ARBITRATION SUMMARY AND AWARD LOG
OCB AWARD NUMBER: #1432

OCB GRIEVANCE NUMBER: **27-20-981221-3687-01-03**

GRIEVANT NAME: Tawn Smith

UNION: OSCEA/AFSCME Local 11

DEPARTMENT: Rehabilitation and Correction

ARBITRATOR: Anna DuVal Smith

MANAGEMENT ADVOCATE: Renee Macy

2ND CHAIR: Cindy Sovell-Klein

UNION ADVOCATE: James McElvain

ARBITRATION DATE: March 16, 2000

DECISION DATE: May 5, 2000

DECISION: DENIED

CONTRACT SECTIONS: Article 24

HOLDING: Grievance is DENIED. Grievant was charged with engaging in an unauthorized relationship with an inmate when the inmate gave him a haircut. Grievant was also charged with bringing unauthorized material into the institution. The Arbitrator found the Grievant did, in fact, engage in a relationship with the inmate, and did bring contraband into the prison. She denied the grievance.

COST: $875.00

VOLUNTARY LABOR ARBITRATION TRIBUNAL

In the Matter of Arbitration	*	
Between	*	
	*	OPINION AND AWARD
OHIO CIVIL SERVICE	*	
EMPLOYEES ASSOCIATION	*	Anna DuVal Smith, Arbitrator
LOCAL 11, APSCME, AFL/CIO	*	
	*	Case No. 27-20-981221-3687-01-03-T
and	*	
	*	
OHIO DEPARTMENT OF	*	Tawn Smith, Grievant
REHABILITATION	*	Removal
AND CORRECTIONS	*	

APPEARANCES

For the Ohio Civil Service Employees Association:

James McElvain, Staff Representative
Ohio Civil Service Employees Association

For the Ohio Department of Rehabilitation and Corrections:

Renee B. Macy, Labor Relations Specialist
Ohio Department of Rehabilitation and Corrections

Cindy Sovell-Klein
Ohio Office of Collective Bargaining

I. HEARING

A hearing on this matter was held at 9:00 a.m. on March 16, 2000, at the Mansfield Correctional Institution in Mansfield, Ohio, before Anna DuVal Smith, Arbitrator, who was mutually selected by the parties, pursuant to the procedures of their collective bargaining agreement. The parties stipulated the matter is properly before the Arbitrator and presented one issue on the merits, which is set forth below. They were given a full opportunity to present written evidence and documentation, to examine and cross-examine witnesses, who were sworn or affirmed and excluded, and to argue their respective positions. Testifying for the Ohio Department of Rehabilitation and Corrections (the "State") were Captain Ben Rachel (Retired), Corrections Officer Chris Humbert and Corrections Officer Michael Miller. Also present were David Burris and Esther Thomas. Testifying for the Ohio Civil Service Employees Association (the "Union") was the Grievant, Tawn A. Smith. Also in attendance were Doug Sollito (Chapter President) and Jim Beverly (Chapter Vice President). A number of documents were entered into evidence: Joint Exhibits 1-7 and State Exhibits 1-3. The oral hearing was concluded at 11:30 a.m. on March 16. Written closing statements were timely filed and exchanged by the Arbitrator on April 4, 2000, whereupon the record was closed. This Opinion and Award is based solely on the record as described herein.

II. STATEMENT OF THE CASE

At the time of his removal in December of 1998, the Grievant had been a corrections officer for the State of Ohio for ten years. His active discipline consisted of the following:

1-15-97	Written reprimand	Absence: call-in
9-26-97	Written reprimand	Absence: documentation
1-3-98	Fine: 1 day	Absence: call-in
1-7-98	Verbal reprimand	Following orders, regulations, policies, etc.
3-21-98	Suspension: 5 days	Absence: excessive or abuse of leave
5-19-98	Suspension: 5 days	AWOL, document falsification

The circumstances of the May suspension were that the Grievant was arrested in the company of an ex-felon while driving a car the Grievant had borrowed when his own car would not start. The arrest was for driving without an operator's license, no license plate light and misdemeanor possession of marijuana. When the Grievant reported for work after being released, he put down "car trouble" on his request for leave but did not report having been arrested, which is a violation of Rule 26. Unauthorized fraternization with a former felon is a violation of Rule 56b.

The events that led to the Grievant's removal began on August 11, 1998, when he was assigned to the medium-security Richland Correctional Camp ("Camp") adjacent to Mansfield Correctional Institution ("MANCI"). Cpt. Ben Rachel testified he had heard rumors that the Grievant had been getting haircuts from an inmate, so when the Grievant's partner, CO Chris Humbert was called in for discipline regarding contraband (for which he subsequently received a one-day suspension), he asked him about it, but Humbert had nothing to say about it. Humbert denies he was offered a lesser penalty in exchange for making a statement against a fellow officer. However, he testified that before he came into the Camp that day, the Grievant

mentioned that he was going to get a haircut that night. Around 2:00 a.m., the Grievant took Inmate Starr into the staff restroom. Humbert saw the inmate with hair clippers but did not hear them running or see the inmate using them. Neither did he see the cigar the inmate later claimed he had received from the Grievant. However, he could tell the Grievant had gotten his hair cut because he saw him before they went into the restroom and after they came out. He wrote an incident report about it that night. For his part, the Grievant denies telling Humbert he needed or was getting a haircut and claims he took the inmate, who is a porter, into the restroom so he could put cleaning supplies away. He believes the inmate was coerced for his statement and states that he did not have a good relationship with Cpt. Rachel.

When Rachel got Humbert's report, he sought permission to have the Grievant reassigned from the Camp to MANCI in order to protect the investigation. That permission was granted on August 14. On August 18, when he pulled the Grievant from the Camp to reassign him, the Grievant said he had left his lunch and a coat back at the Camp. Rachel instructed a floater, CO Billotte, to locate these items and bring them over to MANCI, but Billotte reported he could find only a briefcase. Rachel told him to send it over and ask the Grievant about the other things. Billotte handed the briefcase off to the yard patrol, but was unable to reach the Grievant. The Grievant did, however, call his partner, CO Humbert, to ask him to keep the briefcase for him until the shift was over, but by this time it had already been sent to MANCI.

Unlike at the Camp, staff articles coming into MANCI are subject to search. CO Michael Miller, who is also a Union steward, was assigned to the entry building that night and took the briefcase from Officer Charlie Harper, who had carried it over from the Camp.

Miller searched the briefcase in the presence of CO Veronica Russell and Lt. James Hicks. It contained a number of contraband items including magazines, books from the inmate-only MANCI library, and a seed, later identified by the Ohio Highway Patrol to be marijuana. The Grievant admits he knew the reading material was contraband and that he called Humbert to take his briefcase out of the Camp. He says he had this material to help him stay awake on third shift and that this is common practice at the institution. He was not aware of the drug residue, however, and has no idea how it got into his briefcase. However, he notes three people handled the case that night and says the state trooper told him he did not find any package and did not know why he had been called in.

Predisciplinary meeting notices were sent on September 8 (for the haircut incident) and October 22 (for the contraband incident). The predisciplinary hearings were held on October 28 resulting in findings of just cause for discipline. The Grievant was subsequently removed effective December 14, 1998, for violations of Rule 7 (failure to follow post orders) and 45b (giving preferential treatment to an inmate) in that the Grievant permitted an inmate to cut his hair and gave him a cigar as payment. The letter also cites violations of Rule 30a (conveyance, etc. of drugs) and 30c (conveyance, etc. of other contraband) in that the Grievant brought books, magazines and a seed of marijuana into the Camp.

The removal was grieved on December 15 and processed through the grievance procedure without resolution until it came to arbitration where it presently resides, free of procedural defect, for final and binding decision.

III. ISSUE

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

IV. ARGUMENTS OF THE PARTIES

Argument of the State

The State submits that it did not stack the charges against the Grievant. His acts were sufficient to support all the charges. With respect to the haircut incident, the first time the Grievant offered any explanation for why he took the inmate into the restroom was in arbitration and his story that he did so to have the inmate stack supplies is just not credible given that this was in the middle of the night. On the other hand, it is unrebutted that the Grievant's hair was shorter when he came out than when he went in to the restroom. Thus, the evidence as a whole is sufficient to support violation of Rule 7 and 45b. With respect to the contraband incident, it is uncontroverted that the Grievant's briefcase contained books and magazines, including inmate-only material that the Grievant had no business having in his possession. In addition, although the Grievant claimed not to know how the marijuana seed got into his briefcase, he did admit that he had been arrested and charged with possession of marijuana. The Grievant accordingly violated both Rule 30a and Rule 30c.

The State contends that it followed the principle of progressive discipline when it removed the Grievant. Before the haircut incident he had accumulated an extensive disciplinary record including a previous violation of Rule 7 and falsification of an official document just six months earlier. Despite what the Union contends, not all of the Grievant's discipline was attendance related. Referring to the Department's disciplinary grid, the State

points out that a second violation of Rule 7 calls for a 3-5 day suspension; a first violation of Rule 30c or 45b calls for a short suspension (1-3 days) up to removal; and a first violation of Rule 30a justifies removal. Therefore, concludes the State, removal is appropriate in this case.

However, should the Arbitrator overturn the discharge, the State argues that the remedies requested by the Union are inappropriate. The Union submitted no evidence about what, if any, overtime the Grievant worked. Therefore, this is just a request for speculative damages. Second, the Grievant, himself, chose to exhaust his PERS balance. This, too, is a remedy that should be denied. If the Arbitrator finds the Grievant's actions were not sufficient to support a removal, the State asks that he be reinstated without back pay because of the severity of his offenses.

Argument of the Union

The Union argues that the State stacked the charges and grouped the two incidents in order to support removal. Looking first at the alleged haircut incident, the Union points out that the State relies on the testimony of a corrections officer who did not see a haircut or the giving of a cigar, or hear the clippers being run. The Union submits that there are credibility issues here. The captain testified numerous officers told him about the alleged haircuts, but he could not name one of them. He also said he talked to CO Humbert about the Grievant getting haircuts from an inmate, but Humbert testified he did not. The Union notes the context of this conversation: CO Humbert was being charged, himself, with bringing contraband into the institution. If he had heard the Grievant talking about getting a haircut earlier that day, why did he not tell the captain at his own investigatory interview? Finally, the inmate's use of the phrase "as you would say" implies he was either intimidated or being told what to write.

Looking next at the contraband incident, the Grievant admits he was wrong to bring magazines into the institution, but strongly denies he knew anything about the marijuana seed. The Union asks the Arbitrator to note that Miller testified the Grievant did not bring the briefcase to the entry building and that there were conflicting statements about how many seeds it contained. The Union submits that the State did not prove the Grievant violated Rule 30a. As for Rule 30c, which the Grievant admits violating, the disciplinary grid calls for a 1-3 day suspension on a first offense, which is what CO Humbert got. If the Arbitrator relies on the Grievant's prior discipline, which she should not since all of it was attendance related (the May 15, 1998, occurrence being a car that would not start), then there is wide latitude because the grid calls for a suspension of 5-10 days to a removal for a second offense.

The Union concludes that there is not just cause for removal. It asks that the Grievant's record be expunged and that he be reinstated with full back pay, no loss of seniority, lost overtime opportunities, leave balances restored and accrued, PERS balance restored, and made whole in every way.

V. OPINION OF THE ARBITRATOR

Since the Grievant admits to having brought contraband reading material into the institution and there is evidence the Employer enforces this rule, the Arbitrator need only determine whether removal is justified for this violation in the context of the Grievant's record with the Department or if there is sufficient proof of other violations serious enough to warrant removal.

The Grievant's record consists mostly of attendance violations. His most recent suspension, however, was not because he had "car trouble" causing him to be absent, but

because he was arrested, used his broken-down car as an excuse, and failed to report the arrest. Had he been candid when he reported for duty, he may have received discipline for being AWOL–an attendance violation–but not for the other charges. Thus, even if discipline progresses separately for attendance, the Grievant has a history of two other incidents in which he was disciplined for violating other work rules and he had served two 5-day suspensions in the five months immediately prior to the events of August 11-18. For these reasons, the 30c violation taken alone justifies progression to a major suspension to impress upon the Grievant the importance of complying with the Employer's work rules.

Turning now to the Rule 30a charge, the evidence that the Grievant brought a marijuana seed into the institution is circumstantial and weak. While it is true a seed was found in his briefcase, there is no evidence the briefcase was locked and at least two other individuals handled it before it was searched by Officer Miller. The fact that the Grievant was arrested for marijuana creates the suspicion that he, himself, was responsible for its presence, but suspicion is not clear and convincing proof.

On the other hand, I am convinced he got the haircut from the inmate as alleged. Even though CO Humbert did not see the Grievant's hair being cut or hear the clippers, he saw the inmate with the clippers and the Grievant go into the locked staff restroom and come out again. He also saw the length of the Grievant's hair before and after. No plausible conclusion could be drawn other than the inmate cut the Grievant's hair as he said he did. Moreover, the Grievant's explanation–that at 2 or 2:30 a.m. he woke the inmate up and took him into the restroom to stack cleaning supplies–defies credulity without some reasonable explanation for why this was done in the middle of the night.

As to the Union's other contentions, I do not find the discrepancy between Cpt. Rachel's and CO Humbert's testimony discrediting to Humbert. Rachel's version of his investigatory interview with Humbert is corroborated by Humbert's incident report of August 11, 1998. The fact that in arbitration Humbert did not remember Rachel talking to him about the Grievant on August 11 is better explained by the passage of time and Humbert's nervousness about testifying against a fellow officer than that he cut a deal with the captain. He was, after all, disciplined for his own offense within the grid's guidelines.

The Union also contends the inmate's use of the phrase "as you would say" indicates words were placed in his mouth by the captain who was out to get the Grievant. To begin with, no reason for or evidence of the captain's alleged animosity was given. Second, the phrase pointed to modifies a euphemism for "cigar," namely "black and mild." Rather than implying that the captain ("you") told him to say he had received a cigar, these words are a figure of speech flagging the words that follow as another figure of speech.

I therefore find the Grievant guilty of dealing with an inmate. Like the contraband violation, this, by itself, would justify a major suspension on top of the Grievant's existing discipline record. Together, the two offenses committed in two separate acts separated by about a week do not constitute "stacking the charges." In the context of the Grievant's history of repeated failures to conform to his employer's expectations, removal is justified.

VI. AWARD

The grievance is denied in its entirety.

Anna DuVal Smith

Anna DuVal Smith, Ph.D.
Arbitrator

Cuyahoga County, Ohio
May 5, 2000
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