#1229

ARBITRATION DECISION

October 27, 1997

In the Matter of :

State of Ohio, Department of Rehabilitation and Correction, Oakwood Correctional Facility	)	Case No. 27-28-961118-0109-01-03 Louis Blackwell, Grievant
and	)	
Ohio Civil Service Employees Association, AFSCME Local 11	)	

APPEARANCES

For the State:

John McNally, Advocate, Office of Collective Bargaining
Wendy Clark, Second Chair, Office of Collective Bargaining
Rich Mawhorr, Labor Relations Officer, Oakwood Correctional Facility
James Downing, Psychiatric Attendant
Kay McGue, Psychiatric Nurse
Barbara Brown, Warden
Sherrie Rodney-Kahle, Inspector-Investigator
Mary Hampton, Psychiatric Nurse
Kathleen Recker, Psychiatric Nurse

For the Union:

Michael Hill, Advocate
Mark E. Linder, Second Chair
Louis M. Blackwell, Grievant
Patrick J. Wilson, Chief Steward

Arbitrator:

Nels E. Nelson

BACKGROUND

The grievant, Louis Blackwell, was hired in 1984. He worked as a psychiatric attendant at the Northwest Psychiatric Hospital Forensic Unit at Oakwood which was a mental hospital for inmates in the Ohio prison system. In February 1994 the Department of Rehabilitation and Correction took over security control for the unit which then became known as Oakwood Correctional Facility. The psychiatric attendants remained employees of the Department of Mental Health until June 9, 1996 when they became employees of the Department of Rehabilitation and Correction.

On October 26, 1995 the grievant was removed from his position. The record indicates that he was removed for "being unalert while on duty and .. [being] at the step of discipline that calls for termination of employment." However, on June 7, 1996 a last chance agreement was executed which allowed the grievant to return to work on June 9, 1996. It specifies that the grievant would be discharged for any violation of the rules of the Department of Rehabilitation and Correction, Oakwood Correctional Facility and that the discharge would "not be grievable or arbitrable except to the extent that the Employer (DRC) must prove that the Employee did commit a violation of the work rules or policies." The last chance agreement states that "the Arbitrator has no authority to modify the imposed discipline, he/she only has the ability to decide if the policy, directive or work rule was violated."

On November 8, 1996 the grievant was removed for the alleged violation of two of the Department of Rehabilitation and Correction's rules. First, the state contends that the grievant violated Rule #26 when he failed to report his arrest on June 5, 1996 for making a false alarm in violation of Section 2917.32(A)(3) of the Ohio Revised Code. Second, it asserts that on June 25, 1996 the grievant breached Rule #28 when he carelessly allowed an inmate to gain access to an electric razor which the inmate, who is a self-mutilator, used to injure himself.

A grievance was filed on November 12, 1996. It charges that the grievant was removed without just cause in violation of Article 24 of the collective bargaining agreement. The grievance requests that the grievant be reinstated and be made whole.

When the grievance was not resolved, it was appealed to arbitration. The hearing was held on August 28, 1997. Post-hearing briefs were received on September 19, 1997.

ISSUE

The issue as agreed to by the parties is as follows:

> Was the termination of Louis Blackwell for just cause? If not, what shall the remedy be?

RELEVANT CONTRACT PROVISIONS

Article 24 - Discipline

> 24.01 - Standard
> Disciplinary action shall not be imposed upon an employee except for just cause. The Employer has the burden of proof to establish just cause for any disciplinary action.

STATE POSITION

The state argues that there was just cause to remove the grievant. It charges that the grievant's failure to notify Oakwood Correctional Facility regarding a pending criminal charge was a violation of Rule #26 of the Department of Rehabilitation and Correction's Standards of Employee Conduct. The state claims that Sherrie Rodney-Kahle, an inspector-investigator, learned from the Lima Police Department on July 11, 1996 that the grievant had been charged on June 5, 1996 with filing a false police report in April 1992. It contends that the grievant had from his return to work on June 9, 1996 until he went to the Corrections Training Academy on July 8, 1996 to report his arrest but stresses that he remained silent.

The state charges that the grievant also violated Rule #28 which prohibits the "loss of control of any instrument that could result in a breach of security or jeopardize the safety of others." It points out that during the second shift on June 25, 1996 the grievant went to the nurses' station to get an electric razor so Inmate X could shave. The state claims that after X shaved, the grievant took him back to his cell where he placed him in waist/wrist restraints and then "4-wayed" him to the bed for the night. It asserts that when the grievant exited X's cell, he carelessly left the electric razor on the sink in the cell.

The state reports that the grievant's loss of control of the electric razor resulted in injuries to X. It claims that after the grievant left, X slipped out of his restraints, got the razor, and slipped back into his restraints. The state observes that shortly after the third shift began, X again slipped out of his restraints, smashed the electric razor on the floor, and threatened to cut himself with one of the blades from the razor. It reports that before Kay McGue, a psychiatric nurse, and other staff were able to persuade X to slide the razor under the cell door, he cut himself on the forehead, forearm, and abdomen resulting in his need for treatment at a local hospital.

The state maintains that its contention that the grievant left the electric razor on the sink in X's cell is supported by the statement and testimony of James Downing, a psychiatric attendant. It points out that he indicated that the day after the incident, X told him that he was sorry if he caused the staff any trouble when he cut himself. The state notes that when Downing asked X how he got the razor, he said that the grievant put it on the sink while he was putting the restraints on him and forgot to take it when he left.

The state argues that the grievant was responsible for knowing and adhering to the Standards of Employee Conduct. It cites the decision of Arbitrator David Pincus in State of Ohio, Ohio Department of Mental Health, Northwest Psychiatric Hospital Forensic Unit at Oakwood and Ohio Civil Service Employees Association, Local 11, AFSCME, AFL-CIO; Case No. 23-05-95-07-01-09; Niki Musto, grievant. The state notes that Arbitrator Pincus rejected the union's arguments regarding notice and training:

> The Grievant was provided with proper foreknowledge of the work rule in question, and the possible consequences associated with wrongdoing. Proper notice concerning the Department of Rehabilitation and Correction Standards of Conduct ... was provided directly to the Grievant. She received the document on February 28, 1994 as evidenced by the signature page. Her uncertainty regarding the import of this document, and its impact on Department of Mental Health employees, seems far fetched and incredulous. The document clearly indicates, "I understand that these Standards are effective June 17, 1990." (Page 11).

The state contends that the grievant was given due notice of the Standards of Employee Conduct. It points out that on February 8, 1994 and March 2, 1994 the grievant acknowledged receiving the Standards of Employee Conduct effective June 17, 1990 and that on June 28, 1996 he acknowledged receipt of the Standards of Employee Conduct effective February 18, 1996. The state admits that the numbers of the rules that the grievant is alleged to have violated changed from the 1990 standards to the 1996 standards but claims that both sets of standards include the rules that the grievant is accused of violating.

The state maintains that the grievant's discharge is required by the last chance agreement he signed on June 7, 1996. It points out that the agreement states that the grievant will be discharged for any violation of the Department of Rehabilitation and Correction's rules, directives, and policies during the 24 months beginning on June 7, 1996. The state asserts that since the grievant's failure to report his arrest and his loss of control of the electric razor constitute violations of the Standards of Employee Conduct, his removal is proper and for just cause.

UNION POSITION

The union argues that the grievant did not violate Rule #26 of the Standards of Employee Conduct of the Department of Rehabilitation and Correction. It states that during the entire investigation the state relied on the 1990 Standards of Employee Conduct which were issued to the grievant twice during 1994 but it observes that no

criminal charges were brought against the grievant until May 16, 1996 and he did not learn of the charges until June 5, 1996. The union also indicates that the grievant was not an employee of the Department of Rehabilitation and Correction on either date but was a suspended employee of the Department of Mental Health.

The union acknowledges that in State of Ohio, Ohio Department of Mental Health, Northwest Psychiatric Hospital Forensic Unit at Oakwood and Ohio Civil Service Employees Association, Local 11, AFSCME, AFL-CIO; Case No. 23-05-95-07-01-09; Niki Musto, grievant, Arbitrator David Pincus upheld the removal of a Department of Mental Health employee at Oakwood Correctional Facility under the Department of Rehabilitation and Correction Standards of Employee Conduct. It asserts, however, that the instant case can be distinguished from that case. The union indicates that in the case before Arbitrator Pincus the state always claimed that employees were covered by both Department of Mental Health and Department of Rehabilitation and Correction rules while here the Memorandum of Understanding between the union and the Department of Mental Health and Department of Rehabilitation and Correction states that the Department of Rehabilitation and Correction jurisdiction over employees did not begin until June 9, 1996. The union also reports that although the employee in the earlier case was removed for violating a Department of Rehabilitation and Correction rule, there was a "mirror" rule in the Oakwood Forensic Code of Ethics but there is no "mirror" rule in the instant case.

The union complains that the testimony of Barbara Brown, the warden, was "incredible as well as not credible." (Union Brief, page 5). It points out that while she claimed that Rodney-Kahle was conducting a background check on the grievant when she discovered the charge against him but Rodney-Kahle stated that she learned of the charge in the course of a conversation with a Lima Police Department detective. The union notes that Brown asserted that background checks were done on all of the Department of Mental Health employees when they became Department of Rehabilitation and Correction employees on June 6, 1996 but Rodney-Kahle stated that no such checks were made.

The union contends that the grievant was not properly charged. It reports that he was investigated for violating Rules #26 and #28 of the June 19, 1990 Standards of Employee Conduct of the Department of Rehabilitation and Correction. The union observes that Rule #26 prohibits "interfering with or failing to cooperate in an official investigation or inquiry" and Rule #28 requires a supervisor "to properly supervise or enforce the rules." It stresses that Rules #26 and #28 of the Standards of Employee Conduct adopted February 18, 1996, under which the grievant was removed, are substantially different.

The union contends that the grievant did not have an opportunity to report his arrest. It points out that the grievant was given the 1996 Standards of Employee Conduct on June 28, 1996 and ten days later was sent to the Corrections Training Academy where he received training in the rules and was advised by a training officer that he should report the charges against him to a supervisor. The union indicates that when the grievant returned to Oakwood on July 29, 1996, he had no chance to talk to his supervisor before being placed on leave because he was directed to report to Rodney-Kahle's office immediately after roll call.

The union disputes the allegation that the grievant violated rule #28. It notes that none of the state's witnesses had any personal knowledge whatsoever that the grievant left a razor in X's cell. The union further notes that there were no reports filed that a razor was missing the day before, the day of, or the day after the incident.

The union complains that the state failed to call X as a witness. It points out that he could have testified as to the accuracy of Downing and Rodney-Kahle's statements that he told them that the grievant left a razor in his cell. The union notes that Hill and Sinicropi on page 102 of the second edition of Evidence in Arbitration quote Wigmore which indicates that the failure to call a potential witness "serves to indicate ... that the party fears to do so, and this fear is some evidence that the ... witness, if brought, would have exposed facts unfavorable to the party."

The union maintains that the state was unable to prove that the razor in X's cell was the razor that the grievant got from the nurses' station. It observes that the state had no method of tracking, identifying, or logging razors. The union notes that after the events of June 25, 1996 the state created a system for keeping track of razors.

The union contends that X took the razor from the nurses' station. It states that fully-charged razors are stored in a drawer by the door to the nurses' station or left on the counter by the door so that they were an arm's length from where one of the state's witnesses placed X on the evening of June 25, 1996. The union notes that the statement signed by X indicates that he took the razor while at the nurses' station discussing his medication.

The union concludes that the state did not meet its burden of establishing that there was just cause to remove the grievant. It asks the Arbitrator to direct the state to reinstate the grievant with back pay and benefits and to remove any record of the discipline from his file.

ANALYSIS

The grievant is charged with two violations of the Standards of Employee Conduct of the Department of Rehabilitation and Correction. First, the state alleges that the grievant violated Rule #26 by failing to report his June 5, 1996 arrest for making a false police report. Second, it charges that on June 25, 1996 the grievant breached Rule #28 when he left an electric razor in X's cell which resulted in serious injuries to X.

The facts related to the first charge are clear. In April 1992 the grievant reported a burglary at his home where he claimed that several guns and other property was taken. A routine check of pawn shops by the Bureau of Alcohol and Firearms in 1996 revealed that one or more of the guns reported stolen by the grievant had been pawned and that the pawn slips had the grievant's signature on them. A complaint was issued against the grievant by the Lima Municipal Court on May 16, 1996 for making a false police report.

The grievant was arrested on the charge on June 5, 1996. The grievant never reported his arrest to the Department of Rehabilitation and Correction.

The Arbitrator is convinced that the grievant knew, or should have known, that he was required to report his arrest. He acknowledged receiving the June 17, 1990 Standards of Employee Conduct of the Department of Rehabilitation and Correction on February 8, 1994 and March 2, 1994. They state that "should an employee be arrested for, charged with or convicted of any felony or degreed misdemeanor (except for a minor misdemeanor) ... that employee shall immediately inform the appropriate Appointing Authority." The grievant acknowledged receiving the February 18, 1996 Standards of Employee Conduct on June 28, 1996. Rule #26 makes the "failure to immediately report any personal arrest or criminal charge" a matter for discipline.

The Arbitrator must reject the unions argument that the grievant did not violate Rule #26 because he was not an employee of the Department of Rehabilitation and Correction at the time he was arrested. While it is true that he was removed as an employee of the Department of Mental Health on October 26, 1995, he was returned to work as an employee of the Department of Rehabilitation and Correction on June 9, 1996 on a last chance agreement. The last chance agreement indicates that the time the grievant was off work was converted to a suspension. Thus, the grievant was an employee and was bound by the 1990 Standards of Employee Conduct.

The Arbitrator must also reject the union's contention that the grievant had no opportunity to report his arrest. The grievant returned to work on June 9, 1996 and remained at Oakwood until he was sent to the Corrections Training Academy on July 8, 1996. The grievant had nearly one month to report his arrest but he failed to do so even after he received the 1996 Standards of Employee Conduct on June 28, 1996.

The Arbitrator would note that the grievant did not claim that he was unaware of the requirement to report pending charges. When he returned to Oakwood after attending the Corrections Training Academy, Rodney-Kahle asked him why he did not report the

charge. He stated that he "talked to [his] attorney and he said it was no big thing." The grievant, however, acknowledged that his attorney did not advise him that he did not need to notify his employer.

The second charge against the grievant is that he violated Rule #28 of the Standards of Employee Conduct on June 25, 1996 by his "loss of control of [an] instrument that could result in a breach of security or jeopardize the safety of others." Some of the facts related to this charge are undisputed. The parties agree that around 9:10 P.M. on June 25, 1996 the grievant got an electric razor from the nurses' station and supervised X while he shaved. They concur that when X finished shaving, the grievant took X to his cell and "4-wayed" him to the bed for the night.

The parties disagree about how X got the razor that he used to cut himself. The state contends that the grievant never returned the razor that X used to shave himself to the nurses' station but that he took it to X's cell where he carelessly left it after he "4-wayed" him to the bed. The union claims that the grievant returned the razor to the nurses' station after X finished shaving and that X took the razor that he used to cut himself from the nurses' station at 9:10 P.M. while discussing his medications.

The Arbitrator must accept the state's version of the events of June 25, 1996. First, at the time the union claims that X took the razor, two psychiatric nurses -- Mary Hampton and Kathleen Recker, a corrections officer, and another staff member were in the nurses' station. Even if a razor had been on the counter by the door as the union claimed, it would have been very difficult for X to take it without being seen. Second, the grievant's testimony that he returned the razor to the nurses' station when X was given his medication, is contrary to the testimony of Hampton. She stated that the grievant never returned to the nurses' station and that X took his medication by the door to the medication room rather than at the nurses' station. Third, if X took the razor, he would have had to conceal it on his person and then in his cell without being detected. This

would have been difficult especially given the grievant's statement that indicates that he "shook down" X before he "4-wayed " him to the bed.

The Arbitrator cannot accept the union's argument that an adverse inference should be drawn from the state's failure to call X as a witness. First, it appears to be the practice of the parties not to call inmates to testify in matters of employee discipline. Second, even if X had been called, the Arbitrator could not attach significant weight to his testimony. The record indicates that X is manipulative and not always truthful. Furthermore, as an inmate, he could very easily be subject to coercion by either the state or the union.

The union placed considerable emphasis on the lack of a method for tracking, identifying, and logging electric razors. While it is true that there was no such system in place on June 25, 1996 and that a system was devised after the incident at issue, it does not relieve the grievant of the responsibility for safeguarding potentially dangerous instruments. This is especially the case in dealing with an inmate who is a self-mutilator.

The remaining issue is the proper penalty. The last chance agreement signed by the grievant on June 7, 1996 states "if there is a violation of Department of Rehab and Correction, Oakwood Correctional Facility rules, directives and policies, the Employee will be discharged." It further indicates that "the discharge will not be grievable or arbitrable except to the extent that the Employer (DRC) must prove that the Employee did commit a violation of the work rules or policies." Since the Arbitrator has concluded that the grievant violated Rules #26 and #28 of the Standards of Employee Conduct of the Department of Rehabilitation and Correction, he has not alternative but to deny the grievance.

AWARD

The grievance is denied.

Nels E. Nelson
Arbitrator

October 27, 1997
Russell Township
Geauga County, Ohio