

VOLUNTARY LABOR ARBITRATION TRIBUNAL

In the Matter of Arbitration *

Between *

OPINION AND AWARD

OHIO CIVIL SERVICE *

EMPLOYEES ASSOCIATION *

Anna DuVal Smith, Arbitrator

LOCAL 11, AFSCME, AFL/CIO *

Case No. 27-18-19991217-0097-01-09

and *

OHIO DEPARTMENT OF *

Paul Tillett, Grievant

REHABILITATION AND *

Removal

CORRECTIONS *

APPEARANCES

For the Ohio Civil Service Employees Association:

Lynn Belcher, Staff Representative
Anissia Goodwin
Michael Hill, Staff Representative
Ohio Civil Service Employees Association

For the Ohio Department of Rehabilitation and Corrections:

W. Patrick Mogan
James M. Lendavic
Ohio Office of Collective Bargaining

I. HEARING

A hearing on this matter was held at 10:30 a.m. on July 25, 2000, at the Ohio Reformatory for Women in Marysville, Ohio, and continued on August 21 and 22 at the Ross Correctional Institution in Chillicothe, 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 other exhibits, 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" or "ODRC") were Anthony V. Anderson, Director of Industry, Ohio Penal Industries ("OPI"); John K. Arbogast, Asst. Chief Inspector, ODRC; Carolyn Hurst, Citizen; James J. Jarrett, former Penal Workshop Superintendent, OPI; Becky Sue Wolfe, Inmate #46623; and William Rachel, Jr., Production Manager - Asbestos, OPI. Testifying for the Ohio Civil Service Employees Association (the "Union") were Kenneth C. White, former Penal Workshop Specialist ("PWS"), OPI; William Thornsley, PWS, OPI; Richard Carter, Penal Workshop Superintendent, OPI; Dante Burnett, Inmate #269-782; Suzanne Meade, former Union Steward; Jamie Nash, former PWS, OPI; and the Grievant, Paul Tillett. Also in attendance was Maudie G. Williams, President of Chapter 2597, OCSEA/AFSCME Local 11. A number of documents and tape recordings were entered into evidence: Joint Exhibits 1-33 and Union Exhibits 1-7. The oral hearing was concluded at 8:15 p.m. on August 22. Written closing

statements were timely filed and directly exchanged on September 26, 2000, whereupon the record was closed. This opinion and award is based solely on the record as described herein.

II. STATEMENT OF THE CASE

The Grievant was hired as a corrections officer by the Ohio Department of Rehabilitation and Corrections on January 21, 1986. Nine years later, on January 22, 1995, he transferred to Ohio Penal Industries as a Penal Workshop Specialist, which was the position from which he was removed on December 18, 1999. He received in-service training in 1987 and 1988 and the February 1996 ODRC Work Rules, but there is no written record that he received the 1998 revision. At the time of his removal, the Grievant had no active discipline on his record. The last performance appraisal in his file, for 1998, shows him to have been a good performer. This case concerns the adequacy of inmate supervision at OPI job sites which allegedly contributed to an escape from an Ohio correctional facility in January of 1999.

In order to understand the charges against the Grievant, it is necessary to understand the mission of OPI, its functioning in 1998, and its relationship with ODRC correctional facilities. According to Anthony Anderson, Director of Industry, OPI is a \$40 million self-sufficient business inside state government. Its mission is to provide training and work skills to inmates, to aid in the operation of correctional institutions, to provide products and services to state agencies, and to assist with community projects. OPI recruits inmates for its work crews from Ohio's prison population. Aside from skills and other job-relevant qualifications, security level and the nature of an inmate's offense are issues in selection because inmate crews work "outside the fence" on some OPI projects. Anderson testified that they usually do not

drop below security level of Minimum II and avoid those with sexual offenses. In addition, inmates are usually kept inside the institutions until they stabilize after being denied parole.

Outside inmate crews are transferred to ODRC facilities near their work sites. On work days they receive their breakfast inside the walls and are given a lunch and perhaps a dinner to take with them for the day. They are then transported by bus or van to the worksite under the supervision of one or more penal workshop specialists, returning to the institution for the night. According to Anderson, although they are monitored and controlled by the institution, no institutional personnel are on the work site.

In late 1998 when the events of this case took place, OPI was working on a large project it had recently received involving the removal of underground storage tanks from ODRC institutions and Ohio Department of Transportation ("ODOT") facilities. The ODOT contract, which called for December 1998 completion, required the OPI work crews to work long days of 14-18 hours and frequent six or seven-day weeks. The record is replete with evidence that inmate work crew food supplied by the institutions was inadequate both in terms of quantity and quality for such long and arduous work days. Moreover, because of being transferred from one institution to another, inmate personal funds were not always available for them to draw upon to purchase food from the institutional commissary.

The Grievant was among the penal workshop specialists supervising the fairly stable inmate work crews which removed the tanks at ODOT facilities. His immediate supervisor was James Jarrett, Penal Workshop Superintendent, who also supervised PWS Michael Kvarness and PWS Kenneth White who, like the Grievant were on the underground tank removal project, although the latter was assigned institutional removals. The Grievant testified

that he was encouraged by Jarrett's supervisor, Robert Mouridian, to select Inmate #190-146, Ransom Staley, for his work crew. Jarrett testified that Staley, who was serving 7-15 years for felonious assault with a firearm specification, was the most respected member of the crew because of his knowledge and skill. He was also, according to Jamie Nash who worked with him before Jarrett came on as Superintendent, a manipulative convict who was on Mouridian's "A Team" and acted as if he were staff, not an inmate. As PWS White testified, "If he opened his mouth, he was lying." The record clearly establishes that this inmate received improper privileges while working on the ODOT tank removal project. By Staley's own statement, his girlfriend's (Becky Wolfe), sister's (Carolyn Hurst) and Jarrett's testimony, Staley's family was permitted to visit him and to bring him food which he shared with other inmates and, according to some, OPI staff. His girlfriend also visited him on ODOT property where they had sexual relations. In addition, Staley gave money to Jarrett, who purchased food for him and other members of the crew. Whether and how much of this was known at the time by Jarrett's own supervisor and the penal workshop specialists under Jarrett's supervision, including the Grievant, is at issue here, but it all came to light in the aftermath of Staley's escape on January 5, 1999, when he walked away from Madison Correctional Institution while under the supervision of PWS Michael Kvarness. When Staley and his girlfriend were apprehended and brought to trial, Staley testified about the visitations. These allegations inspired ODRC to launch a lengthy and complex administrative investigation on July 15, 1999. Assistant Chief Inspector John K. Arbogast, assisted by Walt Ashbridge, interviewed numerous witnesses, including the Grievant and his supervisor, Inmate Staley and members of his family, and other inmates and staff. Staley's girlfriend, who was convicted of aiding an

escape and grand theft (auto), Becky Wolfe, refused to be interviewed during the investigation on the advice of her attorney, but just before the instant arbitration, did grant interviews to both the State and Union. After investigating the matter for two months, Arbogast concluded that the escape would not have occurred had any of the officers, including the Grievant, prevented the visits to the job sites, reported their attempts to visit and/or reprimanded Staley. He therefore recommended disciplinary action against the Grievant.

A pre-disciplinary hearing was held on November 9. The hearing officer found just cause for discipline, citing violations of seven ODRC work rules. On December 10, the Grievant was notified that he was being removed from his position effective December 18, 1999, for "permitting, having knowledge of, or failing to report the following:

1. Providing food for inmate work crews....
2. Inmates being permitted to eat food provided by the family of Inmate Staley.
3. Eating lunch with Inmate Staley and his family at work sites....
4. Inmate Staley visiting with Becky Wolfe in her personal vehicle at work sites.
5. Failing to cooperate with the Ohio Department of Rehabilitation and Corrections during the investigation of Inmate Staley's escape." (Joint Ex. 2)

These actions were found to be in violation of:

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| Rule 8: | Failure to carry out a work assignment or the exercise of poor judgment in carrying out an assignment |
| Rule 24: | Interfering with or failing to cooperate in an official investigation or inquiry |
| Rule 38: | Actions that could compromise or impair the ability of the employee to effectively carry out his/her duties as a public employee |
| Rule 45: | Without express authorization, giving preferential treatment to any individual under the supervision of the department...." (Joint Ex. 2) |

PWS Michael Kvarness was also removed. Their supervisor, Jarrett, resigned. Anderson testified that had Jarrett not resigned, he, too, would have been terminated.

A grievance protesting the Grievant's removal was timely filed on December 17 and appealed without procedural defect to arbitration, where it presently resides for final and binding decision. At Step 3, the Union claimed it had not been provided a complete pre-disciplinary packet and that some statements were still missing. Further, it claimed that its objection on this matter was not reported in the predisciplinary officer's hearing report. Not until a week before the arbitration hearing was the State's investigator able to interview Inmate Becky Wolfe, and the Union did not interview her until the first day of the hearing. As of that same date, the Union still had not received the Ohio Highway Patrol Investigation Report or Inmate Staley's Master File. The Union obtained the report, with redactions, directly from the Patrol on August 18. Despite the Arbitrator's subpoena, as of the third day of hearing, August 22, ODRC still withheld Inmate Staley's records, referring the Union to its policy on public records and claiming the material sought was exempt from the Public Records Act in any case. After some communication between the State's advocates and ODRC, the subpoenaed file, minus the presentence investigation report which is exempt from the Public Records Act, was delivered by courier and admitted into the record. Shortly thereafter, ODRC demanded that the document be returned. The file was examined *in camera* and found not to contain the exempt report. Upon being assured of this fact, the ODRC withdrew its demand and yielded custody to the Arbitrator.

III. STIPULATED ISSUE

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

IV. PERTINENT SECTIONS OF THE CONTRACT

ARTICLE 24 - DISCIPLINE

24.01 - Standard

Disciplinary action shall not be imposed upon an employee except for just cause.

24.04 - Pre-Discipline

When the pre-disciplinary notice is sent, the Employer will provide a list of witnesses to the event or act known of at that time and documents known of at that time used to support the possible disciplinary action. If the Employer becomes aware of additional witnesses or documents that will be relied upon in imposing discipline, they shall also be provided to the Union and the employee.

ARTICLE 25 - GRIEVANCE PROCEDURE

25.08 - Relevant Witnesses and Information

The Union may request specific documents, books, papers or witnesses reasonably available from the Employer and relevant to the grievance under consideration. Such request shall not be unreasonably denied.

V. ARGUMENTS OF THE PARTIES

Argument of the State

The State's position is that the totality of circumstances clearly and convincingly leads to the conclusion that the Grievant committed the work rule violations with which he is charged.

Seven witnesses testified that Inmate Staley's sister, Carolyn Hurst, and other members of his family visited him at the Lancaster and New Lexington ODOT job sites and brought him food which inmates and officers shared. Inmate statements taken during the investigation corroborate Mrs. Hurst's story, including her testimony that she gave her brother a sack containing contraband clothing which was transported back to the institution in a supervisor's truck. Even though she could not pick him out of the photo lineup, Mrs. Hurst positively identified the Grievant at the hearing as being present at these sites. She also testified that

others present referred to him by name. Logbooks and other documents place the Grievant at these locations on November 4 and 5, 1998, fitting the facts as testified to by Mrs. Hurst.

The testimony and statements of former Supt. Jarrett and Inmates Staley and Wolfe are consistent and supported by the Grievant's personal log and bi-weekly attendance report: the Grievant was present at the Worthington ODOT garage when Wolfe visited Staley and had sexual intercourse with him in her car on November 30, 1998. The fact that sex occurred is not so important as, once again, a civilian drove onto a work site and was allowed to interact freely with an inmate. All statements except the Grievant's place Wolfe and Staley together in the car and in the building while staff and inmates ate chicken which the Grievant had been sent to purchase because he was nervous. The State submits that he was nervous because he knew what was occurring was wrong. He accepted the task of going for food so he would not be at the site to see what was happening.

Inmate Wolfe's testimony, in conjunction with documentary evidence, also places the Grievant at the District 6 Headquarters on Route 36 in Delaware on November 24 when Wolfe visited Inmate Staley, engaged in sexual foreplay with him and then spoke to the only guard present. In the eyes of the State, this set the stage for completion of the sex act six days later in Worthington.

None of the Union's witnesses except the Grievant testified about these four dates, and none except the Grievant rebutted the testimony of Mrs. Hurst or Inmate Wolfe. The Grievant, however, while disavowing knowledge of these affairs, did implicate himself during the investigatory interview conducted by Arbogast and Ashbridge. The State submits that his admissions during the course of that interview show that he was at least aware that civilians

were visiting work sites with contraband. Blaming everything on Jarrett now is disingenuous. The Grievant is just not credible. The only way he could not know what was going on is if he deliberately turned his head.

The Grievant is a 14-year veteran of ODRC, including several years as a corrections officer. All corrections officers are trained on the devious nature of inmates. Moreover, the rules and regulations apply whether inside or outside of the institution. No doubt the Grievant knew that any visitation outside of institutional control and giving of contraband created a security risk. He also had to know that failure to report those security breeches was bad judgment at the very least.

The fruit of the Grievant's "don't ask, don't tell" posture was the escape. In retrospect, Inmate Staley should not have been working on OPI crews outside prison walls, but given that he was, Jarrett and the two penal workshop specialists working under him were responsible for maintaining basic security levels. Had the Grievant reported what he surely knew, the inmate would no doubt have been removed from the outside crews and his escape prevented.

The State contends that Union attempts to discredit OPI, the working conditions and inmate security lapses are not relevant to the charges against the Grievant. Even if what the Union says is true, it does not justify the Grievant shrinking from his duty to acknowledge and report clear, obvious and serious security violations and to cooperate with an investigation. His failure to do so renders him incapable of working in ODRC as a penal workshop specialist or in any other security-sensitive position.

Argument of the Union

The Union contends there is a big difference between knowingly and intentionally violating ODRC policy and not reporting known OPI practices less secure than those within prison walls. It submits there is also a problem with disciplining bargaining unit members for not reporting these practices when both individual employees and the Union made numerous attempts to report favoritism. Regardless of one employee's withdrawal of his complaint in the interest of labor-management relations, the reports warranted investigation.

The Union claims the Grievant had nothing to do with the escape. The State's investigation shows it was arranged from institutional phones inside Madison Correctional Institution, not from an OPI job site. The roots of Staley's escape are in the favoritism reported by the Grievant and others. In fact, Jarrett admitted his culpability and took responsibility for the insecure practices now being held against the Grievant. Management, in looking for a scapegoat, ignored evidence of higher management knowledge. Indicative of its zeal is the fact that Rule 25, which the Grievant is charged with violating, carries a penalty of an oral reprimand to a one-day suspension for a first offense, whereas the Grievant, who is a long term employee with a clean record, has been terminated. Management even planned to remove the Grievant before it completed its investigation, and now it stacks the charges, none of which hold up to scrutiny.

The charge of poor judgment (Rule 8) must be viewed in the context of the OPI setting which waives many security precautions institutions take. For example, inmates recently denied parole, like Staley, continued to work outside prison institutional walls, inmates worked in their home counties, and penal workshop specialists became too familiar with their crews yet

were allowed to continue working with them despite it being reported. As in the parties' *Dingey* case (No. 25-14-19970117-0002-01-07), most of the questionable practices appeared to be condoned by supervisors with the authority to approve them.

With respect to Rule 24, the Union submits that there is no evidence that the Grievant interfered with the State Patrol's investigation. The Patrol did not even interview him.

Regarding Rule 38, actions compromising the ability of the employee to effectively carry out his/her duties certainly fits former Supt. Jarrett and OPI management with its focus on profit. Jarrett, who resigned and thus did not face disciplinary charges, was permitted to work after his resignation as a private contractor with OPI crews in contact with the inmates being investigated. He thus could have compromised the investigation.

The Union contends that the charge of violating Rule 45 (giving preferential treatment) is misplaced. The Grievant brought food to eat. He and the inmates ate food provided by other workers and ODOT because they were hungry. ODRC and OPI were remiss in making no written provision for employees' and inmates' basic needs during a grueling project. Policy does allow recipient agencies to provide meals to inmates. OPI employees did witness supervisors eating, then inmates consumed the leftovers. Jarrett is the one at fault and he knew the Grievant would object or he would not have sent him away. The Grievant, on the other hand, was unaware of the family visits and food. Many civilians were around the ODOT work sites and the penal workshop specialists had to attend to the safety of the digging. The State is ignoring evidence implicating others, such as Robert Mouridian who protected Staley. It is also remiss in not providing training and written rules as requested by Union members.

Employees have to rely on administrators' judgment, but that judgment put Staley, a man convicted of a violent felony and rejected by the Parole Board, outside the fence.

The Union also raises several procedural issues. For one, it claims the investigation was tainted. Witnesses were interviewed within hearing of each other. This fact was misrepresented by the investigator in his report. Some interviews were missing from the pre-disciplinary packet and some allegations are unfounded. The entire case rests upon Inmate Staley, who is a manipulative, deceitful "con." Moreover, the investigator misrepresented facts during his interviews.

In addition, the State withheld relevant documents requested by the Union as early as November 1999 when the Union first sought Inmate Staley's record prior to the pre-disciplinary conference. This document was not provided until the last day of the three-day hearing and then the State demanded its return, making a mockery of the procedure and Article 25.08. The withholding of this file, Jarrett's interview, many other witness tapes and transcripts and the Ohio Highway Patrol investigation inhibited the Union's ability to resolve the grievance at the earliest level possible and unduly lengthened the hearing by a full day.

The Union asks that the Arbitrator sustain the grievance, remove the punitive discipline from the Grievant's record, and reinstate him to his former position with full benefits and back pay, including lost overtime (which the Union calculates as 57.5 hours per pay period from August 30 to December 5, 1998). The Union further requests interest on the back pay because of Article 24 and 25 procedural violations. Finally, because the State withheld documents in blatant disrespect for due process and the Contract, the Union asks that the State bear the full cost of one day of hearing and a day of study.

VI. OPINION OF THE ARBITRATOR

The State has convincingly demonstrated that the Grievant is not merely a scapegoat as the Union would have me believe. Although there is no evidence he, himself, acquired and gave food to inmates on his own initiative, I am convinced he knew or should have known of the security lapses involving visitations and food on at least three occasions and failed to stop them, object to them or report them. The credible testimony of Inmate Staley's sister and girlfriend, and of former Supt. Jarrett, corroborated by the statements of other witnesses, time sheets and the Grievant's own log show him to have been at the Lancaster, New Lexington and Worthington job sites when impermissible visitations occurred. There are also the Grievant's own admissions of knowledge when being interviewed by the investigators. The Grievant and Union tried to explain them away as either being misinterpreted or made under duress. I have carefully reviewed that interview and cannot give it the interpretation the Union urges upon me. At best, the Grievant admitted turning a blind eye to what was going on around him. As a long-term veteran of the corrections system, it was his responsibility to keep both his eyes and his ears open and to report observed irregularities as they occurred. Every PWS and former PWS who testified knows this and the Grievant should have known it, too. Aside from the 1996 letter in which the Grievant joined with fellow officers but was later retracted by the Union steward "to restore Labor Management relations" (Joint Ex. 19), there was no evidence the Grievant filed any written report of unusual incidents. He did not even come forward after the escape, when the State might have benefitted by his knowledge in order to apprehend the inmate. Thus he also failed to cooperate in the investigation as charged. For these reasons, discipline was justified.

However, the Grievant's lapses must be viewed in the context of his employer's failings, both at the level of his immediate supervisor and at higher ranks. Not only was Jarrett an active participant, but by the unrebutted testimony of various Union witnesses, a higher manager (Robert Mouridian) singled this inmate out for favorable treatment because of his skill. One wonders how consistent this is with the rehabilitation and correction mission of the Department. Management turned a deaf ear to employee attempts to clarify rules, to strengthen security, and to provide adequate nourishment for the inmates on arduous work assignments. An employer committed to security would have investigated employee reports of favoritism or inappropriately close staff/inmate relationships even if they were withdrawn "to restore Labor Management relations." It appears to this arbitrator that OPI turned its deaf ear in pursuit of profit. In ignoring insecure practices to pursue its financial interest, OPI was no different than the Grievant.

Management's claim that a corrections officer or PWS who fails to report security lapses is unfit to supervise inmates also suffers from its own behavior. The fact that the Grievant's supervisor, who admits his culpability, is allowed to interact with inmates while he is performing as a private contractor, suggests one of two things: either OPI believes Jarrett has learned from his mistakes and is immune to inmate attempts to co-opt him, or it still does not take security issues as seriously as it would have me do in upholding the Grievant's discharge. Admittedly the Grievant pled innocent before me whereas I have found him guilty. Thus, unlike his supervisor, he has not yet taken the first step towards rehabilitation, namely acceptance of responsibility. However, I believe him capable of doing so because he did so during his interview with the investigators. For this reason, even in light of OPI's shared

responsibility in this affair, I cannot return him to his former position without corrective action. Some action is warranted to impress upon the Grievant that he—like everyone in a system where security is a serious issue—has to be *individually* responsible. Therefore, while discharge is unjust, significant discipline, in the form of a 60-day suspension, is warranted. The Grievant should understand that his job is at stake should he turn a blind eye again.

Finally, there is the matter of the State's failure to provide relevant documents in a timely fashion in disregard of the Collective Bargaining Agreement and to the point where the arbitration tribunal was held hostage to a document the Union was entitled to and should have had long before the hearing convened. Both the Ohio Highway Patrol Investigation Report and the inmate's master file were necessary for the Union to effectuate its duty and were discoverable under Section 25.08 of the Contract, being reasonably available and relevant to the grievance. Stonewalling by the State might have prevented settlement at an early stage. It certainly lengthened the arbitration hearing. If I had the authority under the Contract to assess the cost of arbitration in unequal proportions, I would do so. Lacking that authority, I reduce the penalty on the Grievant by 15 days. I do not, however, award him overtime because the overtime cited by the Union was worked during a time-limited project. Interest is also denied at this time.

VII. AWARD

The grievance is sustained in part, denied in part. Under the circumstances discussed above, the Grievant's removal was without just cause and is reduced to a 45-day suspension. The Grievant will therefore be reinstated forthwith to his former position of Penal Workshop Specialist and restored lost wages, benefits and seniority less forty-five (45) days. Back pay is to be reduced by such interim earnings as he may have had on account of his removal. The State may require reasonable evidence of said earnings. The Arbitrator retains jurisdiction for a period of sixty (60) days for the sole purpose of resolving any disputes that may arise in the implementation of this award.



Anna DuVal Smith, Ph.D.
Arbitrator

Cuyahoga County, Ohio
November 5, 2000