#1173

In The Matter of the Arbitration Between

OHIO DEPARTMENT OF REHABILITATION & CORRECTION, SOUTHEASTERN CORRECTIONAL INSTITUTION,	:	**OPINION AND AWARD OF ARBITRATOR GIBSON**
Employer,	:	
and	:	Case No. 27-24 (2/6/95) 0241-02-11
DISTRICT 1199 HEALTH CARE AND SOCIAL SERVICE UNION, SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO	:	
Union.	:	

Appearances:

For the Employer:

David J. Burris, Department of Rehabilitation and Correction, Labor Relations, Central Office
David Crabtree, Labor Relations Officer, Southeastern Correctional Institution
Brian Walton, Labor Relations Specialist, Office of Collective Bargaining

For the Union:

Harry W. Proctor, Administrative Organizer, District 1199 - SEIU, AFL-CIO

OPINION

A. Introduction

Pursuant to ¶7.07 of Article 7 of the 1994-1997 labor contract, Rankin M. Gibson was selected from a panel of arbitrators to hear and determine Grievance No. 27-24 (2/6/95) 241-02-11 protesting the fifteen day disciplinary layoff of T.L.S., RN No. 65511 for alleged violations of Standards of Employee Conduct on three separate occasions. Having exhausted the grievance procedure, the grievance was referred to arbitration for a final and binding decision. The parties agree to share equally the arbitrator's fees and expenses.

A hearing was held at the offices of the Southeastern Correctional Institution (SCI),

in Lancaster, Ohio on October 15,1996, before the undersigned arbitrator, between the hours of 9:00 a.m. and 4:30 a.m. Ample opportunity was afforded both parties to offer proofs and make argument. Both parties waived the filing of post-hearing briefs.

B. Background Facts

This proceeding involves disciplinary actions taken by the Department of Rehabilitation and Corrections against T.L.S., a registered nurse, employed in the SCI Infirmary. The Department operates 29 correctional institutions located throughout the State of Ohio housing more than 40,000 felons. The Department employs more than 13,000 employees in a multitude of classifications. Southeastern Correctional Institution (SCI) is a medium security facility, housing 1824 inmates, approximately 70% are black and approximately 30% are white, and employing more than 400 employees. The mission of the Department is to ensure that the persons who are incarcerated are kept in a safe, secure and humane environment while serving their sentences. While incarcerated the Department makes available to inmates many programs designed to further their education, deal with drug dependencies, render health care, etc.

The Department provides medical care for treatment of inmates which does not differ in quality from that available to the public generally. However, the fact that persons being treated are incarcerated presents differentiations in how and when they receive treatment. Even routine treatment often requires an inmate to follow several procedural steps before he is treated. Taking into account security precautions, emergency treatment is basically the same that is available to the public at large.

The SCI Infirmary has a Medical Director, and it operates under the supervision of a Health Care Administrator, with a staff of 6 Registered Nurses, including T.L.S., and 3 Licensed Practical Nurses. The Infirmary sees approximately 70 to 100 inmates daily. It offers continuous care for diabetics, epileptics and the usual emergency room activities.

The grievant, T.L.S., classified as a Nurse 1, attended nursing school and has worked nearly 7 years as a Registered Nurse. He was hired in February 1990. He works the second shift in the Infirmary.

As a result of three incidents occurring in 1994 and 1995 where T.L.S. allegedly violated specific standards of conduct, the Warden of OCI submitted the results of investigations to the central office with recommendation for removal of T.L.S. The central office did not concur and suggested suspension.

A description of the three incidents for which disciplinary layoffs were imposed will be discussed separately under Analysis.

The parties stipulated that the issues for determination are (1) whether the grievant's five and ten day suspensions were for just cause, and (2) If not, what shall the

remedy be?

C Analysis

At common law, the owners of a private business enterprise and their managers have rights that were and are in substantial measure based upon their ownership of property. Numerous limitations by law, and sometimes by contract, control the exercise of such rights. The rights and powers of public employers are based upon the consent of the governed, as delegated by their elected representatives to Congress, the General Assembly, the City Council, the Board of Education, etc.

The General Assembly of Ohio in enacting the Public Employees Collective Bargaining Law in 1983 set forth extensive "management rights" of a public employer in R.C. §4117.08. In accordance with this delegation of authority, the parties in ¶8.01, Article 8 of the collective bargaining agreement entitled "Discharge", agree as follows:

> "Disciplinary action may be imposed upon an employee only for just cause."

In industrial jurisprudence the phrase "just cause" has no fixed meaning. The most an arbitrator can do is to determine what a reasonable person, mindful of the habits and customs of industrial life and the standards of justice and fair dealings prevalent in the community ought to have done under similar circumstances. See Arbitrator Platt in *Riley Stoker Corp., 7 LA 764*; Arbitrator McGoldrick in *Worthington Corporation, 24 LA 1*; Arbitrator Harris in *RCA Communications, Inc., 29 LA 567.*

Work rules, adopted by the Employer or negotiated with the Union, help give meaning to "just cause" by setting forth standards of conduct and a schedule of sanctions applicable if a rule is broken. By ¶8.02 of Article 8, the parties are contractually committed to the principles of progressive discipline. At ¶8.03 it is agreed that prior to the imposition of a suspension of more than three (3) days or removal, an employee shall be afforded an opportunity to be confronted with the charges against him/her and to offer his/her side of the story.

It should not be overlooked that by Article 5 entitled "Management Rights", the Employer reserves "all of the inherent rights and authority to manage and operate its facilities and programs" .... including specifically "the determination and promulgation of the standards of quality and work performance to be maintained .... " Management also agrees not to "discriminate against any employee in the exercise of these rights or for the purpose of invalidating any contractual provision."

On May 31, 1990, T.L.S. received and signed for a copy of the Revised Standards of Employee Conduct of the Department of Rehabilitation which became effective June 17, 1990, with the understanding that he would read the same. The Standards of

Employee Conduct promulgated by the Employer set forth forty-six rules, some consisting of one or more subdivisions, which set forth a schedule of penalties ranging from oral - written reprimand to removal or termination. The individual rules with which grievant is charged will be discussed in connection with the discussion of the incidents giving rise to the grievant's suspension.

The grievant was suspended for 5 days on a charge that on November 7, 1994 he violated Rule 8, which provides.

> 8. Failure to follow post orders, administrative regulations and/or written policies or procedures

Violation of the Rule calls for sanctions ranging from oral reprimand/three day suspension for first offense to removal for the fourth offense.

The Employer charges grievant with violating Rule 8 on the basis of an incident occurring in the infirmary on the second shift on November 7, 1994 concerning his handling of inmate Gray who reported to the Infirmary with stabbing chest pains. The grievant's notes entered on Interdisciplinary Progress Notes for Inmate Gray for November 7, 1994, read as follows:

> "7:35^{p} - c/o chest pain $\overline{c}$ deepbreath - a stabbing like pain - BP 126/56 - P 60 reg rate and rhythm - lung sound good - noted in all quadrants - smoker (PK/day) - skin w/b - nail beds blanch well - excution of chest wall equal - tracheal deviation none noted - states leaves in 10 days - family loss recent - gave analgesic balm and ASA Π - encouraged to return if further problem - encouraged to avoid salt - caffeine and fatty goods - exercise and reduce stress - T.L.S.

The grievant left work at 8:00 p.m.

At 8:10 p.m. Nurse Poole entered the following notes on the Interdisciplinary Progress Notes for inmate Gray:

> Dr. Gulaff notified of incidents - Pass to see Dr. in a.m. to be given to inmate. Dorm officer notified of need to have inmate see Dr. in a.m. Officer reported when inmate returned to the dorm was unsteady and light headed. Informed Dr. Gulaff of inmate being unsteady and light headed. New orders obtained. Admit and vital - q 4 hrs. C.O. informed that inmate is to be admitted for obsv. / J. Poole RN

In March of 1990, R. Dean, R.N., the Infirmary Health Care Administrator issued a procedure (IPC-102) for handling inmates with chest pain, reading in pertinent part:

II. PURPOSE

To define the procedure for inmates with chest pain.

III. PROCEDURE

A. For unexplained chest pain, call the Medical Director and proceed as directed.

B. An ECG may be done if deemed necessary.

C. Lay inmate in infirmary until seen by the Doctor if not an emergency.

The administrator testified that a policy and procedure manual is maintained in the Infirmary office. T.L.S. testified that he first saw the IPC-102 after his predisciplinary conference. Nurse Poole, nurse supervisor, testified that she does not know whether a copy of IPC-102 was given to nurses. T.L.S. also testified that inmates frequently complain of chest pains in order to talk to someone. He testified that Inmate Gray was 17 or 18 years old. From speaking with the inmate he found Gray was anxious about his release in 10 days, concerned about the thrashing by the other inmates, the fact that recently his grandmother had died. Based upon his observation and the vital signs he concluded that inmate Gray was not in need of medical care. Thus, he gave analgesic balm and ASA II and sent Gray back to his dorm but encouraged him to return if further problems arose. The grievant left work at 8:00 p.m.

The grievant did not call Dr. Gulaff the Medical Director. An ECG was not done. Whether an ECG machine was available is in question. Inmate Gray was not admitted to the infirmary by the grievant until seen by the doctor.

When Nurse Poole reported for work at 8:10 p.m. she notified the Medical Director, who ordered the inmate admitted, to have vital signs taken every four hours, and that he would see the inmate the next day. The inmate was thereafter admitted to the Infirmary.

According to the testimony of the Health Care Administrator, the principal purpose of calling the medical director is to spread the responsibility in case the inmate thereafter sues for improper medical care.

The arbitrator is aware that so called "defensive medicine" is a common practice. However, the problem here is absence of proof that the policy and procedure of IPC-102

was called to the attention of the grievant. When new policies and procedures are adopted, these actions necessitate that the policies and procedures be called to the attention of employees required to comply therewith. An employee cannot be expected to comply with a policy with which he is not aware. The arbitrator finds that the five day suspension of the grievant in this incident is not justified.

The grievant was suspended for ten working days in August of 1995 for violations which allegedly occurred on May 23, 1995 and July 10, 1995, of Standards of Employee Conduct Rule 9 and Rule 30. Rule 9 reads:

> "9. Failure to carry out a work assignment or the exercise of poor judgment in carrying out an assignment.

The penalties for breach of this Rule range from written reprimand/removal for first offense to removal for the fourth offense.

Rule 30 provides:

> "30. Loss of control of any instrument that could result in a breach of security and/or jeopardize the safety of others, e.g., to include, but not limited to class "A" tools, keys, communication devices, etc."

The penalties for violation of this Rule range from written reprimand/removal for first offense to removal for the fourth offense.

On May 23, the grievant created an infirmary chart, writing "that Inmate Kennon was admitted to the Infirmary at 7:15 p.m. Later that evening at 9:15 p.m. the grievant charted with respect to Inmate Kennon "eyes closed - respiration noted - resting quietly". At 10:00 p.m. Nurse Romine, who had relieved the grievant, in making infirmary rounds discovered that she had one more chart than she had inmates. After checking she found that she had a chart for Inmate Kennon containing two entries by the grievant but Inmate Kennon was in his dormitory.

The grievant testified that when Inmate Kennon presented to the Infirmary, he called the Medical Director at 7:15 p.m. and received a telephone order to administer a shot of compazine IM and clear liquids. Inmate Kennon then went back to the dormitory for his belongings. The grievant testified that he told Nurse Huddy, LPN, to give the shot of compazine and stated that it was her responsibility to admit Inmate Kennon to the infirmary when he returned from his dormitory. He testified his entry on the chart that Kennon was resting quietly with eyes closed and respiration noted was based on a report of Nurse Huddy. In fact Kennon was not admitted to the Infirmary until 11:15 p.m. that evening. The grievant testified that he reported to Nurse Romine when she relieved him

on what had happened on the second shift.

The Health Care Administrator testified it is not an accepted practice to make a notation in the nurses notes unless the source of the information is noted. The grievant during the Employer's investigation of the incident, conceded that "he may have made a mistake".

The arbitrator believes and finds that when a nurse records an entry on a patient's record, the exercise good judgment requires that he record his own observations and if the observation of another are to be noted, then a nurse should clearly identify the observation as that of another. This the grievant did not do. His failure to accurately report on the patient's record demonstrates his lack of concern and poor judgment in carrying out his responsibilities as an RN. It further deprives the attending physician who later reviews the patient's record of the opportunity to weigh the source of the notation.

The grievant is charged with violating Rule 30, for the loss of control of any instrument that could result in a breach of security and/or jeopardize the safety of others for an incident that occurred on July 10, 1995. The incident as described by the grievant on July 10, 1995 reads:

> "Mistake - No one was hurt -
> "While doing med line I remembered I left a syringe in H-1Z c the diabetic. I immediately went down to get it. CO Gundy said he would not give it to me. Said Capt. Ratliffe told him to write it. Capt. Ratliffe said when I asked him it was the first he heard of it. CO Addington said, after I left, he overhead on phone Gundy tell Poole RN 'we got him now' he left a needle' - I called back and asked Gundy "why he wanted to ruin my career'."

CO. Van Gundy described the incident in two reports written to Warden H.S. Mitchell, at 4:05 p.m. and another written at 6:40 p.m. on July 10, as follows:

> "Ma'am on the above date and time I officer Van Gundy was making my rounds in DC area when inmate Caldwell 298 083 called me to DC cell 22 and gave me a needle and a syringe that Nurse ***[T.L.S.] had give to Caldwell to take his diabetic shot with. Nurse ***[T.L.S.] was in H1 at 359 and out at 4:04 p.m. Nurse ***[T.L.S.] did come to H1 to get the Syringe at 6:05."
>
> * * *
>
> "Ma'am on the above date and time I officer Van Gundy got a telephone call from Nurse ***[T.L.S.]. When officer R. Blosser gave me the telephone, Nurse ***[T.L.S.] said 'why do you get pleasure

> out of screw up other peoples career'. At this time I told him that I was writing this up and hung the telephone up."

The Health Care Administrator testified, without dispute, that a syringe and needle is a class "A tool", an escape tool, which requires that a syringe and needle not be left with an inmate. He explained that inmates have access to toilet bowl cleaners, etc. and that a syringe and needle can also be used by an inmate to stab. Further, a needle could be used to infect another with Aids or Hepatitis.

The grievant testified that when he reached the Infirmary, he discovered that he had not gotten the syringe and needle back, but he had a med line to be seen, that about an hour and one-half later, he returned to H1 but that CO Van Gundy would not release the syringe and needle until after he wrote an incident report. And that when he got back to the infirmary he learned that Officer Van Gundy told Nurse Poole, "We've got him now. he left a needle." The grievant also testified after the incident, procedures for getting rid of needles were promulgated. In his opinion he did not think the inmate who gave the syringe to Van Gundy contemplated injuring himself or anyone else.

The Employer contends that SCI is not a "boy scout camp", and that a syringe and needle, even though small, in the hands of an inmate, for even a short period of time, poses a security threat to other inmates and SCI staff.

With respect to all charges against him, the grievant contends that these disciplinary actions were in fact taken by the Employer because of his letter of September 1, 1994 to the Governor of Ohio criticizing the quality of health care at SCI. A copy of the grievant's letter to the Governor was not adduced in evidence. However, a letter to the grievant from Gregory Trout, Chief Counsel to the Department was introduced. This letter reads in pertinent part:

> "Michael Watson, Chief Counsel to the Governor, has forwarded to me a copy of your letter of September 1, 1994, regarding your concerns about the quality of health care at SCI. I have spoken with Warden Betty Mitchell, and she is aware of your concerns. Of course, it goes without saying that we are all committed to providing the best quality health care possible. It is important that you keep you supervisor, and supervisor's supervisor, informed of your concerns, since they are in a position to address your concerns directly."

Evidence was also adduced respecting charges and countercharges, against and by, the grievant concerning racial discrimination at SCI. Further, it is stipulated that the grievant was suspended for five days in 1992 for violations of Rules 24, 26 and 40.

In light of the evidence, the arbitrator finds that the grievant's conduct in preparing the patient's record, which did not in fact report the grievant's observations of the patient nor identify that which LPN Huddy reported, and the grievant's admitted failure to promptly retake the insulin syringe and needle from an inmate confined in unit H1 warrants the imposition of a ten day suspension without pay.

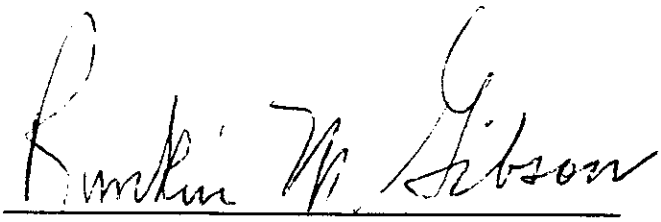
AWARD

Having found that the five day suspension imposed on December 22, 1994, was not justified and that the ten (10) day suspension imposed on August 14, 1995 was justified, it is the arbitrator's award -

(1) That the grievant be forthwith paid all benefits, including five days of back pay and expungement of his record with respect to the November 7, 1994 incident; and

(2) That the grievance with respect to the ten (10) day suspension on August 14, 1995 be denied; and

(3) That the fees and expenses of the arbitrator be borne equally by the Employer and the Union.



RANKIN M. GIBSON, ARBITRATOR

DECIDED AND ISSUED AT Columbus, Franklin County, Ohio this 18th day of November, 1996.

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