#1452

ARBITRATION DECISION

October 2, 2000

In the Matter of:

State of Ohio, Department of Rehabilitation and Correction, Ohio Reformatory for Women	)	
and	)	Case No. 27-19-(99-08-27)-01-03 Maurice Smith, Grievant
Ohio Civil Service Employees Association, AFSCME Local 11	)	

APPEARANCES

For the Department:
David Burrus, Labor Relations Officer, Department of Rehabilitation and Correction
Meredith Lobritz, Office of Collective Bargaining
Neni Valentine, Office of Collective Bargaining
Kathy Merrill, Labor Relations Officer
James Hoffman, Institutional Investigator
Kathy Durham, Trooper

For the Union:
George L. Yerkes, Staff Representative
Tim Roberts, Staff Representative
Charles Cook, Acting President
James Adkins, Chief Steward
Maurice Smith, Grievant
Andrea Smith, Witness
Brendan Jamal Carson, Witness
Joey Hawke, Sergeant
Cheryl King, Correction Officer
Kimberly Lescalleet, Correction Officer Counselor
Mark Johnson, Sergeant
Roland Alvarez, Correction Officer

Arbitrator:

BACKGROUND

The grievant is Maurice Smith. He was hired as a Correction Officer at Ohio Reformatory for Women on September 12, 1994. At the time of his removal he had no discipline on his record.

The events leading to the grievant's removal occurred on June 7, 1999. On that date Trooper Kathy Durham, who is assigned to the ORW, and Trooper Darrin Fussner, a K-9 handler, conducted a routine drug sweep of the parking lot. James Hoffman, the institutional investigator at ORW, accompanied them.

In the course of the sweep, Buckeye, the K-9, alerted on a green Honda. When Durham saw what appeared to be a marijuana seed on the front seat, she ran the license plate and discovered that the car was registered to Correction Officer Andrea Shelton. Shelton was not at work but her car was driven onto the grounds by the grievant, who at the time was her fiancée and is now her husband.

When the grievant was brought to the lot, the car was searched. It resulted in the discovery of five seeds -- one on the front seat, two on the floor, and two in the trunk -- and a small amount of material in a cigar butt in the ashtray. A NIK test indicated that the seeds were marijuana.

The grievant was also searched. It revealed that the grievant had a hollowed out cigar and a cellophane wrapper containing tobacco in his breast pocket. Durham's report states that the cigar was the same brand as the cigar found in the ashtray.

Durham questioned the grievant. He told her that the car had been driven the previous

evening by Brendan Jamal Carson, his cousin, and suggested that Carson was responsible for the marijuana found in the car. The grievant also indicated that he routinely removes the tobacco from his cigars and puts in only the tobacco he needs to smoke so as not to waste the cigar. He agreed to take a drug test and was transported to the Marysville Highway Patrol Post. After the grievant provided a urine sample, he returned to his post at ORW.

The events of the next month are contained in Durham's report. It indicates that she contacted the grievant and Shelton a number of times trying to get Carson's telephone number and that she paged Carson but that he did not respond. The report states that on July 8, 1999, Durham called the crime lab and learned that the grievant's urine test had come back positive for marijuana but the material taken from the car had not yet come back from testing.

On July 9, 1999, a pre-disciplinary hearing was conducted. The grievant was charged with "the conveyance, distribution, possession, or consumption of alcoholic beverages and/or drugs of abuse" while on duty or on state property in violation of Rule 30(a) of the Standards of Employee Conduct. Durham testified that a field test of the material found in the car indicated that it was marijuana and that the grievant had tested positive for marijuana use. She also stated that a criminal background check on the grievant indicated one charge of assault and two charges of domestic violence and an active warrant for assault. (Joint Exhibit 2, page 3). The union pointed out that Shelton was never questioned and claimed that another employee of ORW who was charged with violating Rule 30 was not removed. It stated that the grievant smoked Black & Mild cigars and had a habit of taking the tobacco out of them.

Following the pre-disciplinary hearing Durham received the lab reports. One report indicated that the material taken from the car was marijuana and that it weighed .207 grams. The other report stated that the grievant's urine test was positive and that it indicated that the grievant

had a level of 289.33 ng/ml of the marijuana metabolite. Both reports were forwarded to the Union County Prosecutor's Office.

The disciplinary action against the grievant proceeded. On July 27, 1999, Vicki Lucas, the Deputy Warden of Operations, held that the evidence and facts indicated that the grievant had violated Rule 30(a) of the Standards of Employee Conduct. She found that just cause existed for discipline. On August 11, 1999, the appointing authority removed the grievant for violating Rule 30(a).

The union responded by filing a grievance on behalf of the grievant. It charged that the grievant was removed without just cause and alleged a violation of Article 24 and Appendix M of the collective bargaining agreement. The grievance asked that the grievant be reinstated and be made whole.

On September 1, 1999, the case was presented to the Grand Jury. A true bill was returned and an arraignment was scheduled for September 10, 1999. The grievant was ultimately arraigned on December 13, 1999, and a scheduling conference was set for February 7, 2000. (Joint Exhibit 2, page 9). The record indicates that the evidence was destroyed on February 11, 2000, but does not reveal the disposition of the case.

The step three grievance hearing was held on October 26, 1999. The state asserted that the grievant was properly removed when the Highway Patrol found five marijuana seeds in his vehicle. The union complained that the vehicle belonged to the grievant's fiancée; the Highway Patrol entered the vehicle prior to the grievant's arrival; the state failed to interview all of the witnesses; and the grievant was not allowed to speak at the pre-disciplinary hearing. The hearing officer rejected these charges and denied the grievance.

The arbitration hearing was held on July 18, 2000. The record was to be closed on the

receipt of written closing statements on August 4, 2000. However, after the exchange of closing statements the state charged that the union's statement contained testimony and evidence not offered during the arbitration hearing. The parties agreed that rather than reopen the hearing, the state could submit a written rebuttal. The Arbitrator received it on August 24, 2000.

ISSUES

The issue as agreed to by the parties is:

Was the grievant's removal for just cause? If not, what is the proper remedy?

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.

Appendix M
Drug-Free Workplace Policy

Section 1. Statement of Policy

* * *

D. Any employees suffering from a substance abuse problem shall receive the same careful consideration and offer of treatment that is presently extended under the State's existing benefit plans to those employees having other mental health and substance abuse conditions, as well as under the Employee Assistance Plan established under Article 9 of this Agreement...

* * *

Section 6. Disciplinary Action

On the first occasion in which any employee who is determined to be under the influence of, or using, alcohol or other drugs, while on duty, as confirmed by testing pursuant to this policy, the employee shall be given the opportunity to enter into and successfully complete a substance abuse program certified by the Ohio Department of Alcohol and Drug Addiction Services. No disciplinary action shall be taken against the employee, provided he/she successfully completes the program. Last chance agreements shall not be effective for longer than five (5) years ...

STATE POSITION

The state argues that the grievant was properly removed from his position. It points out that Rule 30(a) of the Standards of Employee Conduct prohibits the conveyance of drugs of abuse onto state property. The state notes that a sign posted on the entrance road reminds employees not to bring alcohol or drugs into the facility. It claims that the evidence that the grievant violated this rule is unrebutted.

The state contends that the grievant knew that there was marijuana in the car. It indicates that Durham testified that the grievant told her that he saw the marijuana seeds in the trunk when he changed a flat tire on the way to work. The state observes that when he was questioned later about seeing the seeds, he did not deny seeing them but said that he did not want to answer.

The state rejects the union's contention that the marijuana belonged to Carson. It claims that Carson failed to testify that the marijuana belonged to him or his friends. The state maintains that absent such an admission, it must be presumed that the marijuana belonged to the grievant.

The state disputes the charge that it failed to contact Carson. It reports that Durham testified that she tried to contact him but none of her calls or pages were returned. The state notes that even though Carson was the grievant's "witness and supposed alibi," the grievant offered no statement from him at the pre-disciplinary hearing or at step three of the grievance procedure.

The state argues that the amount of marijuana found in the car is irrelevant. It points out that Rule 30(a) does not establish different penalties for varying amounts of contraband. The state indicates that it has a zero tolerance policy. It cites State of Ohio, Department of Rehabilitation and Correction, Case No. 27-01-(97-08-20)-0094-01-09, Regina Cater, Grievant,

where Arbitrator John Murphy stated:

> The weight, however, of the marijuana plant material is not relevant. The Department's rule does not grade sanctions based upon the weight of the drug material. Given the purpose and function of the Department of Rehabilitation and Correction graduation of sanctions for the possession of drugs by employees of the Department would not appear sensible. (Pages 8-9).

The state objects to the charge that it "rushed to judgment." It claims "the evidence was prima facie therefore there was little to be gained from an in-depth investigation." (State Written Closing Statement, page 1). The state indicates that the purpose of Hoffman's investigation was limited to establishing whether any drug of abuse was found in the parking lot and who brought it onto the property.

The state disputes the union's claim that it neglected to interview all of the potential witnesses. It contends that Shelton had no material information because she did not drive or ride in the car on June 7, 1999. The state maintains that Carson could not be located by the Highway Patrol so there was no way it could have located him. It indicates that Cheryl King's claim that the grievant's car was searched before he arrived in the parking lot is immaterial because once the canine alerted on the car, the Highway Patrol had probable cause "to do what needed to be done."

The state argues that the pre-disciplinary hearing was properly conducted in accordance with the collective bargaining agreement and Loudermill. It points out that the grievant and his union representative were present. The state notes that the grievant had the opportunity to speak and to present witnesses. It claims that no evidence was presented to show that the grievant was harmed in any way.

The state characterizes the union's contention that it ignored its duty to rehabilitate the grievant as "incredulous." It asserts that the grievant was not tested at its initiative under

Appendix M but that he asked to be tested so that the testing was done under the authority of the Highway Patrol. The state charges that the grievant is trying to hide behind the provisions of the contract and the Employee Assistance Program.

The state rejects the union's charge that the grievant was subject to disparate treatment. It maintains that Roland Alvarez and the grievant were not similarly situated. The state points out that Alvarez drove a neighbor's car to work that contained a six-pack of beer while the grievant used his fiancée's car that had an illegal drug in it. It stresses that Alvarez immediately produced a letter from the vehicle's owner while the grievant did not produce his mitigation until the arbitration hearing. The state adds that Alvarez did not test positive for marijuana.

The state maintains that the grievant committed a "grave" infraction. It observes that his job requires him to supervise inmates who have engaged in behavior similar to his behavior. The state asserts that the grievant's actions negated his effectiveness and credibility.

The state asks the Arbitrator to deny the grievance in its entirety.

UNION POSITION

The union argues that the case is riddled with violations of contractual due process regulations. It charges that the pre-disciplinary hearing was "abbreviated." The union points out that Joey Hawke, a Sergeant, and Tim Roberts, a union representative, testified that the usual procedure at a pre-disciplinary hearing is to give a grievant an opportunity to speak and for the hearing officer to solicit input from all those present. It claims that Lucas, who was presiding over her first pre-disciplinary hearing, truncated the hearing to the grievant's detriment.

The union rejects the state's assertion that it did not properly raise the issue of the procedural errors. It points out that Roberts testified that he complained to Kathy Merrill, a Labor Relations Officer, about the problems. The union notes that it presented its concerns at the

step three hearing but David Burrus, the step three hearing officer, chose to ignore them. It claims that the errors were of such magnitude that they cannot be waived by omission.

The union contends that the state failed to conduct a proper administrative investigation. It states that Hoffman failed to question the grievant or any other witness. The union notes that he acknowledged that he simply used the Ohio Highway Patrol's report. It indicates that Hawke and Roberts testified that the practice at ORW is for the institutional investigator to conduct a separate investigation where a grievant is entitled to union representation.

The union charges that Hoffman's actions are suspect. It claims that the grievant should have been interviewed. The union observes that he stated from the beginning that another person had driven the car the previous evening and that he was unaware of the marijuana in the car. It maintains that Hoffman should have interviewed Shelton because she owned the vehicle in question. The union acknowledges that she resigned her employment with the state but reports that she was available for an interview.

The union complains that no attempt was made to talk to Carson. It insists that he would have been easy to contact because he was at the address shown on his driver's license. The union observes that since Hoffman has access to Bureau of Motor Vehicle records, he could have found out Carson's address.

The union complains the state failed to preserve the evidence in the case. It points out that as a result, the cigar and seeds found in the car were not available for presentation at the arbitration hearing. The union claims that if the cigar were available, it would have bolstered the grievant's claim that the cigar found in the car was a Phillies Blunt rather than a Black & Mild which he smokes.

The union observes that the grievant was not strip-searched when he returned to his post

after giving a urine sample at the highway patrol post. It maintains that this suggests that the grievant was not considered a security risk and that the alleged rule violation was not viewed as serious.

The union complains that the Harmon East logbook is missing. It contends that this is important because it shows that the grievant was placed back on his post after the incident. The union points out that Sergeant Mark Johnson testified that he gave the log to Hoffman but Hoffman testified he did not know where it was located. It asserts that this shows "plain negligence or deliberate indifference to the due process rights of the [grievant]." (Union Written Closing Statement, page 5).

The union argues that the grievant was sent for a drug test. It questions why he was put back on his post if the state suspected that he was under the influence of drugs. The union acknowledges that there is conflicting testimony on whether the grievant requested the test or Durham requested him to take the test but it stresses that since the grievant could not leave work on his own, the state must at least have consented to the test.

The union charges that Durham is "not without culpability in this due process fiasco." It claims that she searched the car driven by the grievant without him being present and without his permission. The union maintains that an ordinary cigar and a couple of seeds do not establish probable cause for a search.

The union argues that Carson left the marijuana in the car. It points out that he testified that he drove the car around the previous evening with two friends. The union notes that Carson admitted that they smoked marijuana and that they had accessed the trunk. It stresses that he should be believed because he testified despite the fact that he could have been charged with a criminal offense.

The union contends that the grievant did not know there was marijuana in the car. It indicates that Carson returned the car after dark and that it was still dark when the grievant drove to work. The union claims that Carson's testimony that he smoked Phillies Blunts supports its contention that the marijuana in the car belonged to Carson rather than the grievant.

The union cites two decisions in support of its position. It indicates that in State of Ohio, Department of Mental Health, Twin Valley Psychiatric System, Case No. 23-08-(97-11-25)-1579-01-06, Thomas Dyke, Grievant, this Arbitrator held that an employee who was charged with the conveyance of marijuana onto state property was entitled to reinstatement because of the lack of evidence that the employee knew about the marijuana. The union states that in State of Ohio, Department of Youth Services, Case No. 35-03-95-05-26-0056-01-03, William VanLeer, Grievant, Arbitrator Anna Duval Smith found that removal was not appropriate for an employee "whose knowledge of the small amount of marijuana in her car cannot be clearly demonstrated." (Union Written Closing Statement, page 7).

The union maintains that the grievant's case can be distinguished from the cases where Arbitrators upheld removals. It indicates that in the instant case the grievant consistently denied knowledge of the marijuana, the amount of the marijuana was minute, and the state did not perceive the grievant to be a security threat. The union further claims that the state's investigation was abysmal and that there were procedural errors at the pre-disciplinary hearing.

The union maintains that it is inappropriate to assume that the grievant smokes marijuana because he smokes Black & Mild cigars and that he "freaks" them. It reports that many law-abiding citizens smoke cigars and "freak" them. The union accuses the state of simply assuming that the grievant packed his cigars with marijuana without investigating.

The union argues that the line of reasoning applied in the Alvarez case opens the door for

the exoneration of the grievant. It points out that Alvarez brought alcohol onto the grounds but was excused because he offered a letter showing that the vehicle was not his and that he did not know the contents. The union notes that the fact that the state bemoans that the grievant did not supply evidence regarding Carson's use of the car implies that if the grievant had supplied the information, he would have been excused.

The union contends that if the state is taken at its word, there would have been no arbitration. It indicates that in Appendix M of the collective bargaining agreement the state agreed to rehabilitate employees and that the consequence for an initial positive test for drugs is an opportunity to complete a substance abuse program. The union maintains that pursuant to this agreement the grievant should be working under a last chance agreement and should be enrolled in an Employee Assistance Program.

The union asks the Arbitrator to sustain the grievance. It requests him to reinstate the grievant under a last chance agreement and order him to complete an appropriate treatment program. The union seeks back pay, including roll call, but less appropriate deductions, union dues, and pay for the time needed to complete a treatment program. It suggests that the payment of back pay be delayed until the grievant is eligible to return to work.

ANALYSIS

The events leading to the grievant's removal are clear. On June 7, 1999, a K-9 alerted on the car the grievant drove to work. A search revealed .207 grams of marijuana consisting of five seeds and a small amount of material in a cigar butt in the ashtray. The grievant agreed to a drug test that was positive for the use of marijuana. He was indicted by a Grand Jury but the record does not indicate the disposition of the case.

The state removed the grievant for violating Rule 30(a) of the Standards of Employee

Conduct. It prohibits the "conveyance, distribution, possession or consumption of alcoholic beverages and/or drugs of abuse" while on duty or on state property. The rules specify that the penalty for the first offense is removal.

The rule against the conveyance or possession of alcohol or drugs is entirely reasonable. The security of the facility would be jeopardized should inmates have access to the banned substances. The significance of the threat justifies the imposition of the most severe penalty on any employee who violates the rule.

The Arbitrator, however, does not believe that the grievant was guilty of conveying marijuana onto state property or possessing marijuana on state property. While it is true that the search of the car he drove onto the grounds did contain .207 grams of marijuana in the form of five seeds and a few bits of leafy material, he did not possess or convey marijuana as contemplated by the rule. The scraps of marijuana simply reflected its prior use. It is analogous to a few beer cans thrown on the floor of a car with a few drops of beer left in them.

This conclusion is consistent with this Arbitrator's decision in State of Ohio, Department of Correction and Rehabilitation, Twin Valley Psychiatric System, Case No. 23-08-(97-11-25)-1579-01-06, Thomas Dyke, Grievant. In that case a carpenter at the Dayton Campus of TVPS drove a car to work with .696 grams of marijuana seeds and loose material on the floor and in several roaches in the ashtray. The grievant was charged with the same offense as the grievant in the instant case. This Arbitrator held that "although the 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." (Page 9).

The decision in the instant case is also consistent with the decisions of other Arbitrators in cases involving the alleged conveyance or possession of marijuana. In State of Ohio,

Department of Youth Services, Cuyahoga Hills Boys School, Case No. 35-03-(95-05-26)-056-01-03, William Van Leer, Grievant, 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 facility for young felons. Even though the grievant was found guilty in court for conveying drugs onto state property, Arbitrator Anna Duval 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 instant case is clearly distinguishable from cases where removals were upheld. In State of Ohio, Department of Rehabilitation and Correction, Case No. 27-01-(97-08-20)-0094-01-09, Regina Carter, Grievant, Arbitrator John Murphy upheld the removal of a grievant for the same rule that is at issue in the instant case. However, in the dispute before Arbitrator Murphy the grievant's cigarette case containing .362 grams of marijuana in the form of seven roaches was found in the central office of the Department of Rehabilitation and Correction. This suggests that marijuana cigarettes were brought into the facility in the possession of the grievant. This is very different from finding scraps of marijuana on the floor and in the ashtray of a car in the parking lot.

State of Ohio, Department of Rehabilitation and Correction, Hocking Correctional Facility, Case Nos. 27-10-(10-23-90)-66-01-03 and 27-10-(10-23-90)-67-01-03, Denis Barber and Rebecca Copper-Cullison, Grievants, also involves different circumstances than those facing this Arbitrator. At the Hocking Correctional Facility a drug sweep of the parking lot uncovered roaches and hemostats used to hold roaches in one employee's car and a "baggie of marijuana" in

another employee's car. A "baggie of marijuana" suggests a usable amount of the drug and certainly more than scraps of the drug in the ashtray and on the floor of a car.[1] The cases were combined for hearing and the removals of both employees were upheld.

While the Arbitrator cannot find that the grievant was guilty of the conveyance or possession of marijuana on June 7, 1999, it is clear that he had used marijuana. He believes that the testimony and evidence suggest that the grievant was responsible for the marijuana found in his fiancée's car. However, even if he was not, the urine test establishes that he had used marijuana.

The use of marijuana by a correction officer is an obvious threat to the security of ORW. Many of the inmates are in prison for drug-related offenses and may have friends outside the prison involved with drugs. Should an inmate learn from a friend outside the prison about a correction officer purchasing or using marijuana, the correction officer would be subject to blackmail or other pressure by the inmate. Such a possibility cannot be tolerated.

Despite the potential seriousness of the grievant's use of marijuana, it falls under Appendix M of the collective bargaining agreement. This provision specifies that an employee who tests positive for drug use be given the opportunity to complete a substance abuse program. It states that no disciplinary action can be taken against an employee who successfully completes the treatment program.

The Arbitrator will adopt the union's requested remedy. The grievant is to be given an opportunity to complete a substance abuse program certified by the Ohio Department of Alcohol and Drug Addiction Services. When he has successfully completed the program, he is to be returned to work with back pay less appropriate deductions and excluding pay for the time

[1] The Ohio Highway Patrol's report was listed as an exhibit but the arbitration decision does not indicate the number of grams of marijuana that were found in the employees' cars.

required to complete the substance abuse treatment program. The grievant shall be placed on a last chance agreement for three years under which the state can have the grievant tested at its discretion for drug use and remove him should he test positive.

AWARD

The grievant is to be given an opportunity to complete a substance abuse program certified by the Ohio Department of Alcohol and Drug Addiction Services. When he has successfully completed the program, he is to be returned to work with back pay less appropriate deductions and excluding pay for the time required to complete the substance abuse treatment program. The grievant shall be placed on a last chance agreement for three years under which the state can have the grievant tested at its discretion for drug use and remove him should he test positive. The Arbitrator will retain jurisdiction for 60 days from the date of this award to resolve any issues regarding the implementation of his award.

Nels E. Nelson

Nels E. Nelson
Arbitrator

October 2, 2000
Russell Township
Geauga County, Ohio