

**IN THE MATTER OF ARBITRATION**

**BETWEEN**

**STATE OF OHIO, DEPARTMENT OF )  
REHABILITATION & CORRECTION )**

**CASE NO. 27-11-960508-0446-01-03**

**AND )**

**OPINION AND AWARD**

**OHIO CIVIL SERVICE EMPLOYEES )  
ASSOCIATION, AFSCME LOCAL 11 )**

**KEVIN COBB GRIEVANCE**

**JAMES M. MANCINI, ARBITRATOR**

**APPEARANCES:**

**FOR THE STATE**

**John McNally  
Michael P. Duco  
Ron Hart**

**FOR THE UNION**

**Robert Jones  
Robert L. Goheen  
Kevin Cobb**

## **SUBMISSION**

This matter concerns a grievance filed on May 5, 1996 by Kevin Cobb. The Grievant alleged that he had been improperly discharged 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 (hereinafter referred to as the Union). The arbitration hearing was held on March 12, 1997 in Lebanon, Ohio. The parties presented closing arguments at the hearing and waived their right to submit post-hearing briefs.

## **BACKGROUND**

The Grievant, Kevin Cobb, has been employed by the Department of Rehabilitation and Correction since 1984. The Grievant was employed as a correction officer at the Lebanon Correctional Institution. The Grievant's duties as a correction officer included supervision of inmates in the recreation program at the prison which is a medium security facility.

The events which led to the Grievant's discharge began on the evening of March 8, 1996. At approximately 10:50 p.m., Patrolman Pete Lagemann of the Fairfield Police Department stopped a vehicle being driven by Mr. Cobb for a taillight violation.

The grievant identified himself and said that he was driving home from work. He indicated that he was employed by the Lebanon Correctional Institution. A computer check run by Patrolman Lagemann showed that Mr. Cobb's drivers license was under suspension from a DUI. Because the record indicated that Mr. Cobb had work privileges, Patrolman Lagemann contacted the Lebanon Correctional Institution which told him that the Grievant had not been at work that day. Mr. Cobb later admitted to Patrolman Lagemann that he was not driving home from work. Mr. Cobb was arrested and charged for driving under suspension and for a taillight violation. The Grievant's vehicle was also impounded by police. The Grievant was fined over this incident in the amount of approximately \$345. There was no indication that Mr. Cobb had been drinking that evening.

On the evening of March 9, 1996, Mr. Cobb began to drink excessively. He ended up at a bar located in the Holiday Inn in Sharonville, Ohio. At the Holiday Inn, Mr. Cobb approached a pizza delivery man named Brian Schroeder. Mr. Cobb stated that he was a U.S. Marshall and showed Mr. Schroeder his Lebanon Correctional Institution badge. Mr. Cobb indicated that he was transporting inmates and needed money for gas and food. He not only requested money but also asked Mr. Schroeder for a ride to the Lebanon Correctional Institution. Mr. Schroeder stated that he had to leave to make another pizza delivery. However when he returned, Mr. Cobb again asked for money and a ride to Lebanon. Mr. Schroeder gave Mr. Cobb twenty dollars. Mr. Cobb gave him his telephone number and indicated that he would pay him back.

A short time later, the Sharonville Police Department received a call from a Mr. Timothy Settles who stated that his 1993 Chevrolet C-3 van had been stolen from the parking lot of the Holiday Inn. When the police responded, they attempted to determine the whereabouts of Mr. Cobb who had been seen at the Holiday Inn that night. On March 12<sup>th</sup>, the Springdale Police Department was notified by an anonymous phone call that the stolen van was located at a nearby truck stop in Monroe, Ohio. Mr. Cobb later admitted that he placed this telephone call to the police. The police found the van in the truck stop parking lot.

On March 12, 1996, Mr. Cobb came into the Sharonville Police Department and admitted stealing the van from the Holiday Inn parking lot. The Grievant stated that it was wrong for him to take the van and that he was drunk at the time. The Grievant subsequently gave a videotaped confession wherein he again acknowledged that he had driven off with someone else's van. The Grievant was charged with the Unauthorized Use of a Motor Vehicle and released.

Mr. Robert Wisecup, the Recreational Director at the Lebanon Correctional Institution and the Grievant's supervisor, stated that after the Grievant failed to show up for work on March 12<sup>th</sup>, he decided to look into the matter. He was advised that the Grievant had called indicating that he was in some kind of trouble with law enforcement. Mr. Wisecup conducted an Internal Affairs Investigation and discovered that the Grievant had been arrested for driving with a suspended license on March 8, 1996. He also found out that the Grievant had stolen a van from the Holiday Inn and was charged with

Unauthorized Use of a Motor Vehicle. During an interview on March 25, 1996, the Grievant acknowledged to Mr. Wisecup that the two incidents had occurred but that they related to his alcohol dependency problem. The Grievant denied that he ever identified himself as a U.S. Marshall to the pizza deliver man. Mr. Wisecup concluded his Internal Affairs Incident Report by stating that Officer Cobb's actions have "displayed poor and unlawful conduct." Mr. Wisecup further indicated that inmates had learned about the incidents involving the Grievant and had joked about it. According to Mr. Wisecup, it would now be difficult for the Grievant to supervise inmates in the Recreation Program.

The Grievant acknowledged that the two incidents occurred but blamed them on his drinking problem. He denied that he ever claimed to be a U.S. Marshall. He also indicated that he showed the police officer on the evening of March 8<sup>th</sup> his Lebanon Correctional Institution identification because his drivers license had been suspended at the time and his badge was the only identification which he had on him. The Grievant stated that immediately following the incidents he sought assistance for his alcohol abuse problem by enrolling in the State's Employee Assistance Program. He was subsequently referred to the Jewish Hospital of Cincinnati where he was admitted to the Adult Chemical Dependency Program on March 20, 1996. The Grievant stated that he has now overcome his alcohol abuse problem after eight weeks of intensive treatment at the hospital. The Grievant acknowledged that he had contacted EAP on several previous occasions seeking assistance for his alcohol abuse problem. The Grievant admitted that in 1990 a similar off-

duty alcohol incident occurred and he was reinstated on a conditional last chance basis with the understanding that he seek assistance through EAP.

The Grievant was terminated effective April 29, 1996. Warden Harry Russell testified that the Grievant's discharge was based upon his serious off-duty misconduct as well as his prior disciplinary record. He stated that on the evening of March 8<sup>th</sup>, the Grievant improperly used his place of employment as justification for driving while under suspension. Similarly on March 9<sup>th</sup>, the Grievant used his position at the Institution to obtain money from a pizza delivery person. Later he stole a van from a Holiday Inn parking lot. He stated that the Grievant's off-duty misconduct brought discredit to the Lebanon Correctional Institution. He also stated that the Grievant's behavior compromised his ability to supervise inmates. The Warden further indicated that he took the Grievant's prior disciplinary record into consideration. That record showed that the Grievant had received approximately twelve reprimands and suspensions over the last two years which mainly related to an attendance problem. The Warden was well aware of the fact that the Grievant had previously participated in EAP for his alcohol abuse problem. However, the Warden decided to terminate the Grievant in April, 1996 because he had been given the opportunity in the past to overcome his substance abuse problem. It was noted that in 1990, the Grievant had been reinstated on a conditional last chance basis but had failed to successfully complete rehabilitation for his alcohol abuse problem through EAP. The Warden concluded that the Grievant's off-duty misconduct here constituted a violation of Rules 1, 18, 39, and 41 of the Standards of Employee Conduct.

## **POSITIONS OF THE PARTIES**

### **POSITION OF THE EMPLOYER**

The Employer contends that it had just cause to discharge the Grievant from his position as correction officer at the Lebanon Correctional Institution. The Employer submits that the evidence clearly shows that the Grievant engaged in serious off-duty misconduct which violated certain Standards of Employee Conduct Rules. In addition, the Grievant had a prior record which included several reprimands and suspensions.

The Employer maintains that the evidence clearly shows that the Grievant engaged in serious off-duty misconduct on March 8 and 9, 1996. During both of the incidents, the Grievant improperly used his correction officer's identification for personal gain. The facts clearly show that the Grievant showed his badge to both the patrolmen who stopped his vehicle on March 8<sup>th</sup> as well as to the pizza delivery person in order to obtain money from him. The Grievant's behavior of lying to law enforcement officials and attempting to use his badge for personal gain has eroded the bond of trust which must exist between employer and employee.

The Employer argues that it is clear that a reasonable nexus has been established between the Grievant's off-duty misconduct and his employment with the state. The evidence showed that the Grievant's behavior has harmed the reputation of his employer and brought discredit to the Lebanon Correctional Institution. Moreover, it

was demonstrated that such misconduct impaired Mr. Cobb's ability to work with other employees and supervise inmates. The Grievant's actions violated various departmental work rules. The Grievant violated Rule 18 by misusing his official position for personal gain. He also violated Rule 39 by engaging in actions that could compromise or impair his ability to carry-out his duties. Finally, he violated Rule 41 by committing an act which has brought discredit to his Employer.

The Employer disputes the Union's contention that the Grievant should be given a second chance because he has now sought treatment for his alcohol abuse problem. The evidence showed that the Grievant has been given numerous chances in the past to seek treatment for alcoholism. However, it is apparent that the Grievant's past participation in the EAP program has not worked. Moreover in 1990, the Grievant entered into a last chance agreement which allowed him to attend a rehabilitation program through EAP rather than being terminated from employment. Thus considering the Grievant's long history of participation in several rehabilitation programs, it is apparent that he should not be given a second chance as claimed by the Union. Under the circumstances presented, the discharge penalty imposed should be upheld.



## **POSITION OF THE UNION**

The Union contends that the Employer failed to prove that the Grievant's discharge was for just cause. The Employer had the burden of proving that there was a reasonable nexus between the Grievant's off-duty misconduct and his employment as correction officer. In this case, the Employer failed to clearly demonstrate that the Grievant's off-duty misconduct had an effect on the Employer's reputation. The two incidents involved were not publicized in any way. It was also not clearly shown that the Grievant misused his official position for personal gain. The Grievant used identification on the evening of March 8<sup>th</sup> when he was stopped by police because he had no other personal identification with him at the time. On the following night, the Grievant only showed his ID with the intent to pay the pizza delivery person back later. Finally, the Employer failed to show that the Grievant's off-duty misconduct would impair his ability to effectively carry-out his duties as correction officer. There was no showing made that other employees would have a problem in working with the Grievant.

The Union further argues that the Grievant's discharge should be set aside because the Grievant has successfully completed an alcohol rehabilitation program. The evidence clearly showed that the Grievant made efforts to correct his alcohol problem following the two incidents which occurred in this case. Article 24.02 of the agreement specifically provides that progressive discipline is to be followed by the Employer. Given the fact that the Grievant has successfully completed an alcohol rehabilitation course, it is apparent that

he should be given a chance to respond to corrective discipline. The Grievant's termination for his off-duty misconduct under these circumstances was unwarranted.

Moreover under the parties' agreement, consideration for modifying a contemplated disciplinary action is to be undertaken by management if an employee elects to participate in an EAP program. The Grievant here did elect EAP immediately following the incidents and was admitted to a dependency program on March 20, 1996 which was before the completion of the Internal Affairs investigation. However, the department failed to give Mr. Cobb the consideration called for under its own Standards of Employee Conduct for an employee participating in a substance abuse program. Thus it was clearly wrong for the Employer to summarily terminate the Grievant without taking into consideration this mitigating factor.

The Union also submits that the Grievant's prior participation in the EAP program should not be used against him because during the preceding six years the Grievant was in general denial that he had an alcohol abuse problem. As the evidence clearly shows, the Grievant has now recognized his problem and has successfully completed an alcohol rehabilitation program. Moreover, the prior last chance agreement referred to by the Employer should not be considered because it was to be expunged from the Grievant's record under the terms of the agreement. Thus under the circumstances presented, the Union requests that the Grievant be reinstated without loss of pay or benefits.

## ISSUE

Was the removal of Kevin Cobb for just cause, if not, what shall the remedy be?

## OPINION

The parties stipulated that the sole issue before this arbitrator is whether the Grievant was discharged for just cause. The Employer had the burden of establishing by clear and convincing evidence that the Grievant engaged in the alleged misconduct. Moreover because the misconduct occurred away from the workplace, the Employer also had the burden of showing that there was a reasonable nexus between the misconduct and the Grievant's employment as a correction officer.

Upon careful review of the record, this arbitrator has concluded that a reasonable nexus was established between the Grievant's off-duty misconduct and his job as correction officer. First, it was clearly shown that the Grievant's misconduct has brought discredit to the Lebanon Correctional Institution and harmed the reputation of the Employer. The evidence shows that during both of the incidents which occurred here, the Grievant used his employment as a correction officer for his own personal benefit. On the evening of March 8, 1996, the Grievant attempted to justify his driving while his license was under suspension by claiming that he was merely returning from work at the Lebanon Correctional Institution. The next evening, the Grievant used his identification badge in

order to attempt to obtain money as well as a ride from a pizza delivery employee. Based on his use of the identification badge, the Grievant did in fact receive a total of twenty dollars from that individual. There is no question here that the evidence shows the Grievant misused his official position for his own personal gain. Moreover, the evidence shows that word of the Grievant's off-duty misconduct became common knowledge at the Lebanon Correctional Institution. Mr. Wisecup testified credibly that both the Grievant's coworkers as well as inmates often discussed and joked about Mr. Cobb's off-duty incidents. Considering the Grievant's misuse of his identification badge as well as the evidence indicating that his misconduct had become common knowledge in the community, this arbitrator must find that Mr. Cobb's off-duty misconduct did harm the Employer's reputation in the community.

Moreover, the evidence establishes that the Grievant's off-duty misconduct has impaired his ability to effectively carry-out his duties as correction officer. As stated in the Standards of Employee Conduct, correction officers are expected to conduct themselves in such a manner that their off-duty activities will not adversely affect their ability to perform their duties for the department. The correction officer serves as a role model for inmates. It is evident in this case that the kind of off-duty misconduct engaged in by the Grievant obviously affected his ability to serve as a role model for the inmates he supervises. This is shown by the fact that the Grievant was charged with an Unauthorized Use of a Motor Vehicle for the theft of a van on the evening of March 9, 1996. In addition, the Grievant was cited by the Fairfield Police Department for Driving Under Suspension and for a

taillight violation and fined approximately \$345 for the March 8<sup>th</sup> incident. Again as attested to by the Grievant's supervisor, Mr. Wisecup, the inmates were well aware of the Grievant's off-duty misconduct. Both Warden Russell as well as Mr. Wisecup stated that the Grievant's off-duty misconduct has made it more difficult for him to supervise inmates. This arbitrator would agree with that assessment because it is clear here that the Grievant can no longer serve as a role model for inmates and as a result his ability to effectively carry-out his duties as correction officer has been seriously impaired.

Thus this arbitrator has concluded that a reasonable nexus was established between the Grievant's off-duty misconduct and his job. The evidence clearly shows that the Grievant's misuse of his position as correction officer has harmed the reputation of the Employer in the community. The Grievant's behavior has also seriously affected his ability to carry-out his duties as a correction officer in supervising inmates at the Lebanon Correctional Institution. Clearly, the Grievant's off-duty misconduct was inappropriate here and violated various departmental rules which prohibit certain kinds of off-duty behavior on the part of the employees. In particular, the Grievant's misconduct violated Rule 39 by impairing his ability to carry-out his duties as a correction officer and Rule 41 by bringing discredit to the Employer. The Grievant also violated Rule 18 by misusing his official position for personal gain. These rule violations allow for removal on the first offense. Without question, the serious off-duty misconduct engaged in by the Grievant in this case certainly warranted severe disciplinary action.

Having determined that the misconduct warranted severe discipline, the next question which must be resolved is whether there were any mitigating factors which call for the lessening of the discharge penalty imposed. The Union contends that the discharge penalty was unreasonable under the circumstances presented. Basically, the Union argues that the Grievant should be given a second chance because he enrolled in an EAP program and completed a rehabilitation program for his alcohol abuse problem.

However, this arbitrator does not find in the instant case that it was mitigating that the Grievant voluntarily sought treatment for his alcohol abuse problem. This arbitrator like others accepts the proposition that substance abuse is a diagnosable and treatable disease which should be treated as such. It is generally held that in a case such as this involving alcohol abuse, the employee has the burden of proving that he is taking firm and meaningful action to confront the problem and overcome it. What must be determined here is whether it can be said with a reasonable degree of certainty that the Grievant has now been rehabilitated through treatment to the point where substance abuse is unlikely to reoccur.

The evidence does show in the instant case that on March 20, 1996, the Grievant voluntarily admitted himself to the Jewish Hospital of Cincinnati for substance abuse treatment. There is also an indication that the Grievant's recovery from alcohol addiction has gone well during the past year. However, this arbitrator finds that the Grievant's participation in a rehabilitation program cannot be used as a mitigating factor in the instant case for several reasons. First, the evidence shows that the Grievant has on several prior

occasions failed to overcome his alcohol abuse problem through participation in an EAP program. In August, 1994 and again in July, 1995, the Grievant sought assistance from the Ohio Employee Assistance Program for dealing with his alcohol abuse problem. There was also evidence that in 1990, the Grievant was reinstated on a last chance basis and told that he had to complete rehabilitation through EAP for his substance abuse. It is apparent from the record and the incidents which occurred in March, 1996 that the Grievant failed to overcome his alcohol abuse problem through prior participation in EAP rehabilitation programs. The Grievant acknowledged that he still suffered from alcohol dependency when the final incidents occurred. Thus it is apparent that this is not a case where an employee recognizes for the very first time that he has a substance abuse problem and attempts to seek assistance through the EAP program. Rather, the Grievant was given several prior opportunities to tackle his alcohol addiction but failed to do so. Because of the Grievant's past failures at being rehabilitated through EAP, it cannot be said here with a reasonable degree of certainty that the Grievant has now made sufficient recovery from his alcohol dependency to the extent necessary to assure the Employer that his substance abuse is unlikely to reoccur.

Moreover, this arbitrator finds that the seriousness of the Grievant's off-duty misconduct in this case removes any consideration of mitigation of the discharge penalty imposed. The evidence showed that on the evenings of March 8 and 9, 1996, the Grievant lied to law enforcement officials and attempted to use his correction officer identification badge for his own personal gain. Significantly, this was not the first time that the Grievant

misused his position as correction officer for his own benefit. As attested to by Patrolman Lagemann, the Grievant was charged with unlawful restraint in 1990 after he posed as a law enforcement officer and attempted to arrest a female patron in front of a local bar. Such misuse of his correction officer position certainly represents the kind of conduct which should not have to be tolerated by the Employer here. The Standards of Employee Conduct specifically provide that at no time should employees "use the power of their position for their own personal advantages." Under the circumstances, this arbitrator does not believe that the Employer should have to continue the employment of an individual who based upon his past actions cannot be trusted to carry the badge of a correction officer.

The Grievant's prior disciplinary record also does not support the Union's request that the discharge penalty be mitigated in this case. The evidence shows that during the past two years there have been twelve disciplinary actions taken against the Grievant. This included verbal and written reprimands as well as several suspensions. The record shows that most of the infractions were for the Grievant's excessive absenteeism. Undoubtedly, many of the absences were the result of the Grievant's alcohol abuse problem. However once again, it must be reiterated that the Grievant was given ample opportunity by management to seek assistance for his substance abuse problem through EAP. Because the Grievant failed to complete rehabilitation when given the opportunity, he continued to be absent without proper authorization on many occasions during the past two years. Thus,



the Grievant's prior disciplinary record supports the Employer's decision in this case to terminate the Grievant.

Therefore, this arbitrator finds that there are no mitigating factors present which would call for the lessening of the discharge penalty imposed. The Grievant was not entitled to "another chance" as the Union suggests because he had previously been given ample opportunities by Management to overcome his alcohol dependency through EAP but failed to do so. Moreover, it was clearly shown that there was a reasonable nexus between the Grievant's misconduct and his job as correction officer. As attested to by the Warden as well as the Grievant's supervisor, his off-duty misconduct has impaired his ability to effectively carry-out his duties in supervising inmates. It is apparent that someone like the Grievant who commits serious offenses such as stealing a van cannot possibly serve as a role model for convicted felons. The evidence also demonstrated that the Grievant engaged in serious off-duty misconduct by attempting to misuse his official position as a correction officer for his own personal gain. Considering the Grievant's serious off-duty misconduct including the misuse of his identification badge, it must be held that such behavior has effectively made Mr. Cobb unfit to hold the position of correction officer.

In conclusion, this arbitrator has determined that the Employer had just cause to terminate the Grievant. The Employer demonstrated that the Grievant's misconduct fell outside the range of acceptable behavior. His misconduct violated various departmental rules which allow for the removal on the first offense. There were no mitigating factors

present in the instant case. Therefore considering the seriousness of the Grievant's off-duty misconduct, this arbitrator finds that the Grievant's termination was justified.

**AWARD**

The grievance is denied.

APRIL 10, 1997

  
JAMES M. MANCINI, ARBITRATOR