

#1054

IN THE MATTER OF ARBITRATION  
BETWEEN

STATE OF OHIO, DEPARTMENT OF	)	
REHABILITATION AND CORRECTIONS	)	GRIEVANCE NO. 27-15-(9-9-93)
	)	-0288-01-03
	)	
AND	)	
	)	<u>OPINION AND AWARD</u>
	)	
OHIO CIVIL SERVICE EMPLOYEES	)	
ASSOCIATION, AFSCME, LOCAL 11,	)	GRIEVANT: TIMOTHY FOLLROD
AFL-CIO	)	

JAMES M. MANCINI, ARBITRATOR

APPEARANCES:

FOR THE EMPLOYER

Didi Anekwe  
Rodney Sampson

FOR THE UNION

Patrick Schmitz  
John Vanover  
Timothy Follrod

## S U B M I S S I O N

This matter concerns a grievance filed on September 8, 1993 by Timothy Follrod. The grievant alleged that he had been improperly given a ten day suspension in violation of the Collective Bargaining Agreement between the State of Ohio (hereinafter referred to as the Employer) and the Ohio Civil Service Employees Association, AFSCME, Local 11, AFL-CIO (hereinafter referred to as the Union). An arbitration hearing was held on March 28, 1993 at the Madison Correctional Institution, London, Ohio and on April 6, 1993 at the Office of Collective Bargaining, Columbus, Ohio. The parties stipulated that the grievance was properly before the arbitrator and that there were no procedural issues in dispute. The parties subsequently submitted post-hearing briefs.

## B A C K G R O U N D

The grievant, Timothy Follrod, is a corrections officer employed at the Madison Correctional Institution in London, Ohio. The Madison Prison is a medium security institution. At the time in question, the grievant worked the first shift as a Yard Patrol Officer. The grievant has been employed as a corrections officer for approximately eight years.

On the morning of June 30, 1993, the grievant reported for roll call at about 7:20 a.m. The grievant relieved third shift yard officer, Clarence Lares, at about 7:25 a.m. At that time, Officer Lares transferred certain equipment to the grievant. The yard patrol officer's equipment included nineteen institutional keys, a pair of handcuffs, a two-way radio, and a container of C-8 Gas. According to Mr. Lares, the equipment was placed on a barrel in front of the Control Center for the grievant. The grievant claimed that the equipment was not properly transferred to him by Officer Lares in that it was placed on the window ledge of the Control Center. The grievant does not dispute the fact that he assumed responsibility for the equipment once it had been transferred to him by Officer Lares.

Shortly after the transfer of the equipment, the grievant stated that he heard corrections staff yelling at inmates across the yard outside of the kitchen building. This building is approximately one hundred yards from the Control Center. The grievant stated that he hurried to assist a kitchen employee, Kathy Ooten, who was attempting to get inmates to move some barrels from the yard. The grievant stated that he is trained to respond quickly whenever he hears a fellow worker yelling at inmates in order to prevent a more serious problem

from developing. As it turned out, nothing serious occurred with the grievant merely telling the inmates to move the barrels in question.

According to the grievant, during his haste to assist a fellow worker, he unknowingly left his equipment unattended on the window ledge of the Control Center. The grievant indicated that he returned to the Control Center about five to ten minutes after he had left to assist Ms. Ooten in the kitchen building. It was at that time that the grievant realized that his equipment had been left behind at the Control Center.

Lieutenant Gerald Nelson stated that on June 30, 1993 at about 7:25 a.m., he noticed that certain security equipment had been left unattended on the window ledge at the Control Center. He assigned Lieutenant Bierbaugh to secure the equipment. Lieutenant picked up the equipment and determined that it belonged to the grievant. The equipment was turned over to Captain Pagels. The captain stated that he observed the grievant at that time standing in front of the kitchen and proceeding back towards the Control Center. At about 7:45 a.m., the grievant entered the captain's office and asked about his equipment. The grievant was asked to prepare an incident report and was subsequently given his equipment by Lieutenant Bierbaugh.

In his incident report, the grievant stated that he had left his equipment including yard keys on the ledge of the Control Center where he had relieved Officer Lares. The grievant did not refer to his helping another employee in dealing with inmates in the kitchen area. The grievant did indicate to Lieutenant Bierbaugh that he had hurried to assist a fellow worker in the kitchen area with a problem with inmates. This is reflected in Lieutenant Bierbaugh's subsequent report over this incident which was prepared on July 5, 1993. In that report, Lieutenant Bierbaugh questioned the reliability of the grievant's story about assisting a fellow worker and stated that the grievant had become upset when told about the seriousness of the incident.

The evidence showed that the Control Center where the grievant left his equipment unattended is a secured area which is generally off limits to inmates. According to several of the witnesses, inmates are not allowed within twenty yards of the Control Center. It was also shown that the prison yard is not opened to inmates until approximately 7:50 a.m. However, there are certain inmate workers who remain at the dining hall prior to 8:00 a.m.

Following the incident which occurred on June 30, 1993,

the grievant was charged with improperly leaving keys, radio, and a pair of handcuffs unattended on the window ledge of the Control Center. Management concluded that this constituted a serious violation of Rule 30 of the Standards of Employee Conduct which prohibits "loss of of control of any instrument that could result in a breach of security and/or jeopardize the safety of others..." The grievant was given a ten day suspension for his Rule 30 violation. The evidence indicated that the grievant had not incurred any prior Rule 30 violation. However, the grievant's prior disciplinary record included a thirty day suspension for violations of Rule 23, 39, and 40; a one day suspension for Rule 21 and 22 violations; and two prior oral reprimands.

In support of its position, the Union produced several witnesses who testified about other employees who have committed Rule 30, loss of control violations. Nell Ooten, a steward at Madison, testified that she received a written reprimand for her own loss of control violation a few years ago. Ms. Ooten further indicated that during her approximate seven and one-half years of employment, she has not seen any employee disciplined for more than ten days for a Rule 30 violation.

John Vanover, the local union president, testified that

Correction Officer Thurston at the Madison Correctional Facility recently had been charged with a loss of control violation. He stated that Mr. Thurston had lost his keys while responding to a man down situation. According to Mr. Vanover, when the incident occurred, all inmates had to be cleared from the yard and a search had to be undertaken throughout the cell blocks. Other correction officers had to be taken off their regular duties in order to help search for the lost keys. Mr. Vanover stated that Officer Thurston only received a written reprimand for this loss of control violation. Mr. Vanover also indicated that to his knowledge, no other employee had ever received discipline greater than a written reprimand for a Rule 30 violation.

Steve Mannon, a chapter steward at the North Central Correctional Institute, testified regarding a loss of control violation committed by Officer Barbara Block. Ms. Block left her keys in the staff restroom with the keys subsequently being found by a food service coordinator. The keys were left unattended for about one and one-half to two hours and were assessable to the inmates who were assigned to clean the restroom. Ms. Block received a written reprimand for this loss of control violation.

Charlie Williamson, Union Chapter Steward, testified

regarding Marcella McGraw, a sergeant at the Southern Ohio Correctional Facility. Ms. McGraw lost a set of high security "hot keys" which provided access to the mail room and other areas which were off limits to inmates. An inmate's visitor found the keys in the restroom. Ms. McGraw received a one day suspension for this loss of control violation.

The Union also cited a loss of control violation committed by Warden Arthur Tate of the Chillicothe Correctional Institution. The warden was suspended without pay for five days for not securing his personal shotgun as well as his car which were stolen by an inmate and used for an escape.

The Employer presented several cases involving Rule 30 violations in support of its position. Drew Hildebrand, Labor Relations Officer at the London Correctional Institution, testified regarding the Rule 30 violation committed by John Drayer, a plumber at the prison. The record indicates that Mr. Drayer left a tool cage in plumbing shop unsecured which allowed inmates to remove two hatchets from a tool crib. Subsequently, the inmates assaulted other prisoners with the hatchets resulting in injuries to approximately twenty inmates. According to David Carpenter, the incident was a major one which caused a lock down at the facility as well as a near riot between black and white



inmates. Mr. Drayer was given a twenty day suspension for his loss of control violation.

Joe Andrews, Public Information Officer, testified regarding the discipline handed out to Robert Hinckle. Mr. Hinckle left a set of keys in the door of a cellblock. The keys were subsequently recovered and returned by an inmate. Mr. Hinckle was given a ten day suspension for this loss of control incident.

Didi Anekwe, Labor Relations Officer at the Southeast Correction Institution, testified regarding Officer James Greenlee with respect to his Rule 30 violation. Mr. Greenlee misplaced keys on the compound to the vehicle which he had been assigned while working road patrol. The keys were found by an inmate and turned into the warden's office. Mr. Greenlee was given a fifteen day suspension for the incident which appeared to have been his second or third violation of Rule 30.

Jerry Ballenger, Labor Relations Officer at the North Central Correctional Institution, testified with regard to the Barbara Block incident. He stated that Ms. Block only received a written reprimand after leaving keys unattended in the ladies restroom because she had no prior record and she admitted to the Rule 30 violation. However a captain who investigated the incident, indicated in his report that Officer Block had been less than truthful regarding the missing keys.

## POSITIONS OF THE PARTIES

### POSITION OF THE EMPLOYER

The Employer contends that the ten day suspension imposed upon the grievant for his Rule 30 violation was for just cause. The record shows that the grievant was fully aware of the rule which prohibits the loss of control of any instrument which could result in a breach of security and/or jeopardize the safety of others. For a first offense, the penalty provides a range from a written warning to termination. The grievant's Rule 30 violation was sufficiently severe to warrant a ten day suspension which was appropriate under the Standards of Employee Conduct.

The Employer submits that the evidence shows that the grievant improperly left his institutional keys as well as security equipment on a window ledge at the Control Center. This equipment remained on the ledge for approximately fifteen minutes before being secured by management. This was a serious violation because the equipment included nineteen institutional keys which could aid in the escape of inmates or in possibly causing a riot. The keys and equipment were left unsecured in an area which was easily assessable to inmates.

The Employer disputes the grievant's claim that he inadvertantly left his safety equipment in order to quickly respond to a disturbance in the kitchen area. The evidence shows that there was absolutely no incident report of an inmate disturbance on the morning in question. Moreover, the grievant claimed that he was in a hurry to assist Ms. Kathy Ooten when he neglected to pick up his equipment. However, Ms. Ooten was never called to corroborate the grievant's story in this regard. The grievant subsequently changed his version of the events and claimed that there was a conspiracy by management to get him. Obviously the grievant's testimony contradicted the information which he himself provided in his own incident report on June 30, 1993.

The Employer further maintains that the discipline imposed was proper considering not only the seriousness of the offense but also the grievant's prior work record. The grievant's active disciplinary record consisted of a thirty day suspension; one days suspension; and an oral reprimand. The evidence clearly established the seriousness of the grievant's misconduct here. Under the range of discipline prescribed for a first time violation of Rule 30, management certainly was permitted to impose a ten day suspension under the circumstances presented.

The Employer disputes the Union's contention that the grievant was subjected to disparate treatment. The Union failed to show that any of the other incidents cited involved similar situations. For example, there are clear differences between the grievant's situation and that of Officer Block who was issued a written reprimand for a first time violation of Rule 30. Officer Block had no prior disciplinary record as compared to the grievant's major previous disciplinary record which included a thirty day suspension. Further, Officer Block was truthful and mitigated the discipline imposed whereas the grievant has aggravated the situation by constantly changing his story as to what occurred. The Union simply failed to demonstrate the similarities between the grievant's prior work record, prior disciplinary record, seniority, and degree of fault as compared to the employees cited by the Union in its claim of disparate treatment.

In summary, the Employer asks that this arbitrator not substitute his judgment for management's relative to the appropriateness of discipline imposed. Evidence of the seriousness of the offense committed as well as his prior disciplinary record supports the ten day suspension imposed upon the grievant in this case. Also, the grievant's

untruthfulness aggravated rather than mitigated the situation. As a result, management asks that the ten day suspension be upheld.

#### POSITION OF THE UNION

The Union contends that the discipline imposed was not commensurate with the offense committed. The underlying facts established by the evidence demonstrate that the ten day suspension handed out to the grievant was improper. The discipline also did not correspond to the reasonably foreseeable consequences of the incident.

The Union presented several witnesses who testified that no employee had ever been given a ten day suspension for a loss of control violation at the Madison Correctional Facility. In fact, no one has ever been given discipline greater than a written reprimand for a Rule 30 violation. In one case, a correction officer lost control of his keys in the middle of the compound yard which caused a cell confinement or lock down while a search for the keys was undertaken. The keys were missing for three to four hours. However, this other employee was only given a written reprimand. If the Employer had adhered to the commensurate nature of employee discipline at Madison for a

Rule 30 violation, the grievant would have likewise received at the most a written reprimand.

The Union further cited discipline for Rule 30 violations imposed on employees at other correctional institutions. In one case, keys were left unattended for one and one-half to two hours in a restroom which was easily assessable to inmates.

## O P I N I O N

There were basically two questions presented in this case namely (1) was there just cause to discipline the grievant, and (2) was there just cause to issue a ten day suspension under the facts of this case? Just cause requires proof that an employee has committed a disciplinary offense. In addition, just cause also requires proof that the penalty imposed is justified in light of the gravity of the offense and surrounding circumstances.

The evidence does establish that the grievant committed a disciplinary violation on June 30, 1993 when he left his security equipment unattended for a short period of time. The equipment was left on a window ledge at the corner of the Control Center. The evidence shows that the grievant had been properly transferred the security equipment by third shift Officer Lares who he was relieving. At about 7:25 a.m., the grievant left the equipment unattended on the ledge at the Control Center. The security equipment was subsequently secured by management.

The grievant's actions did violate the department's Standards of Employee Conduct Rule 30. That rules prohibits any loss of control of any instruments that could result in a breach of security and/or jeopardize the safety of others. The

grievant's loss of control of his security equipment which included keys, a radio, and a pair of handcuffs, was clearly in violation of Rule 30. Indeed, the grievant himself acknowledged both at the hearing and by way of a prior statement that he had failed to properly retain control of his security equipment after it had been transferred to him on the morning of June 30, 1993. Thus it is evident that the grievant was deserving of some disciplinary measure for his violation of the department's Standards of Employee Conduct Rule 30.

The Employer basically maintained that the grievant's violation was sufficiently severe to warrant a ten day suspension. The Employer further indicated that the grievant's prior disciplinary record and his untruthfulness aggravated the situation. The Union on the other hand argues that the discipline imposed was not commensurate with the offense committed. The Union claims that the grievant's loss of control infraction was basically a minor incident and did not warrant a ten day suspension.

This arbitrator after carefully reviewing the evidentiary record before him must conclude that the ten day suspension imposed in this case was not justified for several reasons. First, the evidence does not show that the grievant committed a



serious Rule 30 violation. Moreover, the circumstances surrounding the incident in question should have been taken into consideration as a mitigating factor. In effect, this arbitrator finds that the disciplinary penalty imposed on the employee in this case was unreasonable under all of the circumstances presented.

One of the basic just cause determinations which must be made in a case such as this is whether the degree of discipline administered by the Employer is reasonably related to the seriousness of the employee's proven offense. In this case, the evidence does not show that the grievant committed a serious loss of control Rule 30 violation. First, the grievant's security equipment was left on a window ledge at the Control Center which is a secured area, officially off limits to inmates. At the time in question in the early hours of the morning of June 30th, there were no inmates anywhere near the Control Center when the grievant left his equipment unattended. Indeed, there was very little inmate traffic in the entire yard during the time period in question. There were some inmate workers in the kitchen building which was approximately one hundred yards away but there was no showing that the grievant's security equipment could have been visible to them that morning. Moreover, the

was little likelihood that the equipment could have been misappropriated by an inmate. Thus this arbitrator must find that the possibility of a security breach occurring as a result of the grievant's Rule 30 violation was clearly minimal in this case.

It was also established that the grievant's Rule 30 violation did not involve the kind of aggravating circumstances typically associated with a serious loss of control incident. The record of other Rule 30 incidents shows that disciplinary suspensions like that given to the grievant in this case occur whenever there is a loss of security equipment for a considerable amount of time in an area easily assessable to inmates. Again, the grievant only misplaced his security equipment for a brief time in a secured area which was not assessable to inmates. Unlike other severe disciplinary cases, the grievant's Rule 30 violation did not result in any lockdown or other disruption of the correctional facility's operation. Finally, the grievant's case did not involve multiple violations of Rule 30 unlike other more severe loss of control incidents. This was the grievant's first Rule 30 offense. Thus this arbitrator finds from the evidence that the grievant's case did not contain any aggravating circumstances which were present in other severe Rule 30 incidents.

This arbitrator finds no merit to the Employer's contention that the grievant's prior disciplinary record as well as his untruthfulness aggravated the situation. First, the evidence shows that the grievant had never committed a Rule 30 or similar violation prior to the instant case. This was the grievant's first loss of control incident. Moreover, there was no evidence indicating that the grievant had ever been untruthful at any point during the Employer's investigation of the incident. As Lieutenant Bierbaugh's report reflects, the grievant acknowledged that he left his security equipment unattended on the window ledge at the Control Center in order to assist another staff member who was having difficulties with inmates in the kitchen area. At no time did the grievant deny the fact that he left his equipment unattended. There simply was no evidence showing that the grievant at any time failed to be truthful.

This arbitrator further finds that the circumstances surrounding the grievant's loss of control incident on the morning of June 30th serves as a mitigating factor. The grievant explained credibly that he left his equipment on the ledge so that he could respond quickly to what appeared to be a problem in the nearby kitchen work area. Again, the grievant's story

has been consistent throughout in that he offered this explanation when he was first questioned about the incident by Lieutenant Bierbaugh. As the grievant explained, in his eagerness to respond to what he thought could be a problem developing between a staff member and an inmate, he inadvertantly left his security equipment on the window ledge. There is no indication that the circumstances involved with the grievant's Rule 30 incident were ever given consideration by management. This arbitrator finds that these circumstances under which the Rule 30 incident was committed should have been taken into consideration because they show that the grievant was merely attempting to carry-out duties which he had been trained to perform to prevent accidents before they occur. Under the circumstances presented, the severe disciplinary measure undertaken by management was clearly excessive.

This arbitrator would normally be reluctant to modify discipline imposed by management for an established departmental rule violation. However in the instant case, modification of the disciplinary ten day suspension given to the grievant for his minor Rule 30 offense is clearly warranted under the circumstances. The evidence shows that the grievant committed a relatively minor Rule 30 infraction when he left his security

equipment unattended for only about five minutes in a secured area which was not easily assessable to inmates. It is evident from the record that the grievant's misconduct did not pose any serious risk of a breach of security for the Madison Correctional Facility. The evidence further established that the grievant's Rule 30 violation did not involve the kind of aggravating circumstances typically associated with a serious loss of control incident. As provided for in the parties' bargaining agreement, "disciplinary measures imposed shall be reasonable and commensurate with the offense..." In the instant case, considering the relatively minor Rule 30 violation committed as well as the fact that this was the grievant's first loss of control incident, this arbitrator must find that the ten day disciplinary suspension imposed was clearly excessive. Moreover, the grievant's reasonable explanation offered for inadvertantly leaving his equipment unattended in order to respond to a problem in a nearby building further serves as a mitigating factor in this case. Therefore under all of the circumstances presented, this arbitrator must conclude that the degree of discipline imposed was not reasonably related to the seriousness of the offense committed and as such violated the parties' bargaining agreement.

Based on the record before him, this arbitrator finds that it would be appropriate in the instant case to reduce the grievant's disciplinary suspension to three days. This arbitrator cannot agree with the Union's remedial request that the grievant's discipline be modified to only a written reprimand. First, it is apparent from the record that the grievant did commit a Rule 30 violation and even though it was not a severe infraction, it did warrant disciplinary action. Moreover as reflected in the grievance itself and throughout the grievance process, the grievant as well as the Union have previously taken the position that the grievant's ten day disciplinary suspension should be reduced to three days. This arbitrator finds that it would be improper to now grant a remedy greater than that which was sought by the grievant and Union prior to arbitration. Considering all of the circumstances presented relevant to the grievant's Rule 30 infraction as well as the position which he took throughout the grievance procedure, this arbitrator finds that it would be appropriate to reduce the disciplinary suspension to three days. The Employer shall also make the grievant whole for any loss of earnings for the balance of time for which he was improperly suspended.

A W A R D

For the reasons indicated, the grievance is granted in part. The grievant's ten day disciplinary suspension for his Rule 30 violation shall be reduced to a three (3) day suspension. The Employer shall make the grievant whole for any loss of earnings for the balance of time for which he was improperly suspended.

 6-14-95  
JAMES M. MANCINI, ARBITRATOR