

#1502

THE STATE OF OHIO, DEPARTMENT OF REHABILITATION
AND CORRECTION, ADULT PAROLE AUTHORITY AND SEIU, DISTRICT 1199
LABOR ARBITRATION PROCEEDING

IN THE MATTER OF THE ARBITRATION BETWEEN:

THE STATE OF OHIO, DEPARTMENT OF REHABILITATION
AND CORRECTION, ADULT PAROLE AUTHORITY

-AND-

DISTRICT 1199, SEIU

GRIEVANT: JASON PUSTER
GRIEVANCE NO.: 28-08-2000031-0055-02-12

ARBITRATOR'S OPINION AND AWARD

ARBITRATOR: David M. Pincus

DATE: JUNE 11, 2001

APPEARANCES

For the Employer

John Kinkella
Kate Stires
Michael Duco

Chief, Adult Parole Authority
Labor Relations Specialist
Manager, Dispute Resolution

For the Union

Jason Puster
Matt Mahoney

Grievant
Administrative Organizer

INTRODUCTION

This is a proceeding under the auspices of Article 7 – Grievance Procedure, Section 7.06 – Grievance Steps of the Agreement between the State of Ohio, Department of Rehabilitation and Correction, Adult Parole Authority (hereinafter referred to as the “Employer”) and District 1199/SEIU (hereinafter referred to as the “Union”) for the period August 3, 1997 to May 31, 2000 (Joint Exhibit 1).

An arbitration hearing was held on January 31, 2001, at the Office of Collective Bargaining, Columbus, Ohio. The parties had selected David M Pincus as the Arbitrator. At the hearing, the parties were allowed to present and introduce documents, testimony and evidence. They were, moreover, allowed to examine and cross-examine witnesses. At the conclusion of the hearing, the parties were asked if they wished to provide post-hearing briefs. Both parties submitted briefs in accordance with guidelines established at the hearing.

JOINT STIPULATIONS

1. The parties recognize that there is no ripe issue before the Arbitrator, however, the parties agree that the Arbitrator is to rule on the issue set forth above.
2. The parties agree that the issue set-forth above is one of the seven tests of just cause for discipline.
3. The parties agree that the fact that we are asking this Arbitrator to rule on an issue that is not ripe shall not be referred to or introduced into any subsequent arbitration or litigation to establish a practice for the purpose of arguing that a matter is arbitrable.

STIPULATED ISSUE

Is the rule regarding Parole Officers ability to be employed off-duty with local law enforcement agencies reasonably related to the orderly, efficient operation of the Adult Parole Authority? If not, what shall the remedy be?

CASE HISTORY

At the time of the disputed matter, Jason Puster, the Grievant, was serving as a full time Parole Officer. Concurrent to his primary place of employment, he also enjoyed a part-time paid Police Officer position with the Perkins Township Division of Police. The record indicates he served as a replacement officer filling in for those officers on vacation, and to provide extra coverage on shifts.

The genesis of the dispute was triggered by the Grievant's request to continue his outside employment as a part-time Police Officer. His request was denied with reliance placed on the following guidelines articulated in an April 20, 1999 memo:

Parole officers are permitted to work in an auxiliary capacity with a Sheriff's office¹ under the following circumstances:

1. The parole officer is an unpaid volunteer, and
2. The position is part-time and is a position which permits the parole officer to perform duties that do not conflict with the parole officers duties (e.g., training Sheriff's staff, traffic detail, Toys for Tots, etc.), and
3. The parole officer agrees not to knowingly exercise any duties or responsibilities in relation to an offender under APA supervision other than in the capacity of a parole officer.

All other work for a law enforcement agency will be considered on a case-by-case basis, considering the particular duties to be performed by the officer as an agent of the law enforcement agency.

(Joint Exhibit 8)

The rejection of the previously described request caused the filing of a grievance.

The Statement of the Grievance alleged the following:

The grievand (sic) was denied the request to continue his outside employment with Perkins Township law enforcement.

(Joint Exhibit 2)

The parties were unable to resolve the matter in subsequent portions of the grievance procedure. Neither party raised procedural nor substantive arbitrability issues. As such, the grievance is properly before the Arbitrator.

¹ The record indicates the parties view this phrase in a more expansive mode. The questioned prohibition deals with part-time paid employment with a local law enforcement agency.

THE MERITS OF THE CASE

The Union's Position

The Union opined that the policy is unreasonable. The Grievant, as well as the Employer, realize certain benefits from this outside employment opportunity. The Grievant, and other similarly situated employees, are able to earn extra income. They, moreover, are able to enhance their skills and maintain their certification as Police Officers.

In the Union's opinion, the only criterion, as specified in the guidelines (Joint Exhibit 8), violated by the Grievant dealt with his payment status. That is, his part-time position does not afford unpaid volunteer status. He is paid and is not a volunteer. And yet, this status should not preclude the outside employment in question. Mere payment does not engender divided loyalties.

Kinkella's testimony regarding divided loyalties seemed confused and failed to support the loyalty hypothesis. He distinguished payments by political subdivisions, and admitted payment by school boards might be qualified. While performing duties for non-police department subdivisions (i.e. crowd or traffic control), and spotting a parole violator, an "off duty" Parole Officer should make an arrest if necessary. The Union failed to perceive any dissimilarities between Parole Officers functioning as "off duty" Police Officers, and Parole Officers functioning in other capacities when confronted with parole offenders. In both circumstances, the required response would be identical.

Allowing the Grievant, or other similarly situated bargaining unit members, an opportunity to realize paid off-duty employment with a police department would not generate a conflict of interest. Subordination does not appear to raise a problem. The

Grievant, as a Parole Officer, could not give himself an order as a Police Officer. If the Grievant, as a Parole Officer, requested law enforcement assistance in the jurisdiction where he worked, he would contact an individual with greater supervisory responsibilities, not another Police Officer. Subordination, moreover, would be virtually impossible based on the Grievant's present assignment. None of his present duties and responsibilities require his presence in Perkins Township.

Similarly, physical possibility does not play a role involving this matter. As such, potential conflict of interest does not rely on this criterion. The Grievant would never be required to be in two places at the same time. He has advised his part-time employer that he was on call twenty-four hours a day. If contacted while performing his part-time duties, he would make himself immediately available to the Adult Parole Authority. Tim McClung, Police Chief of Perkins Township, supported the Union's position. In a letter (Union Exhibit 1) to the Employer authored on December 6, 2000, McClung advised the Employer that he did not expect any conflict between the Grievant's position as a part-time Police Officer and his full time position as a Parole Officer.

The Employer's Position

The Employer opined that the rule regarding Parole Officers ability to be employed off-duty with local law enforcement agencies was reasonably related to the orderly, efficient and safe operation of the Adult Parole Authority. The reasonableness of the rule is the sole issue in dispute rather than the fairness of the rule. The rule is indeed reasonable because it avoids a conflict of interest caused by differing law enforcement standards, policies and techniques. Additionally, this reduces potential

entanglements with local law enforcement agencies leading to divided loyalties and negative impact on the Employer's relationship with the agencies.

In promulgating the disputed guidelines, the Employer relied on an OAG Opinion No. 86-007 (Joint Exhibit 3), which determined the compatibility of two public positions. The positions of Parole Officer employed by the Department of Rehabilitation and Correction and village Police Chief.

Clearly, the disputed matter here involves a conflict of interest between the two positions. Parole officers and Patrol Officers operate under differing arrest power and search and seizure standards. Criminal convictions might be contested when differing standards are applied mistakenly in the field. Dual roles and responsibilities will also cause the Employer to become excessively entangled in local law enforcement matters.

Dual payment concerns can potentially lead to divided loyalties. The resultant conflict can, therefore, negatively impact the Employer's working relationship with local law enforcement agencies, relationships important to the efficient operation of the enterprise.

The guidelines are narrowly tailored and serve a rational operational need. Generally, the guidelines do not prohibit outside employment. Outside security work with private or public entities is not prohibited because there is no exercise of conflicting arrest powers. Where there are no conflict of interest issues, volunteer work with law enforcement agencies are similarly not prohibited.

The Grievant's current caseload does not serve as a distinguishing feature. A conflict arises as a consequence of potential arrest power conflicts, which apply to any parolee under the supervision of the appointing authority. As such, the Grievant's

recent transfer to an institutional Parole Officer position fails to eradicate the potential conflict of interest.

THE ARBITRATOR'S OPINION AND AWARD

From the evidence and testimony adduced at the hearing, and an impartial review of the record, this Arbitrator finds that the guidelines or rules in dispute are reasonable. They are, moreover, related to the orderly, efficient and safe operation of the Adult Parole Authority.

The Grievant's request violates two of the guidelines used to determine the propriety of any request by a Parole Officer who wishes to work in an auxiliary capacity with local law enforcement agencies. He was a paid part-time officer with the Perkins Township Police Department. As a replacement officer, his duties cause a conflict of interest with his duties as a Parole Officer.

For any rule or guideline to be viewed as unreasonable, it must be proven to be arbitrary, capricious or discriminatory. This means that the rule or guideline cannot result in a blanket prohibition. It cannot, moreover, reflect merely the whim or personal convenience of the Employer, without regard to any legitimate business need.

Here, the guidelines are not excessively broad, but rather, legitimate and confined reflections of a legitimate business purpose. The guidelines solely deal with paid part-time employment in an auxiliary capacity with a local law enforcement agency. Other employment with public or private entities do not fall within these guidelines when there is no conflict with an employee's arrest powers. Unpaid volunteer work for a local law enforcement agency, without conflict of interest issues, is also not prohibited by the guidelines.

There exists a legitimate business purpose for the guidelines because there is a conflict of interest between the two positions. OAG Opinion No. 86-007 (Joint Exhibit 8) articulates when a conflict may arise:

A conflict of interest may result where one person holding two law enforcement positions is subject to different law enforcement standards, policies and techniques.

The Arbitrator fully embraces this opinion's articulated definition. When applied to the present dispute, the two positions clearly expose a conflict of interest situation.

Parole Officers and Patrol Officers are subject to different standards, policies and techniques. The positions are incompatible because their arrest powers differ, and therefore, conflict. A Parole Officer may arrest a parolee whenever he has reasonable cause to believe that there has been a violation of parole conditions. A Patrol Officer, however, may arrest a parolee once advised or knowing that a parolee in his jurisdiction has violated the conditions of his parole. As such, the arrest power for a Parole Officer are much less stringent than the standards employed by Police Officers. A Parole Officer acting as a part-time Police Officer may apply the wrong standard, which would invalidate an arrest. If an arrest is not functionally invalidated, it may serve as a valid procedural defect raised by an attorney during a court proceeding causing the record to be muddled by perceived conflicting duties and interests.

Similar problems may arise in matters involving search and seizures. Parole Officers are generally allowed warrantless search powers as long as there is reasonable suspicion tied to supervision needs. This standard diverges drastically from the

standards imposed on Police Officers, which requires a search warrant based on oath or affirmation of probable cause to authorize a search. Again, simultaneous appointments, whether part-time or full-time, would lead to conflicting interests.

Dual paymasters in related areas may also lead to conflicting loyalties regarding particular roles and responsibilities. On-going field-related decisions may result in exemplary work for the law enforcement agency, but potentially conflict with the mission of the Adult Parole Authority. Goals and duties dealing with protection of the public may inherently conflict with the rehabilitation mission of the Adult Parole Authority. In my view, it would be extremely difficult to change or modify roles and responsibilities depending on any particular assignment. Any perceived or potential conflict could cause friction between the Employer and local law enforcement entities. This would erode the Employer's mission since its work product and efficiencies are related to a well-working relationship with local law enforcement entities.

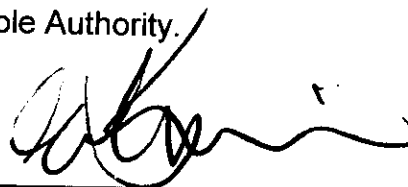
The Grievant's primary work location and caseload do not mitigate nor modify the previously articulated analysis. The dualities and related conflicts cannot be analyzed by merely focusing on the Grievant's particular caseload or work location. Conflicts may arise anywhere when potentially confronting those under the Employer's supervision regardless of the locale or whether the parolee is assigned to any particular Parole Officer. Arrest powers and searches of offenders, for example, are conferred by statute and are clearly not limited to those parolees specifically assigned to the Grievant. These conflicts and entanglement could just as easily arise when confronted by a parolee supervised by another Parole Officer.

AWARD

The grievance is denied. The rule regarding Parole Officers ability to be employed off-duty with local law enforcement agencies is reasonably related to the orderly, efficient and safe operation of the Adult Parole Authority.

June 11, 2001

Moreland Hills, Ohio



Dr. David M. Pincus
Arbitrator