#1465

IN THE MATTER OF ARBITRATION

BETWEEN

REHABILITATION AND CORRECTION

AND

THE OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION/

AFSCME-AFL-CIO

Before: Robert G. Stein

PANEL APPOINTMENT

CASE # 27-29(000405)-493-01-09
Deon Carter, Grievant

Advocate(s) for the UNION:

Robert Jones, Staff Representative
OCSEA Local 11, AFSCME, AFL-CIO
390 Worthington Rd. Ste. A
Westerville OH 43082-8331

Advocate(s) for the EMPLOYER:

Patrick Mayer, LRO, Advocate
Pat Mogan, 2nd Chair, OCB
106 North High Street, 7th Floor
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INTRODUCTION

A hearing on the above referenced matter was held on December 1, 2000 in Dayton, Ohio. The parties stipulated to the fact that the issue was properly before the Arbitrator. During the hearing the parties were given a full opportunity to present evidence and testimony on behalf of their positions. The parties made closing arguments in lieu of submitting briefs. The hearing was closed on December 1, 2000. The Arbitrator's decision, by mutual agreement of the parties, is to be issued no later than January 16, 2001.

ISSUE

The parties stipulated to the following definition of the issue:

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

RELEVANT CONTRACT LANGUAGE
(Listed for reference, see Agreement for language)

ARTICLE 24 DISCIPLINE

BACKGROUND

The Grievant in this matter is Deon Carter. Prior to his termination from employment on March 28, 2000, Mr. Carter held the position of Storekeeper 2 with the Ohio Department of Corrections (hereinafter referred to as "Employer" or "Department"). Mr. Carter was last employed at the Department's Montgomery Education and Pre-Release Center (hereinafter referred to as MEPRC) located in Dayton, Ohio. Mr. Carter previously worked at the Department's Oakwood Correctional facility from February 6, 1995 until his transfer to MEPRC in April of 1996. At the time of his termination Mr. Carter had worked for the Department for just over 5 years.

The Department terminated the Grievant for violation of Rule # 45 (b) of the Standards of Employee Conduct. Rule 45 (b) reads as follows:

> *"Without express authorization, giving preferential treatment to any individual under the supervision of the Department, to include, but not limited to: The offering, receiving, or giving of anything of value."*

The Department's investigation determined that the Grievant was "dealing" with inmates. He was accused of receiving commissary items from inmates for personal use. Many of these were items of food and soft

drinks.

At the time of his termination the Grievant had 12 disciplines on his record. Mr. Carter filed a grievance on March 28, 2000 claiming the Employer did not have just cause to terminate his employment.

EMPLOYER'S POSITION

The Employer acknowledges the fact that the evidence it used to substantiate its decision to terminate the Grievant is largely circumstantial in nature. However, it asserts that the amount and the nature of the evidence is sufficiently conclusive to leave no doubt that the Grievant was dealing with inmates in violation of Rule # 45B.

The Employer largely bases its case on the investigation conducted by Ron Ford. The Employer states that on March 2, 2000, Mr. Ford entered the inmates' commissary and marked commissary food items (such as Snickers bars, Mt. Dew, and Nutrageous candy bars) that were to be sold to inmates only. Mr. Ford took this action based upon prior information he had received from an Inmate Small that identified the Grievant as an employee who was dealing with inmates. The clear and identifiable marks to be used for purposes of tracing were placed in an inconspicuous place on each item.

On March 10, 2000, several food items with these markings were found in the Grievant's right hand desk drawer, which the Employer contends is substantial proof of the Grievant's guilt in this matter when coupled with the statements of inmates. Investigator Ford, accompanied by Deputy Warden Glenn Abraham, found in the Grievant's desk drawer 16 cans of Mt. Dew and two Nutrageous candy bars.

Inmate Sammons stated to Investigator Ford that on March 10, 2000, he placed two six packs of Mt. Dew, two boxes of Little Debbie Fudge Brownies and two Snickers candy bars in the Grievant's right hand desk drawer. The Employer argues that its case is further supported by the action of the Grievant on March 10th. The Grievant left the institution after his shift ended and he was carrying two six packs of Mt. Dew and two sealed boxes of Little Debbie snack cakes when he was checked out at the entry desk of the institution, contends the Employer.

Based upon the above, the Employer requests that the grievance be denied.

UNION'S POSITION

The Union states, "...the whole incident was a set-up to remove Deon Carter from MEPRC." The Union argues it has never seen or heard any of the testimony of Inmate Small, the inmate who tipped off investigator Ford as to the Grievant's alleged dealings with inmates.

The Union also argues that Investigator Ford erred when he did not

record any bar code numbers on the items he marked, and there is no way to determine who put the marked items into Mr. Carter's desk, noting that Mr. Carter never locked his desk drawers. The Union asserts anyone can take a marker and put marks on the bottom of pop cans and on candy bars. The Union also questions why Investigator Ford and Deputy Warden Abraham did not stop the Grievant when they passed in the hall on March 10, 2000. The Union argues that the Employer should have detained the Grievant, called in a Union Steward, and conducted the search of the Grievant's desk with everyone present. In general the Union attacks the Employer's entire investigative process as being faulty. It points out that Mr. Ford did not even take any written or tape recorded statements from inmates.

Based upon the above, the Union requests that the grievance be sustained.

DISCUSSION

The Grievant was terminated from employment for violation of Rule 45b (JX 5):

> *"Without express authorization, giving preferential treatment to any individual under the supervision of the Department, to include, but not limited to: The offering, receiving, or giving of anything of value"*

This rule violation carries a 1-3 day suspension to a removal penalty

for a first offense.

In making its closing argument the Employer readily admitted it *"...it could have done more things to build a more solid case against the Grievant..."* I agree with this analysis. However, I also agree with the Employer's claim that it was able to compile a strong circumstantial case in support of its assertion that the Grievant violated Rule 45b.

Circumstantial evidence is commonly permitted in arbitral proceedings. It must meet the standards of materiality and relevancy to be admitted into evidence. In addition, when used to support an action of termination it must be clear and convincing in nature. However, it is not uncommon for an arbitrator to determine that there is sufficient circumstantial evidence to support an employer's issuance of corrective action, even when such evidence was insufficient to support a criminal finding (See Bethlehem Steel Corp. 81 LA 268 (Sharmoff, 1983)).

The importance of circumstantial evidence was underscored at the 19th annual meeting of the National Academy of Arbitrators. A tripartite panel concluded that circumstantial evidence might have as much probative value as testimonial or direct evidence. The panel went on to recommend that such evidence should be received and considered in the context of all evidence (See "Problems of Proof in Arbitration, Proceedings of the 19th Annual Meeting of NAA, 98 (BNA Books, 1967). A

second tripartite panel also reporting at the NAA meeting found:

> *"Since "direct" evidence may be falsified due to the commission of perjury by witnesses, it is not necessarily more probative than circumstantial evidence. Indeed the latter may be more reliable than so-called "direct" evidence to the degree that close reasoning by inference in a particular situation may actually weave a tighter factual web often less subject to the diversion of doubts of credibility..."*

In the instant matter close reasoning of the factual circumstances clearly and convincingly establishes the fact that the Grievant was involved in receiving items from the commissary from prison inmates. The Union criticizes the Employer for not taking written or tape-recorded statements from inmates. I do not agree. The Grievant was involved in a conspiracy of sorts and in such matters direct evidence is difficult to obtain. In this particular situation the Employer's explanation that it had to protect the identity of inmate informants is plausible. The finding of existence of inmate food items that was improperly in an area controlled by the Greivant is sufficient in this case to establish guilt.

There is no doubt that <u>marked</u> cans of pop and food items were found in the Grievant's right hand desk drawer. These were commissary items that had to have come from inmates. The Union suggests that they could have been "planted" by management in order to get rid of the Grievant; however, it offers no proof of this allegation. I found the testimony of Investigator Ford and Deputy Warden Abraham, who

discovered the items, to be credible. The Union presented no evidence or testimony that undermined the veracity of their statements or supported an allegation that management intentionally planted evidence to "frame the Grievant."

The finding of the marked items in the Grievant's desk drawer on March 10th takes on greater significance in light of what the Grievant did when he left the institution at about the same time on that day. Officer Swagger provided credible testimony that she observed the Grievant taking two six packs of Mt. Dew and two sealed boxes of Little Debbie snack cakes with him as he went home following his shift. The coincidence of finding similar marked items in his desk drawer that were in the same packaged form as those in the commissary is important.

Investigator Ford testified that Inmate Sammons stated to him that he took two six packs of Mt. Dew, two boxes of Little Debbie Fudge Brownies and two Snickers bars and placed them in the Grievant's desk on March 10th. This chain of circumstances leads this arbitrator to conclude, after close reasoning of the facts, that the Grievant is guilty of receiving items of value from inmates. It is clear that Investigator Ford made the markings on the evidence (as validated by the Commissary manager), and there is no mistake that they appear on the items found in Mr. Carter's desk. The Employer established a prima facie case of guilt.

On the other hand, the Grievant's testimony appeared to be evasive and lacked credibility. Even his witnesses could not substantiate his argument that the pop he took out of the institution was his own and that he often brought large quantities of pop into the institution on prior occasions (See Stiles testimony). The evidence or testimony produced no other reasonable theory of what happened on the day of March 10, 2000.

In applying a just cause standard the question then becomes, did the punishment fit the crime? The evidence establishes the fact that the Grievant has numerous corrective actions for absenteeism and performance. From 1997 to the instant case the Grievant has been given twelve corrective actions. An examination of these corrective actions reveals that although the Grievant has numerous corrective actions, none of them have gone beyond a 1 day fine.

Why there wasn't a progressive approach taken by the Employer is unclear. Furthermore, some of the discipline appears to be "regressive" in nature. The Employer appeares to progress from an oral warning to a written warning, and only a few months later, regresses back to an oral warning instead of progressing to a higher form of discipline. On 2/2/99 the Grievant received a 1 day fine for a Rule 5b, and Rule 8 violation. Nine months later, on 11/10/99, the Grievant received an oral reprimand. This is confusing and sends the Grievant a mixed message. For the

Employer it represents the burden of having to justify a leap from a 1 day suspension to a discharge.

The Union did not present any evaluative material to indicate the Grievant was considered to be a good worker. Likewise, the Employer presented no evaluative material. Therefore, for purposes of this proceeding, nothing can be said about the Grievant's performance as an employee.

A first offense for rule 45b violation carries with it a range of discipline from a 1 day suspension to removal. The totality of the evidence in this matter coupled with the Grievant's relatively short work history and his penchant for frequently disobeying rules (particularly rules related to performance, see record) is important in this case. And in this particular case it overcomes the Employer's inexplicable conduct in issuing non-progressive levels of discipline. Nevertheless, the issuance of twelve disciplinary actions in 3 years time speaks volumes about the Grievant's inability to learn from his mistakes, regardless of what form the discipline takes.

The fact is the Employer has lost all faith in the Grievant to perform satisfactorily, and more importantly to be trusted. In a position that carries with it the central requirement that safety and security be strictly maintained, the Grievant's involvement with accepting items of any value from inmates violates a fundamental principle of separation. When this

serious rule violation is viewed within the context of the Grievant's extensive record of other rule violations over the past three years, I find the Employer was justified in removing the Grievant from his position as opposed to issuing a less severe form of corrective action.

AWARD

The grievance is denied

Respectfully submitted to the parties this 15th day of January, 2001.

Robert G. Stein, Arbitrator