#1177

VOLUNTARY LABOR ARBITRATION TRIBUNAL

In the Matter of Arbitration	*	
Between	*	
	*	OPINION AND AWARD
OHIO CIVIL SERVICE	*	
EMPLOYEES ASSOCIATION	*	Anna DuVal Smith, Arbitrator
LOCAL 11, AFSCME, AFL/CIO	*	
	*	Case No. 35-03-950526-056-01-03
and	*	December 19, 1996
	*	
OHIO DEPARTMENT OF	*	William VanLeer, Grievant
YOUTH SERVICES	*	Removal

Appearances

For the Ohio Civil Service Employees Association:

Lynn Kemp, Advocate
Michael Hill, Second Chair

For the Ohio Department of Youth Services:

Barry Braverman, Ohio Department of Youth Services; Advocate
Brian Walton, Office of Collective Bargaining; Second Chair

Hearing

A hearing on this matter was held at 9:15 a.m. on November 18, 1996 at the Ohio Office of Collective Bargaining in Columbus, Ohio before Anna DuVal Smith, Arbitrator, who was mutually selected by the parties, pursuant to the procedures of their collective bargaining agreement. The parties stipulated the matter is properly before the Arbitrator and presented one issue on the merits, which is set forth below. They were given a full opportunity to present written evidence and documentation, to examine and cross-examine witnesses, who were sworn and excluded, and to argue their respective positions. No transcript was made. Testifying for the State were Brad Rahr (Labor Relations Officer), Robert Jackson (formerly Superintendent, Cuyahoga Hills Boys School), and Trooper Daniel Ferguson. Also present was Cardell Parker, Superintendent of Cuyahoga Hills Boys School. Testifying for the Union were Dorothy Brown (Chapter Representative), William E. VanLeer (Grievant), and the Grievant's brother, David VanLeer. A number of documents were entered into evidence: Joint Exhibits 1-5, Management Exhibits 1-6, and Union Exhibits 1-6. The hearing was concluded at 2:00 p.m. on November 18 following oral arguments, whereupon the record was closed. At the close of the hearing, the State moved for a bench decision, to which the Union objected. The Arbitrator sustained the Union's objection. This opinion and award is based solely on the record as described herein.

Stipulated Issue

Was the Grievant terminated for just cause? If not, what shall the remedy be?

Statement of the Case

At the time of his removal on May 25, 1995, for misuse of drugs and violation of 123.34 [sic] O.R.C. (Joint Ex. 2), the Grievant was employed as a Juvenile Correctional Officer (JCO) at the Cuyahoga Hills Boys School, a State facility for the incarceration and correction of felony youth offenders. He had been similarly employed since March 14, 1990, was informed on the work rules of the Department, received good evaluations (Union Ex. 1-3), and had no prior discipline on his record.

The events leading to the Grievant's removal are these: On January 17, 1995, while the Grievant was working the 7:00 a.m. to 3:00 p.m. shift, the State Highway Patrol conducted a drug sweep of the institution. During the sweep of the parking lot, the dogs alerted on two vehicles, one of which was the Grievant's. The Grievant responded to a P.A. request for the owners to come to the parking lot, but was reluctant to open his car for the troopers, saying his brother had used the car the previous evening and he did not want "a mess." The Grievant's brother testified that he did, indeed, use the car the previous day and had unwittingly left items in it he had confiscated from youth that day. The troopers finally obtained the Grievant's consent to search his car where they found and confiscated a number of pertinent items, notably a brown eyeglass case containing drug paraphernalia: a pot pipe, a yellow lighter, a package of cigarette papers and three small plastic bags. A field test of the vegetable matter conducted by Tpr. Ferguson indicated marijuana. Tpr. Ferguson also testified that a roach was found in the vehicle's ash tray. At this point, accounts differ. Tpr. Ferguson claims the Grievant voluntarily changed his story and admitted the marijuana was his when confronted with the evidence. The Grievant denies

the drug was his or that he ever said it was. The parties stipulated a drug test conducted that day on the Grievant was negative. They further stipulated that testing of the seized vegetable matter by the State Highway Patrol laboratory showed a weight of 1.275 grams of marijuana. The investigation proceeded with the collection of witness statements. The evidence was submitted to the Cuyahoga County Grand Jury, which, on February 22, 1995, returned a True Bill against the Grievant on Conveying Drugs, Drug Possession and Drug Paraphernalia (Joint Ex. 3), whereupon the Grievant was placed on administrative leave (Union Ex. 4). He was found guilty of Conveyance (a third-degree felony) on November 17, sentence suspended (Management Ex. 5 admitted over Union objection). Meanwhile, the Employer's case against him progressed, with a pre-disciplinary meeting held on April 21 and removal following on May 26 (Joint Ex. 2 & 3). Robert Jackson, superintendent of Cuyahoga Hills Boys School at the time, testified to the adverse effect on staff discipline and on the youth of one of their role models being returned to work after a drug-related offense. He further testified that the Grievant's criminal conviction played no role in the recommendation to remove the Grievant.

The Union brought evidence through the testimony of Dorothy Brown, Chapter president and chief steward at the time, about the Department's treatment of other employees whose vehicles were found to contain drugs while on Department property. Gerald Strother, a Teacher I who admitted using and tested positive, entered into a last chance agreement pursuant to the terms of OEA's contract with the State (Union Ex. 5, Management Ex. 6). Brad Rahr, a labor relations officer for the Department, testified the only reason the State agreed to this is that it had no choice under that contract. In a

second case, Brenda James, a unit administrator, was demoted from deputy superintendent of another institution and reassigned after marijuana was found in her car and she claimed not to know how it got there. Rahr testified she had four years more seniority than the Grievant and was not convicted or even indicted and, being unclassified, serves at the pleasure of the Director.

A grievance protesting this action was filed May 26, 1995, alleging violation of Article 24 (Discipline) of the Collective Bargaining Agreement. Being unresolved at lower steps of the grievance procedure, the case was appealed to arbitration where it presently resides for final and binding decision, free of procedural defect.

Arguments of the Parties

Argument of the State

The State argues that the facts are not in dispute. Drugs were found in the Grievant's personal vehicle on State property. This is clearly a violation of Rule 21, misuse of drugs, for which removal is appropriate. The story told by the Grievant and his brother is nothing more than self-serving testimony designed to save his job. By contrast, nothing discredited the testimony of Jackson and Ferguson, and the criminal conviction supports the State's decision to remove him.

The State offers a number of arbitration decisions which it claims support its position on various points. In the parties' *Luther L. Jones* case (#35-07-910739-34-01-03), Arbitrator Hyman Cohen weighed the grievant's guilty plea to second degree felony possession in Texas and found a nexus between juvenile correctional officers' off-duty conduct and the mission of the Department. In an Ohio Department of Mental Health case (*Stephen Jones*,

Case No. 23-14-880104-001-01-04), Arbitrator Pincus sustained the removal of an employee involved in the direct care of the mentally ill who pled guilty to a third-degree felony of aggravated trafficking. Nexus between off-duty drug trafficking and the job of a corrections officer was also found in the Department of Rehabilitation and Corrections *Heiss* case, in which the arbitrator upheld the removal despite dismissal of criminal charges. In this, as in other cases, drug violations were found to render corrections officers incapable of being role models for those entrusted to their care. The State draws particular attention to a second DRC case (*Barber/Cooper-Cullison*, Case Nos. 27-10-901023-67-01-03 and 27-10-901023-66-01-03) which it says bears a very strong resemblance to the instant one: drug paraphernalia were found in the grievants' cars during a drug sweep of the institution, the grievants claimed not to be responsible, and the employer's discipline grid called for 5-10 day suspension to removal for a first offense. Even though criminal charges were dismissed, the Arbitrator found the grievants guilty of conveyance, nexus to employment in that they had a clear opportunity to bring the contraband into the prison, and sustained the removals, one of which was of an employee with more seniority than the Grievant here.

In response to the Union's argument about disparate treatment, the State argues that this is an affirmative defense. It directs the Arbitrator to another Department of Mental Health case (*Jennings*, Case No. G23-06-891113-01-21-01-03) in which Arbitrator Rivera set forth the elements the Union must prove. The State contends, the only commonality between the instant case and those the Union alleges as being similarly situated is the triggering event. It further contends that a single instance of different treatment is

insufficient to establish disparate treatment. What is needed is a pattern, and the arbitrator must only determine if any variance is within the "range of reasonableness."

Finally, the State counters the Union's argument about the small amount of drugs involved by citing *Dunlop Tire v. U.R.W.*, 104 LA 653 (Teple, 1995) wherein that employer, too, had a rule that did not specify a minimum amount of the substance, and possession of 2 grams of marijuana was sufficient to sustain the discharge.

In conclusion, the State says a court found the Grievant guilty of criminal conduct. Using the lesser standard of just cause, the Employer did, too, and so should the Arbitrator. It asks that the grievance be denied in its entirety.

Argument of the Union

While admitting that marijuana and paraphernalia were found in the Grievant's vehicle while in the institution's parking lot, the Union claims other facts support its position that the removal was not for just cause. The Grievant, a 5-year employee with a good record, had no way of knowing the items were in his car. Testimony establishes that his brother inadvertently left them there after confiscating them from youth he had run into the day before.

The Union argues that the Grievant did not violate all of Rule 21. He did not report to work under the influence of drugs nor did he use illegal drugs or nonprescribed controlled substances while on duty. Even though drugs were in his car in the parking lot, he was unaware of them and did not bring them into the building. The discipline policy leaves a window of opportunity for a first offense which should apply in this case.

The Union also contends that the removal is defective in its reliance on Rule 46, which other arbitrators have held to constitute a procedural defect (*Ohio Department of Youth Services v. OCSEA Local 11/AFSCME and Wylie King*, Case No. G87-2810 (Pincus, January 7, 1990)).

The Union argues that it has shown different treatment of similarly situated Department employees. Although Strother's positive test invoked the Drug Free Workplace Act, this does not lessen the standard under Rule 21. Strother had three bags of marijuana in his car while the Grievant had a very small amount; but the Grievant, who tested negative, was terminated while Strother stayed in the employ of the Department. James's circumstances were very similar to the Grievant's, but her employment, too, was continued. In the view of the Union, a higher standard, not a lesser one, should apply for management and teachers because they serve as role models not just for youth, but also for their subordinate employees.

In the view of the Union, the Grievant's felony conviction has no bearing on this case and should not be considered by the Arbitrator. Citing *Elkouri & Elkouri* (p. 675-676), the Union says Management should be allowed to rely only on charges levied at the time of removal. The Grievant was not removed for a felony conviction and the Department has not shown any policy that prevents a person with a felony conviction from being employed by them.

The Union contends the Department has not met the criteria for nexus or disparate impact as set forth by Arbitrator Pincus in *Ohio Department of Mental Retardation & Developmental Disabilities v. OCSEA Local 11 and Fontelle Burley*, Case No. G87-1930, June

6, 1988. It has not proved damage to the reputation of the employer, inability of the Grievant to perform his job satisfactory, or refusal of other employees to work with him. In fact, it allowed him to continue to work for some time after the drug sweep.

In conclusion, the Union asks the Arbitrator to consider the lesser discipline in this case, reinstate the Grievant to his former position with full back pay and benefits including seniority, restoration of leave balances and overtime opportunities, and that he made whole.

Opinion of the Arbitrator

In determining the Grievant's guilt or innocense, it is first necessary to determined the charges and relevant evidence. At issue is the matter of the collateral criminal proceeding. Implied in much of the State's case is that such a criminal conviction renders the Grievant incapable of performing his duties which include serving as a role model. If that were the case, it was incumbent on the Employer to include the felony conviction among the charges when it originally considered the discipline. I observe the Employer has the contractually-provided option of delaying pre-discipline until after disposition of criminal charges (§24.04), presumably to allow it to consider the outcome in its discipline decision. It did not do that in this case, and so must rely only on the charges brought at the time of the discipline which do not include the felony conviction.

The State also urges me to defer to the finding of the criminal court that the Grievant was guilty of conveyance. Although I agree that the just-cause standard prescribed by the Contract is lower than the criminal standard, the parties did not bargain for peer factfinding based on community standards. They bargained for the industrial expertise of an arbitrator, and it is therefore incumbent on me to make an independent determination

based on the Contract, charges and relevant evidence presented at the arbitration hearing. While I might receive and credit evidence from collateral proceedings for certain purposes, such as impeachment, it would be inappropriate for me to decide the case on the record presented in another forum. I therefore turn to the record before me.

There is no question the Grievant's car contained a small amount of marijuana and drug paraphernalia while it was parked on institutional grounds. The Grievant broke a legitimate rule of the workplace. Several factors must, however, be taken into account in deciding an appropriate consequence of this violation. To begin with, there is some question in my mind whether he knew or ought to have known about what was in his car. It is unlikely the items belonged to the Grievant himself, for his drug test was negative and no one but Tpr. Ferguson heard the alleged admission. Jackson, who was present at the time, did not mention it in his testimony, and both the Parker and Frias statements refer to things the Grievant said about his brother, not to a self-confession. Before the car was even searched, the Grievant said his brother had borrowed it the previous day. The brother's account of the day, while confirming he used the car, does not accord with the time the Grievant reported to work, thus raising some questions about his testimony. In addition, I am unable to account for the roach allegedly found in the ash tray. Thus, while I cannot say how the contraband came into the car, I am confident the car was not under the control of the Grievant and I am not convinced he knew the drugs were in it. Although the Grievant is guilty of violating Rule 21, the offense is not aggravated either by knowledge or by use.

The State argues there is a nexus to the job primarily because JCOs serve as role models, but then it continues the employment of a manager under exactly the same circumstances. It says the cases are distinguisable in part by the felony conviction of the Grievant, but that conviction was not known at the time the Grievant was removed. For the role model argument to have any credibility or power to affect employee behavior, managers must be held to the same or higher standards than their subordinates.

The cases offered by the State to support its termination decision are distinguishable from the instant case in a number of different ways. L. Jones, an employee of very brief tenure, was a drug abuser who continued to use even after a second-degree felony conviction. S. Jones pled guilty to a third-degree felony drug trafficking charge. Heiss, too, was guilty of off-duty drug trafficking, and in *Barber/Cooper-Cullison*, the arbitrator found knowledge of the grievants, who also refused to submit to drug testing.

Finally, I am struck by the injustice and irony of firing a person of good record who might have saved is job, though not his reputation, by smoking a joint on his way to work. The Employer's own rules provide for flexibility in discipline for this offense. Not to exercise that discretion in a case like this, where the employee is of good record, shows no sign of using, abusing or trafficking in drugs on or off-duty, whose knowledge of the small amount found in his car cannot be clearly demonstrated, is beyond the range of reasonableness and makes a mockery of the discipline grid, particularly when a manager is held to a lower standard.

Award

The grievance is sustained in part, denied in part. The Grievant was removed without just cause, but is guilty of Rule 21, Misuse of Drugs, an offense for which he will receive a 15 day suspension without pay. The Grievant is to be restored to his former position forthwith with full back pay less 15 days, benefits and seniority, less normal deductions and any earnings from employment he may have had in the interim. The Grievant will supply such evidence of earnings as the Employer may require. The request for overtime is denied as too speculative. The Arbitrator retains jurisdiction for thirty (30) days to resolve any disputes that may arise in the implementation of this award.

Anna DuVal Smith

Anna DuVal Smith, Ph.D.
Arbitrator

Cuyahoga County, Ohio
December 19, 1996