#1579

IN THE MATTER OF ARBITRATION

BETWEEN

STATE OF OHIO – DEPARTMENT
OF REHABILITATION AND CORRECTIONS

AND

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

Grievant: Hassan Sweeney

Case No. 27-14-010718-1349-01-02

Date of Hearing: May 9, 2002

Place of Hearing: OCSEA, Columbus, Ohio

APPEARANCES:

For the Union:

Advocate: James McElvain, Representative

Witnesses and Representatives:

Hassan Sweeney, Grievant

Steven Gibson, Correction Officer

For the Employer:

Advocate: Dave Burris, Representative

Witnesses and Representatives:

Roderick Johnson – Labor Relations Officer

ARBITRATOR: Dwight A. Washington, Esq.

Date of Award: June 10, 2002

INTRODUCTION

The matter before the Arbitrator is a grievance pursuant to the Collective Bargaining Agreement ("CBA"), in effect March 1, 2000 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 exists to support removal of the Grievant for violating standard of Employee Conduct Rule(s) 6 - insubordination and 7 - failure to follow orders.

The removal of the Grievant occurred on July 9, 2001 and was appealed pursuant to Article 24 of the CBA. This matter was heard on May 9, 2002 and is properly before the Arbitrator for resolution.

BACKGROUND

This matter involves Hassan Sweeney, Grievant, a four (4) year employee of the Department of Rehabilitation and Correction ("DRC") at its Lorain facility. The Grievant was a Correction Officer ("CO") and an integral part of his duties included following post orders, policies, procedures and/or directives of the DRC.

Standards of Employee Conduct ("Rules") contains a series of rules that DRC employees are required to follow and the consequences for failure to comply are included therein. At all times relevant herein the Rules applied to the Grievant.

Prior to the events preceding the Grievant's removal on July 9, 2001 the following disciplinary actions were on the Grievant's record:

1. Three (3) day suspension for Rule(s) 6 – insubordination and 18 – threatening/intimidating a co-worker dated January 15, 1998;
2. One (1) day suspension for Rule 3(h) – absent without proper authorization dated March 10, 1999;
3. Five (5) day suspension for Rule 18 – threatening/intimidating co-worker dated October 22, 1999; and
4. Fifteen (15) day suspension for Rule(s) 8 – failure to carry out work assignment or use of poor judgment and 18 – threatening/intimidating a co-worker dated December 16, 1999.

The record is clear that Grievant had prior conflicts with co-workers and management. According to the Grievant the underlying reasons for the conflicts were due to standing up for his rights and pointing out misconduct of co-workers and/or management that violated the law. To that extent, the Grievant had filed several administrative actions alleging equal employment opportunity violations while employed at DRC. On the other hand, DRC submits that due to the combative position taken by the Grievant on issues, resulted in an uncooperative employee who refused to follow reasonable work directions.

With respect to the Grievant's discipline trail, a grievance settlement occurred in July 2000 requiring the Grievant to enroll and successfully complete an Employee Assistance Program ("EAP") for anger management. The EAP intake coordinator (i.e., Cynthia Penn) for DRC is located in Columbus, Ohio but the counselor who performed the services was Kate Belew ("Belew") who was located geographically near Lorain, Ohio. The "official" enrollment process includes the execution of several forms by the enrollee (Joint Exhibit "JX" 7), i.e., Participation Agreement, Confidentiality Statement, and Authorization for Release of Information. At the time of the July 2000 settlement the Grievant was not instructed by DRC of the process nor provided the enrollment forms for EAP until May 21, 2001.

From January 15, 2001 until May 15, 2001 the Grievant was off work on disability for stress and completed the requisite forms for disability leave. According to the Grievant, Roderick Johnson ("Johnson") Labor Relations Officer ("LRO") was notified, and the appropriate disability application forms were executed by the Grievant. Johnson's duties included serving as the EAP Coordinator for Lorain for over four (4) years and he was serving in that capacity in 2000. Johnson stated that due to being off from work for thirty (30) days in 2000 and other circumstances delayed officially enrolling the Grievant in EAP.

On January 17, 2001 the Grievant unilaterally sought treatment and commenced to receive counseling from Belew for anger management believing that he was satisfying the EAP requirement regarding the July settlement agreement. The Grievant participated in counseling

with Belew until May 2001. At no time did Belew provide EAP enrollment forms or indicate that the Grievant was not enrolled in an EAP between January and May 2001.

On January 29, 2001 DRC, through Warden Kroft, required the Grievant to present documentation regarding his EAP enrollment by February 16, 2001 or be terminated (JX-3). On February 14, 2001 Belew confirmed in writing to Warden Kroft that since January 17, 2001 the Grievant was in counseling and receiving ongoing treatment. DRC did not respond back to Belew or indicate that the Grievant was **not** properly enrolled in an EAP.

On May 15, 2001 the Grievant return to work based upon Belew's opinion of his work readiness (JX-5). However, based upon past disciplinary experiences, the Grievant was scheduled for a medical/psychiatric exam with Dr. Phillip Epstein ("Dr. Epstein"). On May 21, 2001 at a meeting in Johnson's office, Warden Kroft letter scheduling Dr. Epstein's appointment was given to the Grievant, in the presence of CO Steven Gibson ("CO Gibson"). The medical examination was a directive to the Grievant according to Johnson and the Grievant was told he would be disciplined if he didn't comply. The Grievant and Gibson both deny that Johnson verbally told the Grievant he would be disciplined. Additionally in the meeting, the Grievant was provided for the first time official EAP forms. The Grievant questioned the need to complete the EAP enrollment forms but was required to sign the documents or be disciplined and was asked to leave the institution due to his reluctance to execute the documents.

The Grievant concern with executing the EAP forms was due to his completion of an anger management program prior to May 21, 2001 with full knowledge of DRC, i.e., Belew's letter of February 14, 2001. The Grievant, CO Gibson and Johnson all concur that Johnson stated if he did not sign the EAP forms the Grievant would be disciplined. The Grievant completed the EAP forms in the presence of CO Gibson and Johnson (JX-7). Regarding Dr. Epstein's examination, if discipline was a possibility the Grievant indicated the appointment would have occurred similar to the execution of the EAP forms. The Grievant further indicated that until May 21, 2001 he received no guidelines regarding EAP, and if the proper forms were provided earlier this issue would have been moot.

With respect to CO Gibson's involvement, on several occasions, as opposed to the Union Steward, he was asked to serve as a witness in meetings between the Grievant and management. CO Gibson described his relationship with the Grievant as professional but they were not social friends outside of the workplace. CO Gibson recalled that Johnson stated that the Grievant would be terminated if he didn't sign the EAP enrollment forms (JX-7) – but, did not indicate the Grievant would be disciplined if he failed to see Dr. Epstein. CO Gibson added that the Grievant inquired why he had to sign the EAP paperwork since he had completed the anger management counseling through Belew. Also, the Grievant was uncertain if he was unpaid or paid (administrative) leave status on that date and until Mindy Williams was told by Johnson to put the Grievant on paid administrative leave.

The Grievant, on May 24, 2001, commenced his second anger management program and was assigned to Belew as his counselor after being officially enrolled. Between May 24, 2001 and July 24, 2001 the Grievant failed to maintain proper contact and was determined to be in non-compliance with the EAP (JX-11) and his case was closed effective July 24, 2001. The record is void as to the position of the parties regarding the similarities and/or differences as to the anger management program completed prior to May 15, 2001 and the anger management program commenced on May 24, 2001, and impact upon the Grievant since his removal occurred to the completion of the May 24, 2001 program.

On May 24, 2001 the Grievant did not attend the scheduled appointment with Dr. Epstein and as a result the Grievant was removed as a Correction Officer for violating Rule 6 – insubordination and Rule 7 – failure to follow directive on July 9, 2001.

The hearing occurred on May 9, 2002 and each party had the opportunity to present evidence in the form of witnesses or written documents.

ISSUE

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

RELEVANT PROVISION OF THE CBA AND OHIO REVISED CODE

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. In cases involving termination, if the arbitrator finds that there has been an abuse of a patient or another in the care or custody of the State of Ohio, the arbitrator does not have authority to modify the termination of an employee committing such abuse. Abuse cases which are processed through the Arbitration step of Article 25 shall be heard by an arbitrator selected from the separate panel of abuse case arbitrators established pursuant to Section 25.04. Employees of the Lottery Commission shall be governed by O.R.C. Section 3770.02(i).

OHIO REVISED CODE
ARTICLE 124.34

123:1-33-01 (B) Medical and Psychological Examinations - Pertinent Part

B) ...[U]nexcused failure to appear for an examination, or the refusal to release the results of an examination amounts to insubordination, punishable by the imposition of discipline up to and including removal.

POSITION OF THE PARTIES

POSITION OF THE UNION

DRC failed to timely implement the EAP, and through its own negligence is responsible for why the Grievant had not completed the EAP process by May 21, 2001.

DRC failed to articulate if the Grievant was on administrative leave as of May 21, 2001 and on account of the lack of clarity as to his employee status a question exist as to whether the Grievant was on an "active" or "inactive" status on May 21st and/or May 24th.

Due to DRC's desire to retaliate against the Grievant as a result of his personality towards management and co-workers, DRC failed to demonstrate that a clear directive was provided to the Grievant regarding the appointment with Dr. Epstein. If DRC had threatened discipline similarly to the directive contained in Warden Kroft's letter of January 29, 2001 or by Johnson to execute the EAP enrollment forms, it stands to reason – the medical examination would have occurred. Also CO Gibson was present on May 21, 2001 and his version supports no directive was given.

With respect to CO Gibson, who had no interest in the outcome of this dispute, it's prudent to credit Gibson's recollection of the events of the pivotal May 21st meeting which are in alignment with the Grievant.

Finally, if further discipline including removal was verbally stated to the Grievant on May 17th or thereafter, regarding the appointment with Dr. Epstein – why wasn't the directive memorialized in writing?

POSITION OF THE EMPLOYER

The DRC admits that the EAP forms should have been executed in a more timely fashion, but, dereliction for having the forms timely executed does not obviate the refusal of the Grievant to follow a clear directive to obtain the medical examination.

The Grievant's discipline record demonstrates a pattern of reprehensible conduct over a relatively short period of time consistently involving his inability to follow orders or interact properly with co-workers. The Grievant was aware of the rules and was obligated to abide by the directive or experience the consequences for his failure.

With respect to the credibility divide regarding the meeting with CO Gibson, Johnson and Grievant – the most palatable conclusion supports Johnson's version and no evidence exist to allege that Johnson fabricated his testimony or was motivated to be untruthful.

The removal was based upon just cause and on account of his past discipline record removal was appropriate, however, in the alternative – if just cause is not found by this Arbitrator only back pay plus benefits should be awarded but not reinstatement, due to the relationship of the parties.

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 OBR 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)

DISCUSSION AND CONCLUSIONS

After careful consideration of the evidence in this matter, I find that the grievance is granted. My reasons are as follows:

The evidence is unrefuted that on May 17, 2001 the Grievant was scheduled for a medical/psychiatric evaluation with Dr. Epstein on May 24, 2001 at 10:00 a.m. Johnson testified that the letter (JX-6) was signed by Warden Kroft and hand delivered to the Grievant on May 21, 2001 in the presence of CO Gibson.[1]

What occurred after Grievant received JX-6 is a matter of considerable dispute. Johnson testified that he told the Grievant failure to attend the medical examination would result in some form of discipline. Contrary, testimony through Gibson and Grievant indicates that Johnson stated that discipline could occur including termination **if** the Grievant failed to sign the EAP enrollment forms, but Johnson was silent regarding the medical examination.

The weight and credibility given to the testimony of Johnson, Gibson and Grievant is the heart of this conflict. The undisputed material facts which all three agree occur on May 21st includes the following: the medical examination was discussed; the EAP forms were executed, and the current leave status of the Grievant was uncertain. The evidence also suggests that a modicum of ill will existed between DRC and the Grievant. As example, Johnson testified the Grievant was confrontational, challenged orders and was disrespectful. The Grievant testified

[1] Conflicting testimony between Johnson and the Grievant occurred as to the date of the meeting with Gibson. Based upon supportive evidence such as the execution of the EAP enrollment forms and piecing together the collective testimony of Johnson, Gibson and Grievant, I conclude that May 21, 2001 is the date that JX-6 was hand delivered to the Grievant as well as the meeting of the parties which occurred in Johnson's office.

that management had animosity towards him due to his stance on filing prior administrative charges against DRC alleging sexual and racial misconduct and that due to threats made by co-workers against his family certain relationships were strained. Given the apparent confrontational style and prior disciplines of the Grievant. I have no doubt that DRC would welcome the appropriate opportunity to properly remove the Grievant. I find that a stench of ill will was apparent and existed on both sides of the table. Simply the presence of ill will under this context requires a careful scrutiny of the testimony of Johnson **and** the Grievant, in determining the carousel of credibility.

It is undisputed that Johnson directed the Grievant to execute the EAP enrollment forms or else he would be disciplined. Even though the Grievant questioned the necessity for executing the forms, he reluctantly, but nevertheless complied. The Grievant's disagreement on this issue was based on his understanding that he had completed the anger management program and DRC had received correspondence from counselor Belew delineating his participation. DRC was required beginning in July 2000 and reaffirmed in February 14, 2001, to provide guidelines and clear direction to the Grievant for proper EAP enrollment. Therefore, I find that the Grievant's concerns for execution of the enrollment forms on May 21, 2001 were legitimate and no evidence was offered that indicated the Grievant's conduct in the May 21, 2001 meeting was inappropriate in any manner. Moreover, DRC's failure to respond to Belew's February 14, 2001 letter to Warden Kroft was a tacit admission that the Grievant was enrolled and exacerbated at a minimum, Grievant's confusion on this issue.

DRC further argued the Grievant was on disability leave from mid January 2001 until May 15, 2001 and such leave was non-related to the EAP. However, on January 29, 2001 (JX-3) Warden Kroft writes to Grievant and states in part:

> "...[Y]ou are hereby being given a direct order to enroll in an Anger Management Program through EAP by February 16, 2001. **Failure** to provide documentation that you have, or are currently enrolled, will result in **removal**." (Emphasis added) (JX-3)

The letter states with clarity that while on disability leave, the Grievant by February 16, 2001 must enroll in an EAP or be **removed**. Belew responded on February 14, 2001 and states to Warden Kroft that the Grievant is in counseling and "if" any questions exist to contact her. No facts indicates that DRC rejected Belew's reply or conducted an investigation to determine if the appropriate EAP enrollment forms had been supplied to Belew. In short, DRC accepted Belew's response that the Grievant was in a program through EAP, and did nothing further until the infamous May 21, 2001 meeting. Not only should the Grievant have been apprehensive about executing the EAP enrollment forms on May 21st genuine but also the discipline threat coupled with the execution of the forms demonstrates a manifestation of ill will by DRC given the facts of this case. Query, if the Grievant was not enrolled in an EAP why was he **not** removed by February 16, 2001 in accord with Warden Kroft's directive of January 29, 2001?

Regarding the medical examination, I find CO Gibson's testimony credible and his demeanor forthright. If DRC intended the medical examination to be mandatory or face removal, the May 17, 2001 Warden Kroft's letter would have been drafted similar to his letter of January 29, 2001 (JX-3). Therefore, I find that the Grievant was not provided the certainty required to support the removal and hence, just cause does not exist.

Additionally, if Johnson needed to reaffirm the seriousness of the Grievant's attendance with Dr. Epstein, a confirming memo stating the consequences should have been prepared. I find that the evidence is not persuasive to this Arbitrator that the Grievant was informed of the consequences if he didn't keep the medical exam. Due to the past relationship of the parties a greater sense of definiteness existed by DRC to avoid any confusion in handling disciplinary matters involving the Grievant. In addition to suggestions referenced infra, i.e., removal proviso in Warden Kroft's letter of January 29, 2001; reply to Belew's letter of February 14, 2001; and memo to Grievant after the May 21, 2001 meeting..., DRC could have had a witness in addition to Johnson at the meeting to balance the credibility scale.

The preponderance of evidence supports the version of the Grievant regarding the material dispute between the parties regarding discipline associated with the medical

examination. When widely different versions of the facts are presented, it's the Arbitrator's duty to evaluate the testimony and reach the best logical conclusion. see, Texas Electric Steel Casting Co., 28 LA 757 (Abernathy, 1957). Based upon all of the testimony, the resolution of this credibility conflict is not intended to cast any doubt on the honesty or veracity of any witness. Simply, the most plausible conclusion was based upon my interpretation of the evidence as a whole.

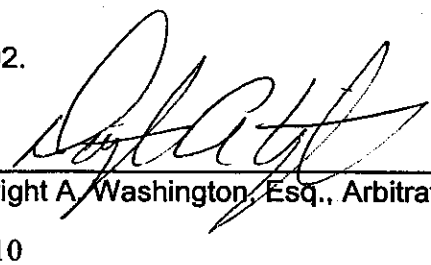
With respect to not complying with Warden Kroft's May 17, 2001 request, the Grievant's conduct is not totally blameless and under different circumstances some level of discipline would have been appropriate. The Arbitrator indicated earlier that ill will existed on both sides of the table. In this matter, the Grievant's misconduct is related to behavior, not performance. I am convinced that the misconduct of the Grievant, if continued, will surely lead to removal. My decision should not be interpreted as condoning the behavior of the Grievant in any respect.

Neither party opined the effect of the anger management program completed by the Grievant and the program initiated on May 24, 2001. Without distinguishing the differences, if any, between the programs as a condition of reinstatement I direct the Grievant to enroll and complete an EAP under the auspices of the Ohio Employee Assistance Program. Moreover, if updated enrollment forms different from the documents executed May 21, 2001 needs to occur that such forms be executed and the program commenced within thirty (30) days of this award.

AWARD

The grievance is granted. The Grievant was not disciplined for just cause. He is to receive back pay, benefits and reinstated with all applicable seniority rights. The Grievant will enroll in an EAP within thirty (30) days of this award. The Arbitrator retains jurisdiction for a period of sixty (60) days to resolve any dispute that may arise in the implementation of this award and/or regarding the enrollment and completion of an EAP by the Grievant.

Respectfully submitted this 10th day of June 2002.



Dwight A. Washington, Esq., Arbitrator

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