#1323

ARBITRATION DECISION

November 2, 1998

In the Matter of:

State of Ohio, Department of Mental Health Twin Valley Psychiatric System	)	
and	)	Case No. 23-08-971125-1579-01-06 Thomas Dyke, Grievant
Ohio Civil Service Employees Association, AFSCME Local 11	)	

APPEARANCES

For the State:

Malleri Johnson-Myricks, Labor Relations Officer, Department of Mental Health
Rhonda Bell, Labor Relations Specialist, Office of Collective Bargaining
James Ignelzi, Chief Executive Officer, Twin Valley Psychiatric System
Albert Hogan. Administrative Assistant, Twin Valley Psychiatric System
Carla Sowder, Twin Valley Psychiatric System, Dayton Campus
Kimberly Zianno, Attorney, Office of Collective Bargaining, Observer
Robert Sycks, State Trooper
Dan Moles, Operations Manager, Twin Valley Psychiatric System, Dayton Campus
Bernice Puller, Lieutenant, Twin Valley Psychiatric System, Dayton Campus

For the Union:

Penny Lewis, Staff Representative
Thomas Dyke, Grievant
Cathy Graves, Chief Steward
Daniel Charles, Plant Services Manager

Arbitrator:

Nels E. Nelson

BACKGROUND

The grievant, Thomas Dyke, was hired by the Department of Mental Health on May 25, 1977. He worked at the Dayton Campus of the Twin Valley Psychiatric System. It serves clients with severe mental disabilities. Sixty percent of the clients are forensic cases. Many of the clients face substance abuse issues. At the time of his removal the grievant was classified as a Carpenter 1.

The events leading to the grievant's discharge appear to have begun in December 1996. On December 31, 1996 Laurie Rinehart, a security consultant at the Department of Mental Health, advised Trooper D.R. Anverse that she had received information that an employee (the name is redacted but presumably it is the grievant) was selling drugs at TVPS. Anverse interviewed the informant who indicated that the employee was using and selling marijuana at the facility. Anverse spoke with Trooper Robert Sycks who advised him that there was insufficient evidence to initiate a case.

In the meantime a complaint was made to the office of Congressman Dave Hobson about drug related activities at TVPS. The complaint was referred to the Governor's office and on March 17, 1997 Sycks was assigned to investigate. The grievant and another employee, whose identity was not revealed to the Arbitrator, were listed as suspects.

On March 27, 1997 Sycks interviewed an unidentified informant. He or she stated that the grievant was selling marijuana at TVPS and was assisted a nursing department employee. The informant also reported that marijuana was being used in offices and restrooms of the maintenance building.

Sycks continued his investigation. He did LEADS and Criminal Case History checks, sought information from the Dayton Police Department, and interviewed a number of TVPS employees including Pat Torvich, the former superintendent. The grievant was placed under surveillance on eight occasions between March 1997 and September 1997 but no improper activities were observed.

On October 1, 1997 Sycks used two K-9 units to conduct a drug sweep of the maintenance department and the adjacent parking lot. When one of the dogs alerted on the grievant's car, he was called to the lot. The Highway Patrol's Report of Investigation reveals that a search of the grievant's car turned up "marijuana seeds and loose vegetation ... under the right front seat, under and along the right side of the left front seat and in and under the center console." The report also indicates that "the front ash tray contained several ... marijuana roaches."

The dog also alerted on the state pick-up truck the grievant drove to the parking lot. A search of the vehicle uncovered a hemostat which is sometimes used in smoking marijuana. Subsequent testing revealed marijuana residue on the hemostat.

On October 11, 1997 Dan Charles, the grievant's supervisor, requested that disciplinary action be taken against the grievant for possession and conveyance of an illegal substance on to state hospital property. A pre-disciplinary meeting was held on October 23, 1997. The grievant was informed on November 20, 1997 that effective the next day he was being removed for failure of good behavior as defined in Directive HR-03.

The grievant filed a grievance on November 24, 1997. He claimed that he was not guilty of the charge against him and stated that he had no prior discipline and 20 years of seniority. The grievance was denied at step three on February 4, 1998.

In the meantime the legal process went forward. On November 5, 1997 Sycks presented the facts to an assistant county prosecutor. The prosecutor agreed to present a charge of conveyance of marijuana on to state property in violation of Section 2926.36(A)(2) of the Ohio Revised Code to the Grand Jury. The case was initially scheduled for the Grand Jury on December 16, 1997 but was not presented until February 11, 1998. On February 17, 1998 Sycks learned that the case was ignored by the Grand Jury. He immediately advised Rinehart of the Grand Jury's action and closed the case against the grievant.

When the grievant's discharge stood, the case was appealed to arbitration on June 2, 1998. The hearing was held on September 17, 1998. The parties post hearing briefs were received on October 3, 1998.

ISSUE

The issue as agreed to by the parties is:

Was the grievant removed for just cause? If not, what should 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.

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 oral reprimand(s) (with appropriate notation in employee's file);
B. one or more written reprimand(s);
C. a fine in an amount not to exceed two (2) days pay for discipline related to attendance only; to be implemented only after approval from OCB;
D. one or more day(s) suspension(s);
E. termination.

* * *

24.05 - Imposition of Discipline

* * *

Disciplinary measures imposed shall be reasonable and commensurate with the offense and shall not be used solely for punishment.

POSITION OF THE STATE

The state argues that the grievant was properly removed for failure of good behavior for possession of an illegal drug while on the Dayton Campus of TVPS. It points out that when his car was searched, marijuana seeds and loose vegetation were found under the right front seat, along the right side of the left front seat, and around the center console and that several marijuana roaches were found in the ashtray. The state notes that the grievant admitted to Sycks that some of the loose marijuana belonged to him but that he claimed that the roaches belonged to friends who he refused to identify. It observes that the state pick-up truck which the grievant was driving had a hemostat with marijuana residue on it. The state reports that a total of .626 grams of marijuana were seized.

The state challenges the union's claim that the grievant did not know there was marijuana in his car and that he did not have any intention of bringing drugs on the grounds. It acknowledges that the grievant gave his key to Sycks to search his car but indicates he did so only after he asked him what would happen if he refused. The state stresses that marijuana was found in the grievant's car and the grievant was responsible for bringing it on the grounds.

The state rejects the union's charge that the highway patrol's investigation targeted the grievant while it ignored others who had been identified as having drugs on the grounds. It indicates that Sycks testified that "because he never found any evidence that [the grievant] was doing anything illegal there was no need to investigate others as their information indicated that these employees were receiving drugs from [him]." (State Post Hearing Brief, page 5). The state further notes that the highway patrol determined how the investigation was conducted and that the conduct of the investigation is not relevant to the charges against the grievant except for October 1, 1997 when the marijuana was found in the grievant's car.

The state disputes the union's charge that it failed to take into account the grievant's good work record and his length of service. It points out that James Ignelzi, the

chief executive officer of TVPS, testified that he considered these factors before recommending the grievant's removal. The state notes that Ignelzi stressed that the facility does many things to insure a drug-free workplace.

The state contends that the grievant's long service and good record do not insulate him from termination. It observes that its disciplinary policy calls for removal for the first offense for the possession of illegal drugs on the premises. The state reports that its Drug-Free Workplace Policy indicates that an employee in possession of illegal drugs will be disciplined. It claims that "due to the nature of our clients, our role as servants of the courts, and our duty to our clients and the community it is imperative that our employees remain above reproach." (State Post Hearing Brief, page 6).

The state challenges the union's assertion that the amount of marijuana that was found was too small to warrant removal. It points out that Section 2921.36 of the Ohio Revised Code prohibits bringing drugs on the grounds of a Department of Mental Health facility without any reference to an allowable amount. The state notes that a sign is posted at the entrance to the Dayton Campus to remind employees of this prohibition. It observes that Ignelzi testified that there is zero-tolerance for illegal drugs on the grounds.

The state maintains that the grievant is not entitled to a "freebie" under the Drug-Free Workplace Policy. It acknowledges that under the policy an employee who is found to be under the influence of drugs or alcohol while on the job will not be disciplined on the first occasion provided he or she completes a treatment program. The state stresses, however, that the grievant was not charged with being under the influence and did not meet the criteria to be tested under Appendix M of the collective bargaining agreement.

The state submitted the decision of Arbitrator Rhonda Rivera in OCSEA, Local 11, AFSCME and Department of Rehabilitation and Corrections, Office of Collective Bargaining, Grievance Nos. 27-10-(10-23-90)-66-01-03 and 27-10-(10-23-90)-67-01-03 in support of its position. It points out that in that case Arbitrator Rivera upheld the removal of two employees who had brought marijuana on to state property. The state

notes that she held that progressive discipline was unwarranted given the seriousness of the offense.

The state asks the Arbitrator to deny the grievance in its entirety. It admits that it is unfortunate for a 20-year employee to lose his job but emphasizes that the grievant chose to engage in illegal activity and to bring marijuana on the grounds of a mental health facility. The state asserts that it must be free to decide not to employ an individual with such a lack of respect for the law and the policies and mission of the Department of Mental Health.

POSITION OF THE UNION

The union argues that the state did not show by a preponderance of the evidence that the grievant "knowingly" and "intentionally" conveyed an illegal substance on to state hospital grounds. It points out that after five months of surveillance the state found no evidence whatsoever of any wrongdoing by the grievant on or off the job. The union notes that as a result the highway patrol conducted a K-9 sweep.

The union contends that the sweep turned up a "very, very small amount" of marijuana. It observes that marijuana was found under the right front seat and under and along the right side of the left front seat along with several roaches in the ashtray. The union stresses that the total weight of the marijuana was only .626 grams -- less than one-half of a marijuana cigarette.

The union maintains that other employees were identified as being involved in drug activities. It observes that when Anverse interviewed an informant, he or she identified a nursing employee as a heavy cocaine user and indicated that the employee "ran around a lot with the grievant." The union reports that a March 6, 1997 letter from Michael Hogan, the Director of the Department of Mental Health, listed the grievant and another employee as the people to be investigated and stated that "it has been suggested that other hospital

employees are also involved." It notes that on March 17, 1997 an informant told Sycks that a nursing employee transported and sold marijuana.

The union charges that the grievant was subject to disparate treatment. It points out that none of the other employees who were identified were placed under surveillance. The union notes that when the K-9 sweep was conducted, it was confined to the maintenance building and the adjacent parking lot even though nursing employees were identified as being involved.

The union acknowledges that marijuana residue was found on a hemostat in a state truck that the grievant was driving on October 1, 1997. It maintains, however, that hemostats are used by virtually all maintenance employees for repairing locks. The union reports that the truck is frequently driven by other employees. It observes that the grievant was off work on the two days prior to the day when the hemostat was found and the truck was driven by other employees on those two days.

The union contends that there is flexibility with respect to penalties. It reveals that Ignelzi testified that the disciplinary grid permits flexibility and that penalties should be determined on a case-by-case basis. The union notes that Directive HR-03 states that "serious disciplinary measures ... are used only when the basic method of supervisor or discipline have failed to produce the desired results." (Union Post Hearing Brief, page 3).

The union argues that the grievant should not have been removed. It observes that the grievant was a dedicated, 20-year employee who had accumulated no discipline. The union stresses that despite these facts the grievant was not given the opportunity to correct his mistake.

The union cites two provisions of Article 24 of the collective bargaining agreement. It points out that Section 24.01 refers to "flexible" corrective action. The union notes that Section 24.05 requires discipline to be "reasonable" and "commensurate with the offense" and prohibits discipline "solely for punishment."

The union offered two Arbitrators' decisions in support of its position. It indicates that in State of Ohio, Department of Rehabilitation and Correction and Ohio Civil Service Employees Association, OCSEA/AFSCME Local 11, Case No. 27-11-(6-3-96)-476-01-03, Arbitrator Jonathan Dworkin reduced the termination of an employee who had been discharged for purchasing cocaine while off-duty to a 30-day suspension based on the employee's ten years of service and his belief that the grievant could salvage his job. The union observes that in Ohio Civil Service Employees Association Local 11, AFSCME and Ohio Department of Youth Services, Case No. 35-03-950526-056-01-03, Arbitrator Anna DuVal Smith modified the removal of two employees for bringing drugs on to state property to 15-day suspensions after considering their good records and years of service and the lack of evidence of drug abuse or drug trafficking.

The union concludes that the grievant was "targeted and basically ambushed by the Highway Patrol and management." (Union Post Hearing Brief, page 5). It requests that the grievant's discipline be modified and the grievant be given an opportunity to correct his mistake.

ANALYSIS

The facts giving rise to the instant dispute are clear. In the fall of 1996 the department received information that the grievant and a number of other employees were bringing drugs on to the Dayton Campus of the TVPS. The Highway Patrol placed the grievant under surveillance but found no improper activities. On October 1, 1997 the patrol used two K-9 units to conduct a drug sweep of the maintenance department and the adjacent parking lot. The sweep led to the discovery of .626 grams of marijuana in the grievant's car. It also resulted in the recovery of a hemostat with marijuana residue on it in the state pick-up truck the grievant was driving at the time of the drug sweep.

A pre-disciplinary hearing was held on October 23, 1997. One month later the grievant was informed that he was being removed for failure of good behavior for the

possession and conveyance of an illegal substance on to state property. The grievant filed a grievance claiming that he was not guilty of the charge against him and noting that he had 20 years of service and no prior discipline. The grievance was denied at step 3 on February 4, 1998 and was appealed to arbitration.

The charge that the grievant conveyed marijuana on to the Dayton Campus and possessed it on the grounds is a very serious matter. Such action would not only violate the department's rules and the state's drug-free workplace policy but would be a breach of the Ohio Revised Code. In fact, a sign posted at the entrance to the Dayton Campus warns those entering that it is a violation of state law to bring drugs on to the grounds of a mental health facility. More specifically, it references Section 2921.36 of the Ohio Revised Code which states that "no person shall knowingly convey ... on to the grounds of an institution that is under the control of the department of mental health .. any drug." The 1995 amendments to this section make such conduct by an employee a fourth degree felony. Thus, if the state were able to prove the charges against the grievant, the union would have a heavy burden to establish that the grievant should not be removed from his position.

The Arbitrator, however, does not believe that the state was able to establish that the grievant is guilty of the charges against him. While it is true that the search of the grievant's car did find marijuana, it consisted of bits of leaf material and seeds scraped from the carpet on the floor of the car and several roaches taken from the ashtray. Although finding scraps of marijuana in the grievant's car might constitute evidence of the prior use of marijuana, it does not indicate that the grievant knowingly conveyed and possessed marijuana on the Dayton Campus.

This conclusion is strongly supported by the action of the Grand Jury. The facts of the grievant's case were presented to the Grand Jury but it chose to take no action. If it felt that there were reason to believe that the grievant had conveyed or possessed marijuana, he would have been indicted. Interestingly, the department's December 22,

1997 step three grievance response erroneously states that "the grievant was indicted by a Grand Jury and the Department is waiting to hear the verdict." (Joint Exhibit 2B).

The hemostat with marijuana residue found in the state pick-up truck the grievant was driving on October 1, 1997 is entitled to even less consideration than the scraps of marijuana in the grievant's car. The state acknowledges that the truck was used by many employees and that other employees had driven the truck the previous two days while the grievant was off work. There is simply no way to know whether the hemostat was ever used by the grievant to smoke marijuana.

While the Arbitrator does not condone the grievant's off-duty use of marijuana, it cannot serve as the basis for the grievant's removal. First, the grievant was discharged for conveying marijuana on to the Dayton Campus and possessing it on the grounds rather than the off-duty use of marijuana. Second, even if the grievant had been charged with the off-duty use of marijuana, the state would have had to establish a connection between the grievant's off-duty conduct and his job. Where an employee holds a position such as a correction officer, a nexus is easy to establish because of the potential manipulation of a correction officer by an inmate should the inmate learn of the correction officer's illegal conduct. However, even in such cases Arbitrators have sometimes found grounds to reinstate a correction officer removed for off-duty drug activity. For example, the union cited State of Ohio, Department of Rehabilitation and Corrections and Ohio Civil Service Employees Association, OCSEA/AFSCME Local 11, Case No. 27-11-(6-3-96)-01-03, where Arbitrator Jonathan Dworkin reinstated a correction officer at the Lebanon Correctional Facility, who he concluded had purchased crack cocaine, because he felt that the grievant was remorseful and would not engage in such activity in the future and because he believed that the grievant was entitled to leniency due to his ten years of service.

The Arbitrator's decision in the instant case is consistent with the decision in OCSEA, Local 11, AFSCME and Department of Rehabilitation and Corrections, Office of

Collective Bargaining, Grievance Nos. 27-10-(10-23-90)-66-01-03 and 27-10-(10-23-90)-67-01-03, which was cited by the state. In that case Arbitrator Rhonda Rivera upheld the removal of two employees of the Department of Rehabilitation and Corrections for the possession and conveyance of marijuana on to state property. However, in the case before Arbitrator Rivera a drug sweep uncovered a" baggie of marijuana" in one employee's car rather than just scraps of marijuana from the floor and the ashtray as in the instant case. Furthermore, both employees were correction officers at the Hocking Correctional Facility and Arbitrator Rivera recognized that their drug use represented a threat to security at the institution. In the instant case there was no indication that the off-duty use of marijuana by the grievant, a carpenter at the Dayton Campus of the Twin Valley Psychiatric System, created a threat to security.

The Arbitrator notes that his decision is supported by the decision of Arbitrator Anna DuVal Smith in Ohio Civil Service Employees Association Local 11, AFSCME and Ohio Department of Youth Services, Case No. 35-03-950526-056-01-03, which was submitted by the union. In that case a drug sweep resulted in the seizure of three small plastic bags of marijuana and drug paraphernalia from the car of a correction officer at a Department of Youth Services facility for young felons. Even though the grievant was found guilty in court of conveying drugs on to state property, Arbitrator Smith reinstated the grievant with a 15-day suspension. She stated that she was not convinced that the grievant knew that the marijuana was in his car. Arbitrator Smith also noted that a manager who had committed a similar offense had not been removed and that there was no indication that the grievant had used or trafficked in drugs on-duty or off-duty.

The Arbitrator understands the department's concern about the events which gave rise to the instant case. One or more informants stated that the grievant was bringing marijuana on to the campus and was involved with other employees in distributing it at the facility. However, despite the efforts of the Highway Patrol no evidence was uncovered

to support these accusations. Clearly, any attempt to discipline the grievant based on the reports of one or more unnamed informants would be improper.

The remaining issue is the proper remedy. While it is clear that use or possession of marijuana in any location violates the Ohio Revised Code, the charge against the grievant is that he conveyed marijuana on to the Dayton Campus and possessed marijuana on the grounds. Since the Arbitrator has concluded that he did not do so, the grievant must be reinstated and made whole.

AWARD

The grievant is to be reinstated with no loss in pay or benefits.

Nels E. Nelson
Labor Arbitrator

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Russell Township
Geauga County, Ohio

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