#1294

OCB-OCSEA VOLUNTARY GRIEVANCE PROCEEDING
ARBITRATION OPINION AND AWARD

Arbitration Between:	*	
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STATE OF OHIO Department of Rehabilitation and Correction	*	Case No. 27-11-(6-3-96)-476-01-03
	*	
-and-	*	Decision Issued: June 11, 1998
OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION, OSCEA/AFSCME Local 11	*	

FOR THE EMPLOYER

Michael P. Duco	Dispute Resolution Manager
Harry K. Russell	Warden
Ron Hart	Labor Relations Officer
Patrick Mayer	Labor Relations Officer
Wendy Clark	Labor Relations Officer
Jerome Smith	Unit Manager

FOR THE UNION

Robert Jones	OCSEA Staff Representative
Keith Boothe	Chapter President
Fred Land	Former Chapter President
Ronald Jackson	Grievant
William Jackson	Witness

Jonathan Dworkin, Arbitrator
101 Park Avenue
Amherst, Ohio 44001

THE ISSUES: REMOVAL

This grievance protests the removal of a Correction Officer at Lebanon Correctional Facility. Grievant had more than ten years' seniority; his date of hire was January 1, 1986.

Saturday, September 16, 1995 (his day off), Grievant and his brother went bass fishing at a gravel quarry near Dayton, Ohio. On their way home, they drove through a neighborhood notorious for crack cocaine transactions. A Dayton police officer saw their vehicle stop in the middle of the street and watched as a man and woman approached them. According to the officer's statement, he observed what looked like a drug sale. The following is an excerpt from the testimony he gave at a court hearing on December 14, 1995:

Q: Directing your attention to approximately 5:15, 5:30 in the evening, did you have occasion to be in the area of Ralliston Avenue?

A: Yes, I did.

Q: Is that in the City of Dayton, Montgomery County, Ohio?

A: Yes, it is.

Q: While in that area, officer, what did you observe?

A: I was on regular routine patrol in that area. I observed black Geo Metro pull up in front of 3215 Ralliston Avenue.

Q: And are you familiar with what is located at 3215 Ralliston Avenue?

A: It's a drug house.

Q: Are you familiar with that house?

A: Yes, I am.

Q: How are you familiar with it?

A: I made numerous arrests in relation to that address in the past before.

Q: For drugs?

A: For drugs and for weapons violations.

Q: Was the Geo Metro, was it parked in front of the house? Did it pull up to the house?

A: It pulled up and stopped in front of it.

Q: You observed that occur?

A: Yes, I did.

Q: What happened after the Metro pulled up outside of 3215 Ralliston?

A: Saw a black male approach the driver side of the vehicle and speak briefly with driver of the vehicle. And I saw him, like the black male's hand go toward the driver of the vehicle, and then pull his hand back. It looked at that time to be a possible drug transaction.

The police officer followed the car several blocks, then pulled it over. He ordered Grievant and his brother out and searched them for weapons. Leaning into the car, the officer spotted what turned out to be a crack rock wedged in the seat track on the passenger side. He removed it with a penknife, tested it, and placed Grievant under arrest. Another search at the police station uncovered a crack pipe (with residue) in Grievant's waistband.

The resulting charge was a fourth-degree felony[1] and the Employee was held until Monday morning. Then a judge released him on signature bond.[2]

The next day, Grievant told his Shift Captain what had happened. Consequently, he was put on paid administrative leave, which continued six and one-half months. Meanwhile, the Department carried out an investigation. As part of it, an internal affairs investigator attended a hearing in the Court of Common Pleas for Montgomery County, December 14 and 21, 1995. The hearing was on Grievant's motion to suppress the evidence recovered from his car and person. He and his brother both testified. The investigator heard him admit

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[1] There are five felony degrees in Ohio. It follows that public policy regards the charge against Grievant as more serious than a misdemeanor or a fifth-degree felony, but less serious than a first-, second-, or third-degree felony.

[2] In the arbitration hearing, the Union emphasized that Grievant submitted to drug tests when he was arrested and when he was released. Both came back negative.

that he had smoked crack (though not on the day of the arrest) and that the crack pipe was his. These admissions were the pivotal to the removal. April 2, 1996, after a predisciplinary hearing officer affirmed that there was just cause for discipline, the Agency sent Grievant notice of his pending removal. It alleged:

> An Internal Affairs Incident Report and evidence was submitted by Captain J. Smith. He reported you were arrested on September 16, 1996, and charged with a felony, resulting from possessing Crack Cocaine and a Crack Pipe. Obviously, this is not behavior that is acceptable by the Department of Rehabilitation and Correction. You admitted to these facts under oath in a public Court Room. Also, you identified yourself, place of employment and occupation. Due to these factors, you would be unable to effectively carry out your assigned job duties with respect to dealing with other staff and inmates.
>
> Your actions constitute a violation of Rule 1 - Any other failure of good behavior; Rule 39 - Other actions that could compromise or impair the ability of the employee to effectively carry out his/her duties as a public employee; and Rule 41 - Any act that would bring discredit to the employer, of the Standards of Employee Conduct.

On February 8, 1996, about two months before the Removal Notice, the Common Pleas Court ruled favorably on Grievant's motion to suppress. Judge Mary E. Donovan held that the police officer's discovery of crack in Grievant's automobile stemmed from a pretextual traffic stop and illegal search, contrary to both the United States and Ohio Constitutions. August 7, 1996, Judge Donovan

dismissed the charges against Grievant on the prosecutor's motion. By then, the removal had been administered.

The Union places major emphasis on the constitutional point. Throughout the hearing, the OCSEA Advocate argued repeatedly that Judge Donovan's evidential suppression and dismissal left no basis for prosecuting Grievant and, therefore, no basis for discharging him. A common pleas judge refused to accept the evidence against Grievant, and the Union contends that the Arbitrator ought to do the same.

* * *

There are contractual restrictions on the Employer's disciplinary powers. No employee can be penalized without just cause. Furthermore, discipline, in most cases, is to be progressive -- to correct misconduct not just punish it. These precepts are set forth in the Collective Bargaining Agreement governing this controversy (1994-1997) as follows:

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.

. . .

§24.02 - Progressive Discipline

The Employer will follow the principles of progressive discipline. Disciplinary action shall be commensurate with the offense. Disciplinary action shall include:

A. One or more verbal reprimand(s) (with appropriate notation in employee's file);

B. one or more written reprimand(s);

. . .

D. one or more day(s) suspension(s);

E. termination.

These are the overriding principles. They are not self-explanatory. Often, just cause embodies subordinate issues that call into question individual facts and circumstances attending alleged misconduct, due process, and compliance with formal procedural requirements. The Union asserted several such defenses for Grievant. They will have to be decided before the Arbitrator can arrive at a defensible opinion on whether Grievant's removal was for just cause. The issues are:

1. Did Grievant commit the misconduct? Of course, this is the most fundamental question of all. The Employee vigorously denies any connection

with the cocaine rock found in his car. Also, he insists that the crack pipe was not his. He admits that he smoked crack in the past, but only "a couple of times" and in moments of weakness and despair. According to his testimony, he stopped then and never repeated his "mistake."

2. Did the dismissal of criminal charges under the Fourth Amendment annul the Employer's power to discipline Grievant? This is an especially important issue because Grievant was an employee of the State of Ohio. The United States Supreme Court has held that public employees (as distinguished from those who work in the private sector) have property rights in their jobs that cannot be divested without due process of law. The employment mantle of constitutional rights merits close attention under the facts and arguments of this grievance.

3. Did the State have justification for intruding into Grievant's private life and removing him solely for (alleged) off-duty activities? While on the job, an employee must follow his/her employer's regulations. S/he must be mindful of the employer's interests and must not commit acts that undermine them. Employees must act decorously at work and obey supervisory directives. In other words, the State had the right and responsibility to monitor Grievant's

activities and behavior eight hours a day (plus overtime). However, the employer is not the guardian of public morals. To put it bluntly, what an individual does on his/her own time ordinarily is none of the boss' business.

There is an exception. Where off-duty misconduct adversely influences the employer's mission and/or reputation, or handicaps the employee's ability to do his/her job, disciplinary intervention is permissible. For the exception to operate, the link cannot derive from managerial supposition. It must be obvious and well defined; it must be palpable. Unless the misconduct meets these criteria, arbitrators will not uphold discipline for off-duty (and off-the-premises) wrongdoing.

The Arbitrator has read many published decisions on this subject. The best statements of the doctrine that he has found were in opinions of Arbitrators Richard Mittenthal and D. Emmett Ferguson:

> [T]he question in a case such as this is not only whether the employee was guilty of the acts charged but also whether such acts were committed in the course of employment and whether they constitute industrial misconduct. Ordinarily, an employee cannot be punished by Management for behavior off the Company premises and after working hours. But where such behavior is ***directly related*** to his employment, Management certainly has the power to discipline. For example, an employee who assaults his foreman because of some disagreement between them at the plant cannot prevent discipline on the ground that the assault occurred outside the plant and after the work day was over. The point is

> that the jurisdictional line which limits the Company's power to discipline is a functional, not a physical line. *Allied Supermarkets, Inc*, 41 LA 713, 714 (R. Mittenthal, Arb., 1963)
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> . . .
>
> The general rule is that an employee upon being employed by a company, places himself under the jurisdiction of the employer so far as their joint relationship is concerned. While it is true that the employer does not thereby become the guardian of the employee's every personal action and does not exercise parental control, it is equally true that in those areas having to do with the employer's business, the employer has the right to terminate the relationship if the employee's wrongful actions injuriously affect the business.
>
> The connection between the facts which occur and the extent to which the business is affected must be reasonable and discernible. They must be such as could logically be expected to cause some result in the employer's affairs. Each case must be measured on its own merits. *Inland Container Corp.*, 28 LA 312, 314 (D. Ferguson, Arb., 1957)

4. Did the Agency's delay invalidate the removal? A widely observed arbitral precept holds that justice delayed is justice denied. Where an employer waits too long to impose discipline, it may forfeit its right to do so. This is more than an abstract principle in the relationship between these parties; it is a contractual mandate. The need for promptness is accentuated by the fact that it is stated in Article 24, Section 24.02 of the Agreement and again in Section 24.05. Section 24.02 expresses the rule and requires arbitrators to follow it:

24.02 - Progressive Discipline

. . .

Disciplinary action shall be initiated as soon as reasonably possible consistent with the requirements of the other provisions of this Article. An arbitrator deciding a discipline grievance must consider the timeliness of the Employer's decision to begin the disciplinary process.

Section 24.05 sets out a more precise due-process requirement. It says that, except in narrowly described circumstances, the employer ***must*** issue discipline within forty-five days after the predisciplinary hearing:

24.05 - Imposition of Discipline

The Agency Head or, in the absence of the Agency Head, the Acting Agency Head shall make a final decision on the recommended disciplinary action as soon as reasonably possible but no more than forty-five (45) days after the conclusion of the pre-discipline meeting. At the discretion of the Employer, the forty-five (45) day requirement will not apply in cases where a criminal investigation may occur and the Employer decides not to make a decision on the discipline until after disposition of the criminal charges.

The Arbitrator reads these provisions as distinct from one another. He finds that in Section 24.05 does not restrict or even define the more sweeping statement in Section 24.02. Inordinate delay that prejudices an individual's

rights can be fatal to discipline regardless of whether or not it meets the forty-five-day limitation.

Based on the following time lines, the Union contends that the delay in disciplining Grievant was extravagant, unnecessary, and prejudicial:

> **September 19, 1995**: Grievant told his Shift Captain of the arrest and consequentially went on paid administrative leave.
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> **December 14 & 21, 1995**: The Montgomery County Court of Common Pleas, Criminal Division, heard testimony and received evidence on Grievant's motion to suppress. A State internal affairs investigator attended both hearing days. He was present when the Employee allegedly confessed to smoking crack and admitted the crack pipe belonged to him.
>
> **February 8, 1996**: The Court granted the motion and suppressed evidence seized from Grievant's car.
>
> **March 27, 1996**: Predisciplinary hearing.
>
> **April 1, 1996**: The predisciplinary hearing officer's report held there was just cause for discipline.
>
> **April 2, 1996**: Thirty-day Removal Notice issued to Grievant. This was just one day after the predisciplinary-hearing report and met the Section 24.05 time line. But it was 196 days after the Employee told his Shift Captain of the arrest, 103 days after the internal affairs investigator heard Grievant's admissions in court, 54 days after the evidence against Grievant was suppressed. Moreover, the Employer cannot successfully

argue that it was waiting for the outcome of the criminal case. It issued the removal more than eighteen weeks before that took place.

August 7, 1996: Criminal charges against Grievant dismissed.

The Union contends that the Employer clearly violated the mandate of Article 24, Section 24.02: "Disciplinary action shall be initiated as soon as reasonably possible." It argues, therefore, that Grievant's due-process rights were breached and the adverse action must be overturned.

5. Did the Agency violate Grievant's contractual protections by refusing to consider his timely request for an EAP disciplinary deferral? This issue focuses on Article 24, Section 24.09, which requires Management to consider an employee's request to be referred to the Employee Assistance Program before discipline is imposed. The Section provides:

24.09 - Employee Assistance Program

> :ases where disciplinary action is contemplated and the affected
> ıloyee elects to participate in an Employee Assistance Program,
> ·:iplinary action may be delayed until completion of the pro-
> Upon notification by the Ohio EAP case monitor of success-
> ıpletion of the program under the provisions of an Ohio EAP
> ɔation Agreement, the Employer will meet and give serious
> eration to modifying the contemplated disciplinary action.
> ɔation in an EAP program by an employee may be considered

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> in mitigating disciplinary action only if such participation commenced within five (5) days of a predisciplinary meeting or prior to the imposition of discipline, whichever is later. Separate disciplinary action may be instituted for offenses committed after the commencement of an EAP program.

A Union Steward testified that he made an EAP request for Grievant at the predisciplinary hearing, and was rebuffed with the answer: "It's too late for that!" Obviously, it was not too late, and Management owed an obligation to consider it. If the EAP application was both timely and in good faith, the Employer violated Section 24.09.

The Agency insists that no one mentioned EAP at any other time within the limits of Section 24.09.

6. In view of Grievant's employment history and other pertinent factors, did the removal comport with just cause? This issue is germane only if the employer's position survives all the other just-cause challenges. There still would be the question of whether terminal discipline was contractually authorized. The answer depends on the Arbitrator's assessment of Grievant's salvageability.

Just cause means an employer must seek a way of using discipline correctively -- to adjust an individual's misbehavior and restore him/her to employment acceptability. Removal is for just cause only where the employee

is immune from correction and incorrigible, or where the misconduct is so pernicious, so contrary to the employer's objectives that it genuinely severs the employment contract.

The predisciplinary hearing officer seems to have ignored these principles. After ruling that Grievant violated departmental rules and "compromised his ability to carry out his duties with staff and inmates alike," he turned to the headings on the hearing form titled "Aggravating Circumstances" and "Mitigating Circumstances." Under "Aggravating Circumstances," he wrote: "Management cannot tolerate such behavior on the part of its employees. The actions of [Grievant] would hinder his ability to perform his duties with staff and inmates." He then observed that the Department of Rehabilitation & Correction had a zero-tolerance drug policy.

Under "Mitigating Circumstances," the hearing officer wrote, "None." The testimony confirms that the Agency followed the same decision-making mode for the removal. It treated the case as if there were nothing in the record that would cause a reasonable, fair-minded administrator to stop and think about salvageability. This was wrong. There was at least one mitigating factor -- the Employee's ten years of service. Since the Agency did not assess it, the Arbitrator must,

even if it means substituting his judgment for Management's on what was just-cause discipline and what was not.

Another ingredient under this heading is whether Grievant was the victim of disparate treatment. Just cause requires that no employee can be punished more harshly than others who commit the same or similar misconduct under the same or comparable circumstances. The Union contends that the Agency violated this standard.

DISCUSSION AND ARBITRAL FINDINGS

Guilt or Innocence. As in all discipline and discharge cases, the Employer carried the burden of proof. That means Management was responsible for furnishing sufficient evidence (direct and/or circumstantial) that Grievant was a party to a drug purchase as alleged. Once it established the basics of that allegation, the burden switched; the Union then had to explain or refute.

Apart from the constitutional issues to be decided later, the State fulfilled its primary evidential obligation. It proved Grievant stopped his car in an area known for drug dealing where he and/or his brother had a conversation with drug merchants in front of a crack house. About ten minutes later a Dayton police office found a cocaine rock concealed in a seat track on the passenger side of the automobile. Also, the police found a crack pipe in Grievant's possession.

To sustain its burden of proof, the Union relied on Grievant's testimony and his brother's. That was a disaster. They could not get their stories straight. Their testimony was made up of truths mixed with half-truths, obvious lies, and maudlin self-serving excuses. Under oath, Grievant gave a clue on how seriously he took his promise to tell the truth. Recounting the incidents surrounding his arrest, he admitted telling the police officer that he was unemployed; he wanted to hide the incident from Lebanon Management. In the next breath, he said he told the police the whole truth because "I couldn't lie to the police." The Arbitrator found that testimony mind- boggling for its layers of deceit.

Grievant insisted he did not know how the crack got into the car, nor did he know who owned the crack pipe that was found in his possession. Curiously, he was aware that the pipe cost $20 but did not know who bought it.

The police found the crack pipe in Grievant's waistband. The explanation was that his brother thrust it to him to hide when the Dayton police stopped the car. Beyond that, he claimed to have no knowledge of the instrument:

> I did not even see that crack pipe and know it was there until the red lights [police cruiser] come behind. When the police officer turned the red lights on, it was shoved in my face and I was told to hide it. I did the first reaction I could. I grabbed it and stuffed it in my waistband. I had no knowledge it was even in the car until then.

This contradicted Grievant's testimony in the suppression hearing on December 14, 1995:

> Q. You also told him [the arresting officer] you had just started smoking crack recently, didn't you?
>
> A. Yes, I did.
>
> Q. And you said that you had paid 20 dollars for the crack cocaine that you had bought?
>
> A. I didn't say I had paid 20 dollars for it, ma'am.
>
> Q. You say that someone had paid 20 dollars for it?
>
> A. Yes, I did.
>
> Q. And did you know that there was crack cocaine on the hood of your car that he [the officer] was testing?
>
> A. It was on the hood of his car. I wasn't sure. I thought it was a McDonald's bread crumb from a biscuit.
>
> Q. But you did tell him you just started smoking crack?
>
> A. Yes.
>
> Q. ***You did have a crack pipe on you at that time you were stopped.***
>
> A. ***Yes. Yes, I did. It was found at the police station.***
>
> Q. ***And you use that to smoke crack?***

A. ***Yes***.[3]

In an attempt to explain the discrepancy, Grievant said that the court transcript was incorrect. In other words, the court reporter, a trained listener, was wrong and so was the internal affairs investigator who attended the court sessions and reported what he heard Grievant say. The Arbitrator found the assertion absurd.

The most preposterous part of Grievant's testimony was his insistence that he had no idea what transpired when the drug dealers walked to his stopped vehicle. In the Employee's favor, all the testimony and evidence, including the police report, imply that if cocaine was exchanged for money it was his brother who made the buy. The dope peddlers came to the passenger side where the brother was seated; Grievant was driving. Furthermore, the cocaine rock was found in the track of the passenger seat. But it was incredible for Grievant to testify that he did not know what was going on. The buy was through his car window a few inches from where he was sitting. That testimony, in the Arbitrator's strong opinion, was an outright lie and an insult to the intelligence of everyone who heard it.

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[3] Court transcript, 109-110. [Emphasis added.]

Grievant's brother was supposed to come to his rescue. In its opening statement, the Union certified that the brother would "clear everything up." It did not happen. The brother claimed to know even less about the drug transaction than Grievant. Apparently the Employee wanted him to take the blame and he was not going to do it. He denied making the drug purchase and denied knowing anything about the crack pipe. Like Grievant, he had no consciousness of what the drug dealers said or did. All he knew was that Grievant stopped the car and they came to the window. The following excerpt summarizes all the testimony he gave.

> Q: Did a man and a woman approach [Grievant's] car trying to sell some crack while you were in Dayton?
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> A: I don't know what they were doing. They just approached the car . . . on my side of the car.
>
> . . .
>
> Q: Do you know whose crack pipe was in Grievant's possession?
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> A: No, I don't.

No one can expect arbitrators to unerringly discern truths from lies. They are mere human beings without celestial guidance to decide grievances. The

best they can do is listen constructively to testimony, examine supporting facts, apply their experience and intellect, and make decisions based on probability.

In assessing what witnesses say, arbitrators are not required to be naive receptacles of what they hear. They have the authority and obligation to weigh testimony. Like triers of fact in courts of law, they are free to believe all, some, or none of what witnesses tell them.

This Arbitrator believes almost none of what Grievant and his brother said. He finds that a drug purchase probably took place as the Agency charges. Given the logistics of how it took place, it is more likely than not that Grievant's brother conducted the transaction. That, however, does not relieve Grievant of guilt. There is every reason to believe that Grievant had a part in the deal -- that there was complete cooperation and complicity between him and his brother. Grievant was the one who drove the automobile into the neighborhood and stopped at the crack house. Unquestionably (contrary to his testimony under oath), he was fully aware of what was going on. And his attempt to disavow the crack pipe was ridiculous.

Whether they bought the crack for the Employee or brother is immaterial. The real reason for the removal was that Management felt it could no longer trust Grievant not to help prison inmates obtain drugs. If he helped his brother (whom

he said was a recovering addict) buy crack and did not purchase it for himself, it would only add to Management's valid apprehensions.

It is held that Grievant committed most of what the Agency alleges. The evidence confirms that he violated Rules 1, 39, and 41.

* * *

The Constitutional Defense. The Union's chief assertion is that since the criminal case against Grievant was thrown out of court, the same result should be awarded here. In his opening statement, the Union Advocate said:

> The motion [to suppress] was sustained by Judge Mary E. Donovan because [Grievant's] fourth amendment rights were violated, the police officer was not credible and the evidence was illegally seized. Article 24.01 of the contract states disciplinary action shall not be imposed upon an employee except for just cause. This was not the case for [Grievant], he was not charged for being in possession of a crack pipe, he was not fined.

If this were a private-sector dispute, the Union's argument would have little force. Industrial discipline is not a criminal penalty. The better arbitral decisions hold that while some fundamental rights apply, the collective bargaining agreement is an employee's basic protection. S/he cannot success-

fully claim the full range of the first ten amendments to shelter him/her against an employer's disciplinary decision.

There are several Supreme Court cases holding that public employees have property rights in their jobs, which cannot be taken away without due process. Two landmark decisions are *Cleveland Bd. of Edn. vs. Loudermill*[4] and *Perry vs. Sindermann*[5]. In *Loudermill*, a school security guard was summarily discharged for lying on his employment application. He was denied a predisciplinary hearing. Because the Ohio civil service law gave public employees property rights to their jobs, the Court held that those rights could not be taken away without due process of law:

> (a) The Ohio statute plainly supports the conclusion that respondents possess property rights in continued employment. The Due-Process Clause provides that the substantive rights of life, liberty, and property cannot be deprived except pursuant to constitutionally adequate procedures.
>
> . . .
>
> (b) The principle that under the Due-Process Clause an individual must be given an opportunity for a hearing *before* he is deprived of any significant property interest, requires "some kind of hearing" prior to the discharge of an employee who has a constitutionally

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[4] 479 US 532 (1984).

[5] 408 US 593 (1972).

> especially, his interests in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to "produce a result which [it] could not command directly." Such interference with constitutional rights is impermissible.[7]

Can illegally seized evidence be the basis of a public employee's discharge? The Arbitrator is uncertain of the answer. There is strong persuasive content in the Union's argument. Here, however, the illegal evidence was not the foundation of the Department's case. The cocaine rock did not come before the Arbitrator nor did the crack pipe. All that was presented was the transcript of Grievant's own motion to suppress where the Employee made telling public admissions.

This case is mainly premised on circumstantial evidence. There is no proof that the substance removed from the car was cocaine. There is only suspicion. Nevertheless, the circumstances, coupled with Grievant's incredible testimony, are enough. It is plain to the Arbitrator that the Employee used cocaine in the past, drove into a known cocaine marketplace, and cooperated in buying what

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[7] 408 US at 597.

he thought was cocaine. It may not have been adequate for prosecution, but it was sufficient cause for discipline.

The removal will not be overturned on the Union's constitutional grounds.

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Off-Duty Misconduct. According to undisputed evidence, Lebanon is a close-maximum security prison. As a Correction Officer, Grievant had direct contact with inmates, 70 percent of whom were convicted of drug-related offenses. The facility has a zero-tolerance policy for inmates, but has not been totally successful in sealing drug pipelines into the institution. Correction Officers enforce random drug screenings of prisoners and often the results are positive -- sometimes as high as 22 percent. Six percent is the average.

The Arbitrator will not speculate on how drugs get into the jail. He agrees in large part, however, with the following statement made by the State Advocate when the arbitration hearing commenced:

> It is common knowledge that crack is one of the most addictive of the illegal drugs. The use of crack can cause a Correction Officer to not be as aggressive in trying to find drugs in the institution, breaching security, or ultimately dealing with the inmates. Thus, the Employer's knowledge that the Officer was using crack is sufficient or just cause for removal.

This Arbitrator is reluctant to sanction any employer's attempt to impose discipline for what individuals do away from work. This applies to drug use. Alcohol probably is our most pernicious drug -- maybe more additive than cocaine. But no one would think to discipline an employee who comes to work sober and drinks to excess on his/her own time.

As stated, there has to be an unequivocal connection between off-duty activities and employment. The Arbitrator finds that the Agency proved the connection. The only way people secure illegal drugs is through criminal activity. While that might not be conclusively destructive of employment relationship in an ordinary case, it clearly is here.

The Union will not prevail on an off-duty-misconduct defense.

* * *

Delay in Imposing Discipline. It bears repeating that the Department did not violate Section 24.05 time lines. Discipline was issued well within 45 days after the disciplinary hearing. Therefore, the Union must rely on the more general mandate in Section 24.02.

Without question, the Agency took too long to discipline Grievant. However, there is no evidence that either the Union or the Employee suffered

deprivation as a result. On administrative leave, Grievant received wages and benefits though he was not required to report for work. Both he and the Union understood why he was on administrative leave and that he was facing eventual discipline. They had more than adequate time to secure necessary records, find and interview witnesses, and prepare a grievance.

In the Arbitrator's opinion, a Section 24.02 violation can impel exoneration from discipline in two circumstances: where the delay is so extraordinary that it shocks the conscience and where delay impedes union representation. Neither factor is evident in this dispute. It is held, therefore, that while the Agency's delay was extra-contractual, it was neither so shocking nor detrimental as to require that the grievance be procedurally sustained.

* * *

Grievant's EAP Request -- Section 24.09. Despite contrary testimony, the Arbitrator finds it probable that Grievant's Union Steward did ask for an EAP disciplinary deferral at the predisciplinary hearing. It is also probable that Management rejected the request out of hand, without considering it.

Recently, the Arbitrator had occasion to review a similar (but not identical) case between OCSEA and the Department of Rehabilitation and Correction[8]. There, an employee was removed for an alcohol-related offense. At the hearing, he testified that he was alcohol-dependent and needed an EAP referral. The Agency ignored the request much as it did here. In the Arbitrator's opinion, that was a plain violation of contractually defined "just cause." He held:

> The contractual essence is that the Employer must consider an individual's election to participate in EAP, and if the recovery attempt proves successful, "the Employer ***will meet and give serious consideration to modifying the contemplated disciplinary action.***" The meaning and intent are clear; the Employer at least has to consider the EAP defense.
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> The Agency is on firmer ground arguing that it does not have to ameliorate this removal just because Grievant entered an EAP program in a last-ditch effort to save his job. That is true. Section 24.09 says that discipline action **may** be delayed until completion of the program. It does not say it **must** be delayed; it is not a mandate. It also says that EAP participation **may** be considered in mitigation.
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> It is true that granting clemency under §24.09 is a matter of managerial discretion. The possibility, once considered, can be rejected. But the Employer is not at liberty to ignore the provision completely, as the Agency did here.

[8] Case No. 27-25-960617-1092-01-03. Decision issued July 16, 1997.

> The Arbitrator finds that attention to §24.09 is a contractually specific element of just cause. Where the Employer wholly disregards any just-cause element, it becomes an arbitrator's duty to insert it him/herself. Sometimes, that means an arbitrator will overrule an agency's otherwise sound judgment.[9]

This case gives the Arbitrator a welcome opportunity to reconsider and refine his interpretation of Section 24.09. There are differences between the two grievances; one is profound. The previous grievant was a true alcoholic who convinced the Arbitrator that he genuinely wanted to recover. Acknowledgement of his honest plea for help was part of the opinion:

> Grievant testified (believably) that he is alcohol dependent. He was drunk when he fell asleep on May 2 and the other times as well. Probably, these were not the only occasions when he reported for duty under the influence of alcohol, but he managed to keep his condition hidden. He said he has been drinking regularly since he was a teenager, and uncontrollably for approximately two years.[10]

Grievant here insisted that ***he is not drug addicted -- he is not even a drug user.*** He experienced cocaine a couple of times then was able to drop it because, "it was not for me." The point was echoed in the Union's written

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[9] *Id.* at 26-27.

[10] *Id.* at 14.

opening statement. Reading the following paragraphs of the statement together displays a startling dichotomy:

> Article 24.09 E.A.P. states that in cases where disciplinary action is contemplated and the affected employee elects to participate in E.A.P. The disciplinary action may be delayed until completion of the program. E.A.P. was not offered or allowed to [Grievant] and [Grievant] asked about E.A.P. at his Pre-D.
>
> The union will show through documents and testimony that the removal of [Grievant] was without just cause. ***[Grievant] is not a drug abuser.*** He was tested twice within a two day period and test results were negative. [Emphasis added.]

The Employee Assistance Program and Section 24.09 are not intended to be sanctuaries for employees facing justifiable discipline. They are designed to help drug/alcohol victims cure their disease and, having cured it, become rehabilitated. The approach taken by Grievant and the Union illustrate manipulative cynicism that subverts contractual purpose. What Grievant said in effect was: "I am not a drug abuser or a victim of drug abuse but I want to get into EAP to postpone and maybe escape my removal."

Management was right to ignore the request. It did ***not*** violate Section 24.09.

Elemental Just Cause. One characteristic that employers and arbitrators look for in deciding whether to modify discipline is remorse. The word "remorse" does not accurately define the trait. Employees do not have to be abjectly sorry for their misconduct. All they need to do is convince an arbitrator that they will not do it again.

Grievant went overboard on remorse. He told the Arbitrator that his cocaine experience stemmed from his wife's cancer. Medical predictions were that she would only live six months (though she eventually recovered). The Employee dramatically recounted his dedication to her. He took a six-month leave of absence to sit by her bed and serve her needs. He turned to cocaine as his wife deteriorated and he became hopelessly resigned to her fate.

The Arbitrator has no desire to demean Grievant's commitment. That flows from the Employee's own testimony. He said he experienced cocaine at parties. When asked how he could leave his wife's bedside for that purpose when he was "taking care of her day and night," he responded: "I probably left her with a sitter." Grievant went on to give an obviously overblown account of his flirtation with cocaine and "remorse":

> I had smoked crack on a couple of occasions in the past. It wasn't yesterday or the day before; it was probably a few months prior to that incident. My wife had cancer. She went through major

> surgery. They gave her approximately six months to live. And I guess my sight was a little blurry. I went down the wrong path. I tried something I shouldn't. And once I realized it wasn't a part of me and wasn't going to help me or my wife, I gave it up.

Little more needs to be said on this subject. It is apparent that Grievant is not remorseful in the tragic sense. But he convinced the Arbitrator that he knows he did something stupid, wants to keep his job, and, therefore, won't do it again. That is enough.

* * *

The Union's disparate-treatment argument calls for only passing attention. It is founded on the allegation that two Correction Officers were reinstated -- one for reporting to work under the influence of alcohol, the other for growing marijuana. At least one, and possibly both reinstatements, resulted from grievance settlements. The Union did not know for sure. The State's Advocate argued vigorously that these examples should not be determinant. He said: "The Union can't have it both ways. They can't get a settlement in one case and use it in another to show disparate treatment." The Arbitrator agrees with the Advocate.

Disparate treatment is an affirmative defense. The Union has to prove its elements. It does not exist unless there is a marked distinction in the penalties imposed on employees who commit the same or similar offenses under the same or comparable circumstances, with no substantive difference in mitigating factors. The Union introduced no such evidence and, therefore, the defense will not succeed.

* * *

Finally, the Arbitrator must address mitigating factors. The most pronounced is that Grievant has a ten-year history with only unrelated infractions.[11] That service record and the probability that this Employee could be salvaged should have been evaluated before the Agency decided on terminal discipline. The Lebanon Correctional Institution gave Grievant no such consideration. It summarily dismissed him solely because of his alleged involvement with cocaine. In the hearing, the Warden explained why. He said that Grievant forfeited his job by "compromising his ability as a Correction Officer":

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[11] All prior disciplines were for attendance/call-in violations. There was a written reprimand in November 1994, another in May 1995, and a one-day suspension in June 1995.

> An Officer's primary duty is security, and one of the chief [security concerns] is drugs. How do I trust [Grievant]? How do I trust him to come in here and try to keep others straight?

The State Advocate's final argument reflected the same position. He began by saying that a known drug user cannot carry out the functions of a Correction Officer at Lebanon. He followed that with the argument that a crack user is impervious to rehabilitation:

> It is common knowledge that crack is very addictive, that it goes straight to the pleasure center of your brain. And it stands to reason that once you try it, you always have cravings for it. Now how do you trust somebody to come into an institution where there are drugs to look at inmates to enforce the drug policies of the institution? How do you know that he won't be manipulated by the inmates to work with them? "Hey, you use, I use. It's us against them."

If the Arbitrator were to adopt the State's theory and deny the grievance on that basis, he would be saying that no one who has ever tasted crack is fit to be a Correction Officer. That might be the Department's belief, but it is not consistent with just cause. If the belief were accurate, what would be the use of an EAP and Section 24.09? Such an award would seriously undermine both the purpose and hopes that went into creating them.

Maybe crack becomes immediately addictive and users cannot recover. As it stands, however, that is nothing more than the Advocate's conjecture; it is not supported by convincing evidence or any evidence at all. Furthermore, it is out of sync with published studies on the subject.

In reinstating this Employee, the Arbitrator might be accused of invading Management's judgment and taking a permissive approach to misconduct. That might be so. If the Agency had carried its obligations under the just-cause mandate, the Arbitrator would have been more hesitant to intrude. But where Management imposes discharge in knee-jerk fashion without attention to the common elements of just cause, the door opens for arbitral intervention. When the employer ignores mitigating factors, an arbitrator cannot.

The evidence does not convince the Arbitrator that Grievant was unsalvageable. It does show that, if reinstated, he probably will not commit the offense a second time. What is more important, it shows that he earned a reservoir of leniency by working as a Correction Officer more than ten years.

* * *

Grievant will be reinstated with full seniority. Back wages present a perplexing problem for the Arbitrator. Ordinarily, this Employee would receive

perhaps a 30-day suspension with the balance of his lost pay. In this situation, that would be demonstrably inequitable. The Arbitrator has authority to construct whatever award he considers fair, and will do so here. His ruling will be that Grievant will recover only six months' lost pay.

AWARD

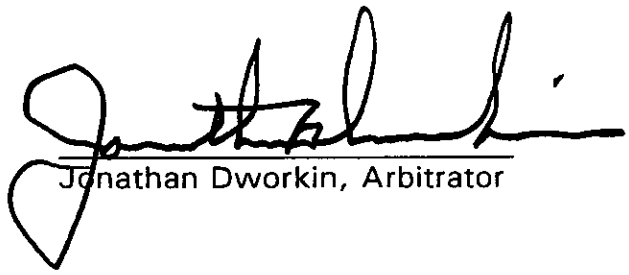
The grievance is partly sustained and partly denied.

The Department of Rehabilitation & Correction is directed to reinstate Grievant without delay and with full, unbroken seniority.

The removal is modified to a 30-day disciplinary suspension. However, the Department shall be liable only for six months' straight-time back pay at the rates in effect from June 2, 1996 to and including December 1, 1996.

In all other particulars, the grievance is denied.

Decision Issued at Lorain County, Ohio June 11, 1998.



Jonathan Dworkin, Arbitrator