

IN THE MATTER OF THE  
ARBITRATION BETWEEN

Ohio Education  
Association, State Council  
of Professional Educators,

(OEA/NEA/SCOPE)

Union

and

Lebanon Correctional Institution,  
Ohio Department of Rehabilitation  
and Correction

Employer

**For The Employer:** Patrick Mayer

**For The Union:** Henry L. Stevens

Grievance No.: 27-11-941103-0273-06-10

Hearing Date: September 19, 1995

Award Date: December 6, 1995

Arbitrator: Floyd Weatherspoon

**I. THE ISSUE**

Was the Grievant issued a one-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

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 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 29: Possession, misuse, conveyance on state property, or display of weapons, batons, restraints, mace, or other contraband without authorization or failure to report knowledge of same.

### **III. STATEMENT OF FACTS**

The following facts in this grievance were stipulated by the parties.

The Grievant, Surjeet Bilkhu [hereinafter referred to as Grievant] is employed at the Lebanon Correctional Institution in Lebanon, Ohio. She has been employed with the State of Ohio for approximately twenty-one (21) years. The Grievant has been an exemplary employee.

The Lebanon Correctional Institution is a maximum security prison in Ohio. It houses some of the most dangerous prisoners in the state correctional system.

On July 20, 1994, the Grievant brought her personal vehicle in to Employer's garage at the Lebanon facility to be washed and waxed. This task is performed by inmates assigned to the Warren Correctional Institution Camp, a minimum security

facility. The inmates from the camp perform a number of other duties while working at the Lebanon Correctional Institution, e.g., mechanical work on state vehicles, litter pick-up, and washing employees' cars.

On this occasion when the Grievant brought her vehicle in the garage to be washed, an inmate discovered a sword in the Grievant's vehicle. There is no dispute that the sword was the personal property of the Grievant.

The inmate reported what he discovered to a correctional officer. The sword was located on the back seat of the vehicle and unsecured. As a result of the sword being in the vehicle on the Employer's property, the Grievant was suspended for one (1) day for violating Rule 29.

#### **IV. THE PARTIES' POSITIONS**

##### **A. Position of the Employer**

The Employer argues that there was just cause for discipline and that the one (1) day suspension was warranted for violating Work Rule 29. The Employer stated that the Grievant was well aware of the Employer's Standards of Employee Conduct policy and was aware that any type of weapon was prohibited on the Institution's property, unless approved by the Employer.

The Employer further argues that the lack of knowledge on the part of the Grievant that the sword was in her vehicle is unacceptable. The Employer stated that the Grievant had the responsibility to ensure that her persons, possessions, and vehicles were contraband-free when she entered the institution's property and failure to do so puts the employee at risk, whether the action was accidental or intentional.

The Employer states that the range of penalties for violating Work Rule 29 is a 5-10 day suspension up to removal for the first offense. Based on the Grievant's exemplary work record, seniority, and lack of any other past disciplinary actions, she was only given a one (1) day suspension. The Employer also took in consideration that the Grievant unintentionally violated Rule 29; therefore, she received a lesser penalty for violating the rule.

Lastly, the Employer stated that the fact that the sword was possibly a religious tool does not change the fact that a sword is considered a weapon.

## **B. Position of the Union**

The Union did not dispute the facts surrounding the grievance; instead, the Union contends that a number of provisions within the Collective Bargaining Agreement were violated when the Grievant was suspended.

First, the Union argues that the parties "are to be governed by the Agreement signed by the parties; they are not to be governed by the Code of Conduct" (Joint Exhibit 4).

Secondly, the Union argues that the Employer violated Section 13.01 of the Collective Bargaining Agreement which only permits the Employer to discipline an employee for just cause. According to the Union, the Employer failed to meet the standards for just cause when the Grievant was disciplined.

Thirdly, the Union argues that the Employer violated Section 13.04 of the Collective Bargaining Agreement by not following the progressive disciplinary procedures.

Lastly, the Union argues that the Employer violated 13.03 of the Collective Bargaining Agreement by not presenting all documents used to support the discipline at the pre-disciplinary conference. The Union specifically referred to Joint Exhibit (5) which are pictures of posted notices at the Lebanon Correctional Institution of Section 2921.36 of The Ohio Revised Code (prohibitive conduct while at the facility).

## **V. DISCUSSION**

This is a grievance where the parties have stipulated that the Grievant violated Work Rule 29; thus, the element of proof under the just cause standard has been established. Because the parties stipulated to the above facts, no testimony was received from employees who had firsthand knowledge of the Grievant's conduct which lead to a violation of Work Rule 29.

During the hearing, the Union also stipulated that the notice requirement for just cause was established by Joint Exhibit 5; therefore, the issue of notice will not be discussed. This stipulation also resolves the issue raised by the Union that the Employer did not present Joint Exhibit (5) in accordance with Section 13.03 of the Collective Bargaining Agreement.

The arbitrator is left primarily with the following questions: whether the Employer failed to meet the seventh test of just cause, i.e., degree of discipline; whether the one (1)

day of disciplinary action violated Section 13.04--progressive discipline provision; and whether the penalty issued under the Standards of Employee Conduct violates Sections 13.01 and 13.04 of the Collective Bargaining Agreement. All three of these questions encompass the ultimate issue accepted by the parties of whether the one (1) day suspension was for just cause.

With regard to the first question, the seventh test for just cause raises the following question:

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 employer in his service with the company; see *In re Heinz, U.S.A. Division of H.J. Heinz*, 95 LA 82, (1995), citing from *Enterprise Wire*, 46 LA 359 (1966).

When evaluating the seventh test of just cause, 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.

Ron Hart, Labor Relations Officer testified that Work Rule 29 permits the Employer to issue a 5-10 day suspension up to removal for the first violation of this rule.

In determining the level of discipline to issue the Grievant, Hart further testified that based on the Grievant's tenure and institutional record, he supported a one (1) day suspension. He felt a one (1) day suspension would be corrective and not punitive.

Mr. Hart's testimony of what factors the Employer considered before issuing the Grievant a suspension is in compliance with what the seventh test of just cause requires. The Employer considered the disciplinary action in light of all of the circumstances and the Grievant's institutional record. The Arbitrator cannot direct the Employer to do more; nor second guess the Employer's decision when it is reasonable in light of all the circumstances.

The second question raised by the Union of whether Section 13.04 of the progressive discipline procedure, as cited earlier requires the Employer to follow a progressive line of discipline, beginning with an oral reprimand. The Union contends that based on the Grievant's exemplary record, she should have received an oral reprimand, not a suspension, which is the fourth step in the progressive disciplinary procedure. The Union is correct that Section 13.04 requires progressive discipline. However, the parties also incorporated the following statement in Section 13.04:

"Disciplinary actions shall be commensurate with the offense."

This provision permits the Employer to issue a disciplinary action which is more severe than an oral reprimand if the offense committed by an employee warrants a more severe penalty. In this grievance, the Employer argues that a first violation of Rule 29 warrants at least a five day suspension; not an oral warning. However, based on the Grievant's service, the Employer reduced the penalty to a one (1) day suspension. This reduction to a one (1) day suspension appears to be fair and equitable under the circumstances. More importantly, the disciplinary action is commensurate with the offense. The Arbitrator lacks the authority, without determining that the disciplinary action is not commensurate with the offense, to grant an award favorable to the Grievant.

In closing arguments, the Union stated that "it was probably not the proper thing [for the Grievant] to do, but it is hard to hold a person in violation of something they are not aware of." An employee is responsible for ensuring that their vehicle is free from any contraband or instrumentality that could violate the Employer's rules of conduct when entering the facility. If an employee fails to comply with such rules they can be held in violation of the rule, even if it was negligence or an accident on their part. The issue of whether their conduct was negligent or accidental goes to the issue of penalty, not whether a violation occurred. In this grievance, the Employer indicated they did consider the Grievant's statement that the sword was accidentally left in the van. The Employer indicated they took this factor into consideration when they reduced the penalty below what was listed as the penalty for a first offense under Rule 29.

The arbitrator cannot now second guess the Employer's decision when the Employer has already considered the same factors that the parties would expect the arbitrator to consider when determining whether Article 13 has been violated. This is especially true with their evaluation of the circumstances in this grievance which appears to be reasonable. In reality the Union is asking the arbitrator to direct the Employer to be lenient. The arbitrator cannot issue an award requiring the Employer to reduce the penalty based on leniency.

The Union also argues that the Employer's Standards of Employee Conduct (SEC) (Joint Exhibit 4A) is in conflict with the Collective Bargaining Agreement (CBA) (Joint Exhibit 1). Specifically, the Union points to the penalties for violating Rule 29 under the Employer's Standards of Employee Conduct, which requires a first offense penalty of at least five days; whereas the Collective Bargaining Agreement, Section 1304, requires an oral reprimand as the first penalty in the progressive disciplinary procedure. The Union contends that the Collective Bargaining Agreement is what the parties agreed to, therefore, the Collective Bargaining Agreement supersedes the Employer's Standards of Employee Conduct policy. In support of their position, the Union also cites Sections D, p. 10 of the SEC which states:

This document does not take the place of, or otherwise alter the provision contained in Ohio Administrative Code, Section 5120-9-45, entitled, "Employee Grievance Procedure" or in the negotiated Collective Bargaining Agreement."

Clearly, the Employer has the right to establish work rules, as agreed by the parties in Section 14 of the CBA. However, as the Union argues, the CBA and its provisions take precedent over any rules and policies unilaterally issued by the Employer which are in conflict with the CBA. The SEC and the CBA mandates that work rules not conflict with provisions of the CBA. The application of Rule 29 in this grievance does not conflict with the CBA. The penalty issued to the Grievant under Rule 29 is reasonable and "commensurate" with the offense, thus is not in conflict with the CBA. It should be emphasized that when determining whether there is a conflict between a work rule and the CBA, the arbitrator should base the decision upon the facts and circumstances in each

individual grievance. The facts in this case supports that the Employer's actions were reasonable and not in conflict with the CBA. A reduced penalty from a five day to a one (1) day suspension, supports that the Employer considered all the facts and circumstances in this grievance.

In this grievance, a suspension of one (1) day for violating Rule 29 does not violate Article 14 of the CBA. The Employer's position is supported by Article 14 - Work Rules, Section 14.01 which states in part:

Work rules shall be all those written policies, regulations, procedures, and directives which regulate conduct of employees in the performance of the Employer's services and programs.

Work rules shall not conflict with any provision of the Agreement.

Here again, technically, the Union is correct. However, further analysis of the documents supports the Employer's contentions that the documents are not in conflict and can be jointly applied to the facts in this grievance. As stated earlier, the one (1) day suspension is commensurate with the offense.

## **CONCLUSION**

The Employer met the just cause standard for issuing a one (1) day disciplinary action; there is no conflict between the CBA and application of Rule 29 to the facts in this grievance, and Section 13.04 was not violated.

## **AWARD**

Grievance is denied.

A handwritten signature in black ink, reading "Floyd Weatherspoon" followed by the date "12/6/95".

FLOYD WEATHERSPOON, Arbitrator



## JOINT STIPULATION EXHIBITS

1. OEA/State of Ohio Collective Bargaining Agreement
2. Discipline Trail
  - a. Order of suspension dated July 28, 1995.
  - b. Hearing Officer's report dated July 27, 1995.
  - c. Notice of pre-disciplinary hearing dated July 27, 1995.
  - d. Management witnesses/documents list dated July 20, 1994.
  - e. Investigatory interview dated July 20, 1994.
  - f. Incident report from Lt. Wynn Hayes dated July 20, 1994.
  - g. Incident report from Officer Chris Ertel dated July 20, 1994.
  - h. Two (2) photos of the weapon found in grievant's van.
3. Grievance Trail
  - a. Grievance form dated
  - b. Copy of Step 3 dated
  - c. Request for arbitration dated
4. Standards of Employee Conduct
  - a. Standards dated 1990 in effect at time of alleged offense; Rule #29.
5. Pictures
  - a. Lebanon Correctional Photos
  - b. Lebanon Correctional Photos ORC 2921.36 ORC
  - c. Lebanon Correctional Photos ORC 2921.36 and Drug Search
  - d. Lebanon Correctional Photos "Notice to All Persons" sign