders were posted and presumably the CO's were not on notice as to the rules.

5. Lastly, both CO "S" & CO "L" testified that they NEVER threw away any mail improperly.

This case is made more difficult by the lack of eyewitness testimony. However, many cases must be decided without the benefit of direct eyewitness testimony. The trier of fact must determine the credibility of the witnesses, the likelihood of the events, and whether the case put forward is sufficient to say that Grievants were disciplined for just cause.

First, what about the testimony of the witnesses? Both CO Angier and Helton were testifying against their best interests. Both were anxious and fearful that testifying against fellow CO's would cause them to be harassed. Moreover, CO Helton was a union member and officer. Both CO's indicated that they testified because they believed what they saw was wrong, morally wrong, hurting the institution and also hurting inmates without reason and gratuitously. Both of these officers at the request of Lt. Moore searched the trash when he was not there, and both found inordinate amounts of first class mail. On both days in question, they saw CO "S" sorting the mail at station #1. Both witnesses were credible, and this Arbitrator can see no reason for them to testify as they did because their testimony would gain them nothing except harassment.

Second, the inmate's testimony was entirely minimal. He basically testified that on the one occasion he found the money

order and called it to CO Angier's attention. He also said that he had seen first class mail before in the trash and had brought it to CO "S"'s attention. The Employer's case could have been made without this testimony. It was merely cumulative. The inmate stood to gain nothing; in fact, he stood to lose something for testifying on the Employer's side. In return, the Union case spent numerous questions attempting to infer that the inmate was in the mail room alone numerous times with the not so subtle implication that, in reality, the inmate was the person who was throwing all the first class mail away. Neither Grievant nor other CO could explain how the inmate could violate the rules so often and never had been issued a ticket by them for being "out of place." The inmate was credible.

One of the defenses of the Grievants was that they had never been properly trained to recognize bulk mail. Grievant "S" made a particular point of this idea. Yet, he admitted he had been trained by CO Rice. CO Rice, the Union's own witness, testified that distinguishing between bulk rate and first class was simple and that he could do it quickly and without effort. Are we to believe that CO Rice had never shown this simple process to Grievant "S"? Moreover, the Grievant maintained that numerous people just walked in the mail room and started pitching mail. Yet when he began his testimony, he noted quite clearly that when he was at work he did Station #1 because it was the most senior position and required the most knowledge. Even accepting on face value that sometimes other persons pitched mail, on the occasions

described by Lt. Moore, in all but two of them (the times when Angier and Helton checked the trash), Moore saw "S" pitching the mail and, subsequently, found the first class mail in the trash! If "S" pitches the mail and first class mail is found in the trash, the thing speaks for itself.

Lastly, Grievant "S" stated categorically that he NEVER threw away first class mail or legal mail. If he had said that "sure he made mistakes and that he never intentionally had thrown away first class mail," his story might have been more persuasive; however, his categorical denial lessened his credibility. Moreover, the Arbitrator finds it incredulous that on those days when a great deal of mail was found in the trash that somebody just happened to walk in that day and start pitching mail and throwing away such a quantity of first class mail.

No fact finder has to wait until an eyewitness comes forward to conclude what happened with reasonable certainty. Circumstantial but cumulative evidence can persuade the fact finder. This Arbitrator is clearly convinced that Grievant "S" did, on at least the occasions charged, throw away what he knew or should have known to be first class mail. However, this Arbitrator also finds that the evidence is not clear that CO "L" did the same conduct. Therefore, the discipline of CO "L" was not for just cause.

CO "S" was charged with three violations of the Revised Code of Conduct. All three charges are essentially one and the same.

Charge #1 encompasses all the other charges and is so broad as to fail to provide sufficient notice to employees of what is forbidden. With regard to Rule 6, the Employer failed to make clear how the Grievant violated this particular rule. Lastly, Rule 9 seems to clearly and specifically cover the situation. In essence, Grievant "S" failed to carry out a work assignment or exercised bad judgement in carrying out the assignment.

Whatever motive Grievant "S" had for throwing away first class mail was never revealed. Whether he was lazy, incompetent, or acted with reckless disregard remains a mystery. However, the Employer's case failed to show a clear malevolent or malicious intent. On the other hand, the Arbitrator is convinced the Grievant knew what he was doing. The defense that Lt. Moore never trained him or that CO Rice never told him the difference between first class and bulk mail is simply a ludicrous defense. The Grievant was clearly on notice that only bulk mail could be thrown away; he said so. The absence of post orders or a thorough training program are, in this case, de minimis errors and certainly did not contribute to or excuse the Grievant's acts. If the Grievant was really confused about the difference between the two types of mail he could have asked!

Under the evidence received, no former discipline was attributed to Grievant "S." He is an employee of moderate duration. The Code of Conduct permits the minimum of a written reprimand to the maximum of removal for a violation of Rule 9.

Given the lack of recent discipline, given the length of

Grievant's service, and given the lack of proof of malice, a ten day suspension is not commensurate. However, given the Grievant's apparent reckless disregard for the rules, his reckless disregard for the mail of inmates he is sworn to protect, and the seriousness of the offense of deliberately throwing away U.S. mail bound for the inmates, the Arbitrator thinks that a five day suspension is just.

AWARD

The Grievance of CO "L" is sustained. The discipline is to be removed from his record, and he is to be made whole for the 10 day suspension.

The Grievance of CO "S" is sustained in part and denied in part. The suspension is to be reduced to a five day suspension, and the Grievant is to be made whole for the other five days.

March 18, 1993

Date

Phonda R. Rivera

Arbitrator