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Dear Gentleman:

Please find enclosed the Decision and Award regarding Sheri Bates, Grievant # 27-14-12-18-00-1210-01-03, Arbitration heard by the undersigned.

Sincerely,

Dwight A. Washington

Enclosures

cc: Baker, Steve – O.C.B.
Rich, Patty – O.C.S.E.A.

IN THE MATTER OF ARBITRATION

BETWEEN

STATE OF OHIO – OFFICE
OF COLLECTIVE BARGAINING

AND

OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION
AFSCME LOCAL 11, AFL-CIO

Grievant: Sheri Bates

Case No. 27-14-12-18-00-1210-01-03

Date(s) of Hearing: August 30, and September 10, 2001

Place of Hearing: CRC Orient, Ohio

APPEARANCES:

For the Employer:

Advocate: T. Austin Stout, Attorney

Witnesses and Representatives:

Ronald G. Vogt – Unit Manager

Edwards Collins – Inmate

Andrew A. Riveria – Inmate

Matthew Swanner – Inmate

Debra Dixon – Correction Officer

For the Union:

Advocate: James McElvain

Witnesses and Representatives:

Mike Rescer – Correction Officer

Ricardo Harris – Correction Officer

Harold Dickey – Correction Officer

Sheri Bates - Grievant

ARBITRATOR: Dwight A. Washington, Esq.

Date of Award: September, 26 2001

INTRODUCTION

The matter before the Arbitrator is a grievance pursuant to the collective bargaining agreement ("CBA"), effective March 1, 2001 through February 28, 2003 between the State of Ohio and the Ohio Civil Service Employees Association AFSCME Local 11, AFL-CIO ("Union").

The issue before the Arbitrator is whether just cause existed to remove the grievant from her position as a Corrections Officer ("CO") for violating rule numbers 24, 42, 43 and 45 of the Standards of Employee Conduct Rules issued by the Department of Rehabilitation and Correction (DR&C). Each party had the opportunity to present evidence in the form of witnesses or written documents to the Arbitrator.

BACKGROUND

This matter involves the removal of the grievant by the DR&C effective December 12, 2000.

The grievant, Sheri Bates, at all times relevant herein was employed as a CO by the DR&C. As a CO the grievant was required to provide security related services for inmates who were under her custody. The grievant was hired in 1996 as a CO and all the events preceding her removal occurred while working at the Correctional Reception Center ("CRC") in Orient, Ohio.

CRC acts as the processing facility for inmates assigned to correctional institutions in the southern half of the state of Ohio. Accompanying all of the inmates to the CRC would include documents indicating the type of crime committed. As a processing center, some of the activities included the following: photos, orientation, assigning ID to inmates, counseling, health services, gang discussions, review of rules, etc. Additionally, other intervention if appropriate, is addressed at this time.

Normally, inmates remain at CRC for less than a week after which they are transferred to their respective institutions. While at CRC, inmates are assigned to a housing pod. Of interest in this matter were the inmates housed in pod R-2 between June – August 2000 regarding events occurring on the second shift.

DR&C, through the testimony of Ronald G.Vogt ("Vogt") stated that four housing pods were under his supervision. Additionally, Vogt was responsible for the protective custody pod, which housed inmates due to court order, or for other legitimate reasons. The protective custody housing pod was located in "C" Block.

Vogt further indicated that in June/July 2000, he became concerned when inmates were requesting transfers to "C" Block from R-2. The basis for the transfer requests were allegedly due to the fact that inmates who were "sex offenders" were being targeted by other inmates with the consent of the grievant. Vogt indicated that during orientation, inmates were told by grievant that CO's would not protect sex offenders from other inmates.

DR&C, through the testimony of inmates Edward Collins ("Collins"), Andrew Riveria ("Riveria") and Matthew Swanner ("Swanner) states from first hand knowledge that the grievant encouraged and directed other inmates to physically abuse sex offenders in R-2.

DR&C, through the testimony of CO Debra Dixon ("Dixon") indicated that she witnessed an inmate who was a sex offender, being assaulted in the TV-room by another inmate in the presence of the grievant. Dixon added that the grievant did not attempt to intervene.

DR&C, through witness Dixon alleges that the grievant interfered with the investigation by the contents of an email dated September 19, 2000 from the grievant to Dixon. DR&C through witnesses Dixon and Riveria indicated that inmates in R-2 who

were assigned as "porters" were given special treatment by the grievant such as, out of cell time and received contraband obtained from the other inmates cells.

DR&C through witness Riveria indicated that the grievant took Edward's toothbrush and attempted to scrub the graffiti off the walls. The statement from Bocook also indicated that Edward's toothbrush was allegedly stomped upon after being rubbed around the rim of the toilet.

The Union, through witnesses Mike Rescer ("Rescer"), Ricardo Harris ("Harris") and Harold Dickey ("Dickey") indicated that the documents, i.e., crime and time sheets containing the criminal offense of each inmate were accessible to CO's and inmates. The Union submitted testimony that the crime and time sheets are routinely in CO's desk or placed in doors. Therefore, there was no need to point out "sex offenders" since the information was readily obtainable.

Additionally, witnesses Rescer and Harris stated that it was a common practice for inmates to share their crime with others. Also between July – August 2000, they were unaware of any inmate attacks. Dickey, Recser nor Harris worked the same shift as the grievant in R-2 between June – August 2000.

The Union, through witness Dickey, points out that "CO Dixon is a good officer and if an assault occurred, she would be there for me." Dickey began working with Dixon in September 2000 when he was assigned to housing pod R-2.

The Union, through the grievant Sheri Bates ("Bates") testified that an investigatory interview did not occur and she cooperated with the DR&C during the investigation. Bates added that she never gave preferential treatment to any inmate and while conducting orientation reminded inmates only "not to broadcast their crime" particularly, if it was a sex crime. Bates worked the second shift while assigned to R-2.

The Union, through Bates denies that she was in the TV room when an inmate was assaulted and never pointed out any inmates as sex offenders. Bates further added

that crime and time sheets were in her office and could be viewed by anyone including inmates. Bates specifically contradicted and denied the testimony (Vogt, Collins, Swanner, Riveria and Dixon) of all the DR&C witnesses.

On November 7, 2001, the pre-disciplinary hearing occurred. Present were Bates, Jeff Gilpin, Union representatives, Sheri Patrick, Chief Steward, Rebecca Hoffman, Deputy Warden, Vogt, and Sgt. David Whiteside. The packet containing the charges was provided by DR&C to Bates and the Union. Prior to November 7, 2000 Vogt testified that he and Joe Fausanaugh ("Fausanaugh"), Investigator, conducted an investigatory interview at the Lorain Correctional Institution ("Lorain") with Bates. where the charges were discussed. No written record of the investigatory interview exists.

On November 18, 2000, grievant was given notice of the disciplinary action, i.e., removal effective December 12, 2000.

On December 18, 2001 Grievance Number 27-14-1218-00-1210-02-03 was filed, alleging a violation of article 24 of the CBA. The substantive dispute is regarding the appropriateness of the disciplinary action.

ISSUE

Was the grievant removed for just cause? If not, what is the remedy?

RELEVANT PROVISION OF THE CBA

ARTICLE 24 – DISCIPLINE

24.01 – Standard It provides in part:

> Disciplinary action shall not be imposed on employees except for just cause, the employer has the burden of proof to establish just cause for any disciplinary action.

24.04 – Pre-discipline It provides in part:

> An employee shall be entitled to the prescience of a Union Steward at an investigation upon request and if he/she has reasonable grounds to believe that the interview may be used to support disciplinary action against him/her.

RELEVANT EMPLOYEE STANDARDS OF CONDUCTS/RULES

Rule 24 – Interfering with or failing to cooperate in an official investigation or inquiry.

Rule 42 – Unauthorized actions that could harm or potentially harm an individual under the supervision of the department.

Rule 43 – Physical abuse of any individual under the supervision of the department.

Rule 45 – Without express authorization, giving preferential treatment to any individual under the supervision of the department, to include but not limited to: a) offering, receiving or giving of favor, b) offering, receiving, or giving anything of value.

POSITION OF THE PARTIES

POSITION OF THE DR&C

The DR&C expects all employees to follow the employee standards of conduct, and the rules as promulgated are reasonable and proper.

The investigation began in July 2000 when inmates from housing pod R-2 began to seek protective custody in "C" block. The inmates seeking protective custody were incarcerated for sex –related crimes. All of the inmates (Swanner, Edwards, Ickes) indicated that they were singled out by Bates due to the nature of their charges leaving them exposed to verbal and physical abuse by fellow inmates.

DR&C further alleges that inmates acting in consent with Bates received preferential treatment, i.e., out of cell privileges, porter assignments, and confiscated property of other the inmates.

Finally, DR&C contends that Bates interfered with the investigation by failing to cooperate and encouraging a material witness (Dixon) not to cooperate.

POSITION OF THE UNION

The Union contends that the DR&C failed to establish just cause to remove the grievant. Namely, the seminal incident regarding the TV-room involving an inmate being

assaulted in her presence did not occur. The grievant denies using inappropriate references during orientation and pointing out sex offenders for abuse by other inmates.

The Union also maintains that the investigation was flawed in the following respects: 1) inconsistent versions of an alleged toothbrush incident; 2) no record of an investigatory interview conducted at Lorain; 3) no evidence that the grievant interfered with the investigation and 4) no evidence that the grievant gave preferential treatment to the porters.

With respect to the TV-room incident, the Union submits that CO's Dixon and Maria Burton's ("Burton") version of what happened was motivated by personal reasons and the truthfulness of their statements are doubtful.

BURDEN OF PROOF

It is well accepted in discharge and discipline related grievances, the employer bear the evidentiary burden of proof. see, Elkouri & Elkouri – "How Arbitration Works" (5th ed. 1997)

The Arbitrator's task is to weigh the evidence and not be restricted by evidentiary labels, i.e., beyond reasonable doubt, preponderance of evidence, clear and convincing, etc. commonly used in the non-arbitable proceedings. see, Elwell- Parker Electric Co., 82 LA 331, 332 (Dworkin, 1984)

The evidence in this matter will be weighed and analyzed in light of the DR&C burden to prove that the grievant was guilty of wrongdoing. Due to the seriousness of the matter and Article 24 requirement of "just cause", the evidence must be sufficient to convince this Arbitrator of guilt by the grievant. see, J.R. Simple Co and Teamsters, Local 670, 130 LA 865 (Tilbury, 1984)

DISCUSSIONS AND CONCLUSIONS

The main operative facts in this matter are in dispute. Namely, what role, if any, did the grievant play in July-August 2000 regarding the alleged abuse of sex offenders in housing pod R-2?

The most critical question for the Arbitrator is whether the Employer's proof was strong enough to establish that removal was justified. Suffice it to say, that this Arbitrator believes ".....that the greater of the consequences of the discipline to the employee, the higher degree of proof that should be required." S.D. Warren Co.; 89 LA 686, 702 (Gwiazda, 1985)

After careful consideration of this matter including all the testimony and evidence presented at this hearing by both parties, I find that the grievance must be denied. My reasons are as follows:

This case is about accountability and honesty. With respect to the TV-room incident of July 14, 2000, the relevant facts adopted by the Arbitrator indicate that CO Burton escorted some inmates from the staging area over to R-2. Swanner, a first time offender was part of that group. The grievant instructed Swanner to go into the TV-room. Inmate Terry Bocook ("Bocook") joined Swanner and the grievant in the TV-room. The grievant asked Swanner why he was in jail in the presence of Bocook. Swanner stated he was in jail for a sex offence with a minor. Bocook proceeded to strike Swanner on the left side of the face causing him to hit his head on the wall, falling to the floor and apparently rendering him unconscious. Bocook was a porter in R-2 on July 14, 200.

CO Dixon testified that she saw the grievant, Swanner and Bocook in the TV-room on July 14, 2000. CO Dixon saw Bocook strike Swanner in the grievant's presence. After being struck, Swanner slid down the wall and fell on the floor. CO Dixon's view [1] into the TV-room was unobstructed and she observed all of the events

[1] The Arbitrator had a site visit to R-2 to better appreciate the distances and physical layout of the pod.

listed above. Swanner's testimony regarding what occurred in the TV-room is similar to CO Dixon's. Swanner received medical treatment on July 19, 2000.

CO Burton's statement (Ex. G) indicates that she saw the grievant, Swanner and Bocook in the TV-room. CO Burton turned away from the room for a moment and upon turning back to the room, she saw inmate Swanner on the floor with inmate Bocook standing over him.

Inmate Bocook's statement (Ex. E) verified that he struck Swanner in the grievant's presence. Bocook's statement further indicated that the grievant would point out sex offenders in R-2 and request him to "take care of business".

I particularly found Swanner's testimony very credible. Swanner was a first time offender and arrived at CRC on July 14, 2000. Within five (5) to ten (10) minutes of arriving in R-2, he was struck by Bocook only because of being a sex offender. On the other hand, the grievant denies that she observed anything on July 14, 2000 involving Swanner and Bocook. Simply, no facts exist to indicate that Swanner, Bocook, CO Dixon and CO Burton had the opportunity or conspired to create this horrific lie against the grievant. The grievant's version is unbelievable and the incident of July 14, 2000 alone is sufficient to sustain the discharge. see, Gilbarco, Inc. 93 LA 604 (Flanagan, 1989). I find that CO Dixon and Swanner's testimony to be credible and believable.

However, additional evidence through witnesses CO Dixon and inmate Collins implicates the grievant in directing that a sex offender (Gerald Edwards) be intentionally struck with a cell door by Bocook. Dixon and Collins observed Edwards being knocked down when Bocook shoved his cell door open as Edwards walked past. The grievant denies any knowledge of or involvement. Bocook's statement also verifies that this incident occurred with the grievant's participation.

Additionally, credible proof was offered that the grievant informed Collins and his cellmate (J. Owens) of another sex offender in R-2 (inmate H. Ickes) and directed Collins

and Owens to mess with the "baby raper". The grievant denies any knowledge or involvement.

It must be noted that inmates Swanner, Edwards and Ickes requested to be moved from R-2 to "C" Block in June 2000. Arbitrators have routinely overturned disciplinary actions if the evidentiary basis is weak or faulty. In termination cases, greater proof is required to support the discipline. I find that the employer met its burden and the weight of evidence support a clear violation of Rules #42 and #43. The grievant's version of her involvement and knowledge of the above events are simply not credible.

With respect to Rule #24, the e-mail from the grievant to CO Dixon (Ex. F-1) is at the heart of this charge. CO Dixon testimony indicates that the overall tone of the letter was threatening, but upon cross-exam it was established that nothing in the document told her not to cooperate with Vogt and/or Fausanaugh. I agree. Therefore, the facts do not support a violation of Rule #24.

With respect to Rule #45, testimony from witness Rivera stated that he observed the grievant take property (envelopes) of Edwards and give it to the porters. CO Dixon testified that "a lot" of the contraband that was confiscated was given to the porters by the grievant. Bocook, in his statement indicated that the grievant gave him a pack of cigarettes and envelopes from Edward's cell and that the grievant would pay him with items from the contraband bag (Ex-E). The grievant denies any knowledge or involvement. Upon cross-examination of CO Dixon, it was pointed out that the shakedown logbook does not indicate that Edward's cell was "tossed" by the grievant while he (Edwards) was in R-2. This inconsistency is seemingly bothersome, unless the facts suggest that unauthorized contraband was being given to porters. If that's the fact, the log book would be intentionally inaccurate since the purpose for the toss was not

legitimate. Once again credible evidence exists through CO Dixon and inmates Rivera/Bocook to support a violation of Rule #24 by the grievant.

The Union claims the investigation was faulty for a number of reasons, given my previous ruling on the merits, it would be superfluous to address all of the concerns (i.e., inconsistent witness statements, preferential treatment issue, inference of the investigation). However, the Union raised concerns that the investigatory interview conducted by the DR&C was not documented, thereby depriving the grievant of actual notice of the charges in violation of the CBA.

As evidence, the Union, upon cross-examination of Vogt, who conducted the investigatory interview along with Fausanaugh testified that he and Fausanaugh did not conduct a question and answer session but she was aware of the charges. The investigatory interview occurred sometime after September 19, 2000 and prior to October 7, 2000.

Vogt in rebuttal for the DR&C testified that the grievant was told what the allegations were and was given the "meat and potatoes" of every charge. DR&C 's position is that the investigation was proper and not deficient.

Under different circumstances, the Union's argument regarding the failure to document the investigatory interview would have merit. Unfortunately, the grievant's truthfulness is again at issue.

On September 19, 2000, the grievant's e-mail to (Ex. F-1) CO Dixon contains the following excerpts: ".... I told you three weeks ago that there weren't after you, that they are after me, ...I don't have to tell you what they are doing. I think that you know, ... All they have are inmates statements (sic) and that is it".

According to the exhibits, all of the inmate's statements and interviews occurred prior to September 19, 2000, except Bocook. Bocook's statement is dated September 29, 2000.

The facts are unrefuted that the grievant on September 19, 2000, was aware that numerous inmates and CO Dixon had been interviewed regarding her. It seems highly unlikely that Vogt and/or Fausanaugh would travel from CRC to Lorain and not inform her of the allegations. It also seems unlikely that the grievant would not have demanded specificity - assuming that Vogt/ Fausanaugh refused to disclose the nature of the investigation. Therefore, despite the lack of a written investigatory report, the investigation was "fundamentally fair" and strong, direct (Vogt's testimony) and circumstantial evidence exists that the grievant had specific knowledge of the allegations. see, OCSEA Arbitration Decision No. 432, AFSCME, Local 11, Anna Smith, and Arbitrator April, 1992. Finally, no evidence exists to indicate that the grievant was not represented by the Union at each stage of the proceeding.

DR&C had just cause to remove the grievant for violations Rules no. 42,43,and 45 and I find no mitigating circumstances that would justify another outcome.

AWARD

Grievance denied.

Respectfully submitted this 26th day of September 2001.

Dwight A. Washington, Arbitrator