ARBITRATION SUMMARY AND AWARD LOG
OCB AWARD NUMBER: 1101
OCB GRIEVANCE NUMBER: 27-25-950104-0820-06-10

GRIEVANT NAME:	James Bowling
UNION:	OEA
DEPARTMENT:	Rehabilitation & Correction
ARBITRATOR:	Floyd Weatherspoon
MANAGEMENT ADVOCATE:	Patrick Mayer
2ND CHAIR:	Georgia Brokaw
UNION ADVOCATE:	Henry Stevens
ARBITRATION DATE:	September 19, 1995
DECISION DATE:	November 27, 1995
DECISION:	Modified
CONTRACT SECTIONS AND/OR ISSUES:	Article 13 The grievant received a two-day suspension for actions which impaired his ability to perform his duties when he was observed by three managment witnesses and subsequently tested .065 for alcohol.

HOLDING: Arbitrator Weatherspoon modified the suspension to a written reprimand. While he was convinced that the grievant engaged in the behavior for which he was charged, he felt the penalty was too severe. Based on ORC Section 4511.19, the grievant was impaired. However, grievant was a 23 year employee with no prior disciplinary record. The disciplinary grid ranged from reprimand to removal. Given that the grievant's position was as a teacher, and not front line security, a lesser penalty was warranted. .

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IN THE MATTER OF THE
ARBITRATION BETWEEN

Ohio Education
Association, State Council
of Professional Educators,

(OEA/NEA/SCOPE)

Union

and

Southern Ohio Correctional Facility,
Ohio Department of Rehabilitation
and Correction

Employer

Grievance No.: 27-25-950104-0820-06-10

Hearing Date: September 19, 1995

Award Date: November 27, 1995

Arbitrator: Floyd Weatherspoon

For The Employer: Patrick Mayer

For The Union: Henry L. Stevens

I. THE ISSUE

Was the Grievant issued a two-day suspension for just cause, and, if not, what shall the appropriate remedy be?

II. APPLICABLE CONTRACT PROVISIONS AND WORK RULES

1. Agreement Between the State of Ohio and SCOPE, OEA/NEA 1994-1997.

   Article 13 - Progressive Discipline

   13.01 - Standard

   Employees shall only be disciplined for just cause.

   13.03 - Pre-Suspension or Pre-Termination Conference

   When the Employer plans to initiate a suspension, fine, termination or demotion a written notice of pre-disciplinary conference shall be given to the employee who is the subject of the pending discipline and to the designated Association representative. Written notice shall include a statement of the charges against the employee, contemplated disciplinary action, and the date, time and place of the conference. The conference will be held at a reasonably convenient location determined by the Employer and shall be scheduled no earlier than three (3) days following the notification to the employee.

At work facilities having no designated site representative, employees may request through supervisor that a fellow employee accompany him/her to a scheduled pre-disciplinary conference.

The employee may request that a representative designated by the Association be present at the conference. The employee, or his/her representative, may make a written request to the Employer for continuance of up to forty-eight (48) hours. A continuance beyond forty-eight (48) hours may be arranged by mutual agreement of the parties. Such continuance shall not be unreasonably requested or denied.

Prior to the conference, the Employer may take temporary action to reassign the duties of the affected employee or place said employee on administrative leave until final disposition by the Employer. Such action may not be unreasonable in duration or result in loss of pay for the employee involved and shall not constitute discipline under this Article.

The pre-disciplinary conference shall be conducted by a designee of the Appointing Authority who was not directly associated with the incident(s) which led to contemplated disciplinary action against the employee. At the conference, the employee shall be provided with all documents used to support the possible disciplinary action which are known of and available at the time of the hearing shall be provided to the Association for examination prior to the issuance of a written decision. The Association will have ten (10) days to examine the new documentation and provide a written response to the employer. The employee may, but is not required to, respond to the allegations and/or present his/her side of the story.

The Appointing Authority shall issue a written decision within twenty-five (25) work days of the of the conclusion of the conference and transmit the written notification to the employee and the designated Association representative. "Work days" refers to Monday through Friday excluding legal holidays. Times shall be computed by excluding the first and including the last day. In the event that additional documentation has been identified and forwarded to the Association, the timeline on the written decision by the Employer may be extended by the ten (10) days during which the Association will examine and respond to the new evidence.

The twenty-five (25) work day requirement will not apply in cases where a criminal investigation may occur and the Employer decides not to make a decision on the discipline until after disposition of the criminal charges.

The employee may waive this conference by written notification. Absent extenuating circumstances, failure of the affected employee to appear at the conference will result in a waiver of that employee's right to a conference.

13.04 - Progressive Discipline

The Employer shall follow the principles of progressive discipline. Disciplinary action shall include:

1. oral reprimand (with appropriate notation in the employee's official personnel file);

2. written reprimand;

3. a fine in an amount not to exceed two (2) days pay for discipline related to attendance only; to be implemented only after approval from OCB;

4. suspension without pay;

5. demotion or discharge.

Disciplinary action shall be commensurate with the offense. The deduction of fines from an employee's wages shall not require the employee's authorization for the withholding of fines from the employee's wages.

2. Ohio Department of Rehabilitation and Correction Standards of Employee Conduct, effective, June 17, 1990.

Standards of Employee Conduct, Rule Violations and Penalties, Effective June 17, 1990; Rule 39: Other actions that could compromise or impair the ability of the employee to effectively carry out his/her duties as a public employee.

III. STATEMENT OF FACTS

The Grievant, James Bowling [hereinafter referred to as Grievant], is employed as a social studies teacher at the Southern Ohio Correctional Facility in Lucasville, Ohio. He has been employed with the state for twenty-three (23) years.

The Southern Ohio Correctional Facility (SOCF) is the maximum security prison in Ohio. It houses the most dangerous prisoners in the state system, including where death row prisoners are executed.

The condition of the Grievant when he reported to work on October 11, 1994, at approximately 7:00 a.m. is the primary dispute in this grievance. The Employer suspended the Grievant for two days for violating Rule 39 because management determined that the Grievant's ability to perform his duties were impaired. The Grievant tested .065 for alcohol. The Grievant emphatically argues that his ability was not impaired when he reported to work on October 11, 1994; nor had he been drinking.

IV. THE PARTIES' POSITIONS

A. Position of the Employer

The Employer argues that on October 11, 1994, at approximately 7:00 a.m. when the Grievant reported to work he was observed by Lieutenant Roger

McAllister to have the smell of alcohol on the Grievant's breath and clothes, and appeared to be disoriented. Lt. McAllister notified the Deputy Warden of Programs, James Hieneman who also observed that the Grievant appeared to be disoriented and speech was slurred. Mr. Hieneman notified the Deputy Warden of Special Services, J.G. Williams of the Grievant's condition. Mr. Williams was responsible for the Education Department and obtained permission from Warden Terry Collins to initiate the process of testing the Grievant for drugs and alcohol. As a result of his condition, as witnessed by management, the Grievant was asked to take a drug and alcohol test, which he volunteered to do. Management further alleged that even though it was approximately 3½ hours after he arrived at work, he tested .065 for alcohol in his system. The results of the drug test was negative. Based on this report and management's observations, the Employer determined the Grievant was "impaired" while on duty in violation of Rule 39.

The Employer also contends that the level of alcohol in the Grievant's system was nearly at the level of .1 which could have rendered him subject to arrest in Ohio. The Employer concluded that it was probably that the level of alcohol was "somewhat" higher when the Grievant reported to work.

B. Position of the Union

The Union argues that the Employer violated Section 13.01 Standard of the Agreement which limits the Employer to only take discipline against an employee when there is "just cause" and Section 13.04, Progressive Discipline.

The Union also argues that the Employer failed to meet the element of "proof", one the seven tests of "just cause". In other words, the Union contends that the Employer's investigation of the Grievant's condition did not substantiate that the Grievant violated Rule 39. The Union also contends that the Employer violated 13.03 of the Collective Bargaining Agreement as well as Appendix F - Drug Free Work Place provision.

The Union contends that the Grievant had not been drinking on October 11, 1994; nor was he impaired. The Union raised the issue that the Employer never explained to the Grievant what they meant by the term "impaired". The

Union also provided testimony of other employees who testified that they did not smell alcohol on the Grievant when they entered the facility with the Grievant on October 11, 1994.

V. DISCUSSION

The heart of the Union's argument is that the Employer failed to meet the just cause requirement in the Collective Bargaining Agreement (CBA) to discipline the Grievant. The following seven tests for just cause are well summarized in *In re Heinz, U.S.A. Division of H.J. Heinz Co., 95 LA 82, (1995)*:

1. Did the company give to the employee forewarning or foreknowledge of the possible or probable disciplinary consequences of the employee's conduct?
2. Was the company's rule or managerial order reasonably related to the orderly, effective and safe operation of the company's business?
3. Did the company, before administering discipline to an employee, make an effort to discover when the employee did in fact violate or disobey a rule or an order of management?
4. Was the company's investigation conducted fairly and objectively?
5. At the investigation did the "judge" obtain substantial evidence or proof that the employee was guilty as charged.
6. Has the company applied its rules, orders and penalties even handedly and without discrimination to all employees?
7. Was the degree of discipline administered by the company in a particular case reasonably related to (a) the seriousness of the employee's proven offense, and (b) the record of the employee in his service with the company? *Enterprise Wire, 46 LA 359 (1966).*

The Union argues that the Employer failed to establish the fifth test, the element of proof to meet the just cause standard. Basic rules of arbitration places the burden of proof on the employer to establish that the employee is guilty of or violated a particular offense. *See In re Renton School District, 102 LA 854 (1994).* To meet this test of just cause, arbitrators have held that "...the employer must show that there is credible and substantive proof that the employee committed the act for which he is being [disciplined]". *See Universal Frozen Food, 92 LA 7405 (1994)*, citing *Ideal Cement Company, 55 LA, 437 (1970).*

The Employer provided credible testimony from three management officials who had first-hand knowledge of their perceptions of the Grievant's condition when he first reported to work, and shortly thereafter.

Lt. Roger McAllister testified that when he came in contact with the Grievant on October 11, 1994, at approximately 7:00 a.m., he smelled an odor of alcohol on the Grievant and observed that the Grievant's eyes were "red and bloodshot". Lt. McAllister further testified that he reported what he had witnessed to James Hieneman, Deputy Warden of Programs. He was unable to contact Mr. Hieneman until after 8:00 a.m. because Hieneman was in a closed meeting with the Warden.

The second management witness, James Hieneman, Deputy Warden of Programs testified to his observations of the Grievant. Mr. Hieneman testified that after observing the Grievant's condition he contacted the Grievant's second level supervisor, Mr. Jerry Williams, Deputy Warden of Special Services. Mr. Hieneman testified that he informed Mr. Williams that he too, thought that the Grievant was under some type of intoxicant. Mr. Hieneman stated that he based his conclusion on 24 years of experience in public safety. Mr. Hieneman further testified that he didn't smell anything when he came in contact with the Grievant because he had sinus-problems. However, Mr. Hieneman testified that he noticed that the Grievant's "speech was a bit slurred", "he appeared to be disoriented"; and that "he was unsure where he was at".

Mr. Williams testified that on October 11, 1994, at approximately 8:30 a.m. he was informed by Mr. Hieneman of Lt. McAllister's report that the Grievant was intoxicated at work. Mr. Hieneman also stated he saw symptoms of intoxication. Mr. Williams testified that he informed the Warden of what had been reported to him by Mr. Hieneman. Mr. Williams made arrangements for the Grievant to have an alcohol and drug test. Mr. Williams explained the testing process to the Grievant. Mr. Williams testified that when he was explaining the testing process to the Grievant he also "smelled alcohol on his person". "He was seated about one foot from him".

The results of the alcohol test taken by the Grievant is more persuasive than the above testimony (Joint Exhibit 2K). The documents in this case reveals that the Grievant voluntarily consented to providing a breath sample to determine if he was under the

influence of drugs and/or alcohol. The tests were administered some three and a half (3½) hours from the time the Grievant was first observed by Lt. McAllister. The test sample for alcohol registered .065. The Grievant also testified that he was drinking the night before. This fact, in and of itself does not prove he was drinking when he reported to work the next day. However, add this fact with the other evidence supports the Employer's position that the Grievant had the smell of alcohol on his body and clothes.

Williams also testified that there is no set number that a person must score on the alcohol test to have violated Rule 39. Williams further testified that the Employer does consider 4511.19 of the Ohio Revised Code to determine if the person is legally intoxicated. If the person tests below 0.1, the Employer may still find a violation of Rule 39 when they consider all the circumstances surrounding an employee's condition. The Employer relies on the following section of 4511.19:

> If there was at the time the bodily substance was withdrawn a concentration of less than ten hundredths of one percent by weight of alcohol in the defendant's blood...Such fact may be considered with other competent evidence in determining the guilt or innocence of the defendant (Joint Exhibit 6)

Based on 4511.19 of the Ohio Revised Code, the Employer concluded that the Grievant was impaired. The Employer not only considered the test results but also the observations of three managers. The Employer's application of 4511.19 supports the element of proof for just cause. The Employer is also in compliance with the Drug-Free Workplace Policy (Joint Exhibit 1 - Appendix F), Section 3(C) which states "[l]evel of concentration must be established in ORC Section 4511.19."

The Union repeatedly raised the argument that the Grievant could not be charged with being under the influence of alcohol based on 4511.19. The Union contends without such a charge, the Grievant could not be charged with violating Rule 39. A further reading of 4511.19 also refers to a concentration of alcohol of less than ten-hundredths of one percent which permits the Employer to consider other evidence to determine whether the Grievant violated Rule 39. Clearly, the Employer considered other competent evidence before charging the Grievant with Rule 39 violation.

Lastly, the Union repeatedly questioned the definition of the term "impaired". Mr. Williams testified that the Grievant was charged with violating Rule 39 because he had alcohol intake in his body which impaired the Grievant's ability to function on the job. Impairment, therefore refers to the ability of the Grievant to perform his duties. This explanation is reasonable within the context of the literal definition of the term. It was reasonable for the Employer to conclude that the Grievant was impaired with 0.65 amount of alcohol in his system.

The Union provided testimony from Allen Hill, Correctional Officer at the Southern Ohio Correctional Facility (SOCF) who is assigned to the school area where the Grievant works. Mr. Hill testified that he talked with the Grievant just prior to 7 a.m. on October 11, 1994 and "off and on for about an hour" during that morning. Mr. Hill further testified that he did not "smell nothing" nor was the Grievant's eyes blurred. Mr. Hill has 19 years of service with the Employer and has worked in the school area for at least 5 years. He also testified that he has had training in detecting substance abuse, but not necessarily alcohol.

The Union also provided the testimony of Rancie Hanna, a co-worker of the Grievant. He has worked at SOCF, since 1982. He teaches math, serves as an acting school administrator in the absence of David Patlet. Hanna testified that on October 11, 1994, he was filling in for the school administrator and did not detect a smell of alcohol on the Grievant; however, he was not close to him.

The Union also provided testimony from Mary Lou Kennedy, a co-worker of the Grievant for 15 years. The witness testified that she saw the Grievant in the B-lobby, talked with him, but did not smell any alcohol or anything unusual. She then walked with him to the school area. The witness further testified that she did not detect any difference in his eyes or in the way the Grievant normally walked and talked. The Union also called Lillian Brister, a Teacher's Aide who also walked with Ms. Kennedy and the Grievant to the school area. The Employer stipulated that Ms. Brister's testimony would be basically the same as Ms. Kennedy, i.e., she didn't see anything unusual about the Grievant on October 11, 1994. The Union's witnesses are all credible and they all had contact with the Grievant during and after the time that the Employer determined that the Grievant's

condition was impaired. In attempting to balance the conflicting testimony of the Union's witnesses and the Employer's witnesses, I must rely on the evidence that is least likely to be biased toward either party. In this case, the results of the alcohol test is determinative. Neither party contest the results of the alcohol test.

In determining whether the proof element of just cause has been met, the Employer should present "clear and convincing evidence" that the Grievant warrant a disciplinary action. See *Kroger Co., LA 906, 908 (1955)*. Most arbitrators require the Employer to meet the burden of proof in a disciplinary action. *See In re Flushing Community Schools and International Union of Operating Engineers, Local 547, 100 LA 444 (1992)*. Based on the results of the alcohol test, the proof element of just cause was clearly met in this case.

The seventh element of the just cause analysis is more problematic, i.e., severity of the disciplinary action. Basic rules of arbitration also mandates that any discipline issued to an employee for violating the Collective Bargaining Agreement or the Employer's Work Rules should be "...reasonably related to the seriousness of the employee's proven offense [and] the record of the employee in his service with the company." In *Enterprise Wire, 46 LA 359, (1966)*. Even though the Union appeared to have focused its argument primarily on the fifth element of just cause, all seven elements of the just cause analysis must be met to comply with Section 13.01 of the CBA (Joint Exhibit 1).

The arbitrator must address the issue of whether the disciplinary action issued to the Grievant is reasonable in light of all the circumstances. If the disciplinary action is not reasonable in light of all the circumstances, the arbitrator should consider a modification of the penalty. The term circumstances includes, but not limited to, the Grievant's length of service, performance history, the seriousness of the misconduct, the depth of proof presented by the Employer, the Grievant's job responsibilities, the type of Employer organization, and any other mitigating circumstances.

The record indicates that the Grievant has 23 years of service with the Employer. There was no evidence that the Grievant has a record of disciplinary action. The Employer emphasizes the maximum security status of the facility. This fact is not taken

lightly by the arbitrator. However, the Grievant's job responsibility is not directly related to maintaining security at the prison; he is a social studies teacher. This is not to imply that the Grievant has no responsibility to comply with rules and regulations to ensure security at the Employer's facility, but he is not a correctional officer. Had the Grievant's duties entailed security, the penalty would have been clearly warranted. When you consider the above circumstances and the Grievant's employment record, the penalty was not reasonable.

The Employer's work rule provides for a wide range of penalties for violating Rule 39. The penalty can range from a reprimand to removal. It is assumed that the reason there is a range of penalties is to permit the Employer to consider the circumstances surrounding the Grievant's misconduct. This is also supported by the CBA under Section 13.04 which states that the Employer shall follow the principles of progressive discipline. The penalty of suspension is listed as the fourth progressive disciplinary action. Moreover, Section 13.04 states that "disciplinary action shall be commensurate with the offense". When you consider Section 13.04 progressive disciplinary requirements, work rule violations and penalties, and the circumstances described above, the arbitrator is compelled to conclude that the penalties was too severe in violation of the just cause standard. This conclusion by the arbitrator is not to suggest that the Employer lacks authority to give the middle or last penalty in the range of penalties available under Rule 39. The arbitrator, however, in this case, finds that the penalty was too severe based on all the circumstances.

The next issue is whether the arbitrator has the authority to modify the penalty. Section 6.05 of the Collective Bargaining Agreement states in part: "The arbitrator shall have no power to add to, subtract from, or modify any terms of this Agreement; nor shall the arbitrator impose on either party a limitation or obligation not specifically required by the express language of this Agreement".

A modification of a penalty by an arbitrator is not a modification of any terms of the agreement, but an evaluation of the reasonableness of the Employer's action and the just cause standard. Arbitrator Platt stated the principle well:

> "In disciplinary cases generally, ...most arbitrators exercise the right to change or modify a penalty if it is found to be improper or too severe, under all the circumstances of the situation. This right is deemed to be inherent in the arbitrators power to discipline and in his authority to finally settle and adjust the dispute before him." See *Elkouri and Elkouri*, HOW ARBITRATION WORKS, p.668, citing Platt, *"The Arbitration Process in the Settlement of Labor Disputes*, 31 J.Am Jud. Soc. 54, 58 (1947).

Lastly, in evaluating the reasonableness of the penalty under the Collective Bargaining Agreement, the parties expect the arbitrator to ensure fairness and justice when disciplinary actions are issued; this too is incorporated in the standards of "just cause". It is also implicit in Section 13.04 of the Collective Bargaining Agreement which states "[d]isciplinary action shall be commensurate with the offense".

VI. CONCLUSION

Based on the testimony of three management officials there was sufficient proof to warrant reasonable suspicion that the Grievant was under the influence of alcohol and/or drugs when he reported to work on October 11, 1994 at approximately 7:00 a.m. More importantly, the results of the alcohol test supported management's suspicion that the Grievant had consumed alcohol and was impaired. The Grievant was warranted a disciplinary action, however, the penalty was too severe in violation of the just cause standard.

AWARD BY THE ARBITRATOR

The grievance is granted in part and denied in part. The Grievant was not disciplined in accordance with just cause standard, as required by Article, Section 13.01 of the CBA.

The appropriate remedy is to rescind the two-day suspension, award back pay and benefits, and expunge all records of his suspension. In lieu of the suspension, the Grievant is to receive a written reprimand for violating Rule 39.

Floyd Weatherspoon 11/27/95

Floyd Weatherspoon, Arbitrator

JOINT STIPULATION EXHIBITS

1. OEA/State of Ohio Collective Bargaining Agreement

2. Discipline Trail
   a. Order of suspension dated
   b. Notice of pre-disciplinary hearing dated November 10, 1994.
   c. Notice of rescheduling of pre-disciplinary hearing dated November 16, 1994.
   d. Acknowledgement of receipt of pre-disciplinary packet dated November 10, 1994.
   e. List of management witnesses/documents dated November 10, 1994.
   f. Statement from J.G. Williams to Terry Collins dated November 8, 1994.
   g. Reasonable suspicion observation worksheet dated October 11, 1994.
   h. Supervisors confrontation notice dated October 11, 1994.
   i. Employee consent form dated October 11, 1994.
   j. BAC Evidence Ticket dated October 11, 1994.
   k. BAC Test Report Form dated October 11, 1994.
   l. Pharchem Laboratories lab report dated October 17, 1994.
   m. Pharchem Laboratories chain of custody report dated October 11, 1994.
3. Grievance Trail
   a. Grievance form dated
   b. Step 3 response dated
   c. Request for arbitration dated
4. Standards of Employee Conduct
   a. Standards revised 1990 in effect at time of alleged offense; Rule #39.
   b. Acknowledgment of receipt of standards signed June 1, 1990.
5. Memorandum of Understanding concerning EAP dated December 30, 1994.
6. Ohio Revised Code Section 4511.19.