#1616

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: Dawn Pennington

Case No. 27-30 (020321) 1412-01-03

Date of Hearing: September 19, 2002

Place of Hearing: Marion, Ohio

APPEARANCES:

For the Union:

Advocate: Lynn Belcher
2nd Chair: Patricia Howell

Witnesses:

David Dauer
Esther Douglas
Michael Schmidt
James Vanderpool
Kevin Flake

For the Employer:

Advocate: Richard G. Corbin
2nd Chair: Dave Burrus

Witnesses:

Terry Knight
Michael Vinson
Gordon Lane

ARBITRATOR: Dwight A. Washington, Esq.

Date of Award: November 4, 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 the removal of the Grievant, Dawn Pennington ("Pennington"), for violating the Department of Rehabilitation and Correction ("DR&C') Standard of Employee Conduct Rule 7-failure to follow post orders, policies, procedures or directives and Rule 24-failure to cooperate in an official investigation. The discipline was issued because the Grievant provided inconsistent statements during an investigation which undermined her credibility and impeded the investigation of an alleged assault by a co-worker against an inmate.

The removal of the Grievant occurred on March 21, 2002 and appealed in accordance with Article 24 of the CBA. This matter was heard on September 19, 2002 and both parties had the opportunity to present evidence through witnesses and exhibits. A site visit occurred to enable the Arbitrator to appreciate the evidence in context with the work area involved. This matter is properly before the Arbitrator for resolution.

BACKGROUND

Pennington worked for DR&C as a correction officer ("CO") for approximately twenty (20) months and at time of removal had no prior discipline of record. On December 29, 2001, the Grievant was working at North Central Correctional Institution ("NCCI") on third shift. The normal third shift hours are from 10:00 p.m. until 6:00 a.m. the following day. Pennington did not have an assigned post due to her length of service and worked as a relief or extra duty officer based upon the institutional staffing needs.

The Grievant was assigned to the segregation unit on December 29, 2001 at NCCI and worked from 10:00 p.m. until 2:00 a.m. in that area. The other COs working in the segregation unit were Michael Schmidt ("Schmidt") and David Dauer ("Dauer"). Inmates who are housed in the segregation unit are generally under maximum observation and post orders are in place that contain standard procedures for inmates in this unit. (JX-6).

The segregation unit is divided into three (3) separate areas, also called ranges. The three ranges are: security control ("SC"); disciplinary control ("DC") and local control ("LC"). Physically located in the center of the unit is the control area also referred to as the cage. The CO's with responsibility for rover or range are called the range officers and the officer inside the cage is called the cage officer. The cage officer works in a protective metal enclosure that is secured at all times. The opening of the individual cell doors, completing paperwork and answering telephones are part of the cage officer's duties.

Inmates who are housed in this unit for a number of reasons such as: protective custody due to life threats from other inmates; failure to follow institutional rules; pending investigations due to alleged misconduct; constant watch required due to irrational behavior; and determination by the Rules Infraction Board that certain inmate conduct justifies placement. Warden Gordon A. Lane ("Lane") indicated that inmates with disciplinary problems reside in the SC, DC or LC units, necessitating the highest degree of security at NCCI.

As an example, range officers are required to restrain the inmates with handcuffs prior to requesting that the cage officer open the cell door. If the inmate is in a cell that is occupied by another inmate, both inmates are required to be placed in restraints prior to opening the cell door. (JX-6). Simply, no cell door is to be opened unless the inmates are restrained in accordance with NCCI policy, which contained the standard procedures for inmates placed in the segregation unit. (JX-6). All employees assigned to this unit were required to have knowledge of the policy and "...must ensure compliance with all rules and regulations". (JX-6, p. 15).

With respect to the segregation unit a thirty (30) day orientation period is required for all officers in accord with the Pick-A-Post Agreement between the parties (Un. Ex 14, p6). The record is void as to whether Pennington prior to December 29, 2001 received the thirty (30) day orientation required. CO Dauer testified that part of his duties was to train Pennington due to her status as a relief officer. Moreover, Pennington, as part of her initial academy training by DR&C received eight (8) hours of O.J.T. (On Job Training) on July 19, 2000 regarding the segregation unit. (JX Ex 8).

The cage officer is the only CO capable of opening any of the range cell doors. The range officers were responsible for restraining the inmates prior to requesting that the cell door be opened. The location of the control unit makes it virtually impossible for the cage officer to visually observe the inmate in handcuffs prior to opening the cell door and as a result depends exclusively upon the range officer in ensuring inmates are properly restrained. CO Esther Douglas ("Douglas") indicated that she's worked for five (5) years as a cage officer and once requested by a range officer to open a cell she complies, with no visual or other actual confirmation that the inmate is restrained.

On December 29, 2001 at approximately 10:30 p.m., CO Schmidt requested the Grievant to open cell 246 on the LC range. The cell door was opened. At approximately the same time CO Dauer requested that the cell doors be opened to allow the inmate porters to commence their work. The Grievant, when initially interviewed on December 30, 2001, indicated that she didn't open any cell doors except for the porters around 10:30 p.m. (JX 1, p 36; testimony of Knight). Inmates Lass and Seaunier were housed in cell 246. The evidence indicates that CO Schmidt entered the cell to retrieve a note posted by inmate Seaunier that was viewed as contraband. CO Schmidt failed to handcuff either of the inmates prior to requesting that the cell door be opened. Officer Dauer, after getting the porters started on doing their laundry work, returned to the LC range and observed CO Schmidt in cell 246 wrestling with inmate Seaunier in an attempt to obtain the "note".

Officers Schmidt and Dauer initially denied any knowledge of cell 246 being open or that either one was inside the cell. CO Dauer indicated that the incident did not generate a lot of noise; no injuries on Seaunier were observed, and in protecting CO Schmidt he lied to Investigator Terry Knight ("Knight") during his initial interview on December 30, 2001. CO Schmidt subsequently admitted that he was untruthful as well but that Pennington could not observe what occurred and that it was the range officer's responsibility to ensure inmates were properly restrained not the cage officer. Whether or not inmate Seaunier was physically assaulted around 10:30 p.m. is a matter of factual dispute. No evidence was offered that at any time between 10:30 p.m. and 11:30 a.m. the following day the injuries were observed by any range officer nor did the inmate attempt to contact anyone (i.e., supervisors, medical) to report the incident.

The site visit enabled the Arbitrator to surmise that an inmate in cell 246, if distressed, was able to speak loud enough to get the attention of the cage officer. No evidence indicates that the inmate's voice was damaged as a result of what occurred on December 29, 2001 or any attempt was made to alert Pennington of the alleged assault. Cell 246 is approximately 25 yards from the control unit and clearly within earshot of the cage officer.

At 2:00 a.m., CO Dauer relieved the Grievant from her control unit duties and Schmidt nor Dauer informed Pennington what happened in cell 246. Moreover, inmate Seaunier did not request any medical assistance or inform CO James Vanderpool ("Vanderpool") who made three (3) visits to the LC range on the shift in question.

On December 30, 2001 at approximately 11:30 a.m., inmate Seaunier informed Lt. Leon Hill ("Hill") that CO Schmidt had assaulted him the previous evening. Inmate Seaunier was referred to medical where several facial abrasions were observed as well as dried blood around the nose. NCCI commenced an investigation by Knight due to the seriousness of the charge and in light the fact that Pennington, Dauer nor Schmidt had prepared an incident report or reported that anything unusual had occurred.

Between December 30, 2001 and January 9, 2002 Investigator Knight interviewed several inmates who stated that CO Schmidt in the presence of CO Dauer had cell 246 opened and proceeded to wrestle and/or fight inmate Seaunier that resulted in facial injuries to the inmate. Knight's confirmation of Seaunier's claims through inmate witnesses suggested that CO's Dauer, Schmidt and Pennington versions were untruthful.

On January 9, 2002 a second interview with CO Dauer occurred where he recanted his earlier version and admitted he saw CO Schmidt in cell 246 wresting with an unrestrained inmate Seaunier. Moreover, CO Schmidt on January 17, 2002 admitted to Knight that he had previously lied about not being in inmate Seaunier's cell and that Pennington opened the door.

Pennington, on January 31, 2002, was interviewed a second time by Knight and her story shifted to the extent that she recalls opening additional doors around 2:00 a.m. as well as opening a cell to allow the removal of a mattress. Regarding cell 246, the Grievant continued to be evasive with respect to specific recall of opening the door for CO Schmidt, according to Knight.

Vinson of OSP on January 9, 2002 met with Pennington and based upon his experience as a specialist involving interview techniques concluded that she was untruthful. Specifically, Vinson testified that her demeanor in the interview, her inability to recall opening cell 246 and failure to recall anything unusual happening led him to conclude that Pennington was not telling the truth. Vinson also interviewed inmates Seaunier and Lass and observed scratches on Seaunier's face and back.

The hearing occurred on September 19, 2002 and each party had the opportunity to present evidence in the form of witnesses or written documents.

ISSUE

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

RELEVANT PROVISION OF THE CBA, ORC AND OHIO ADMINISTRATEIVE 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).

DR&C STANDARDS OF EMPLOYEE CONDUCT
RULE 7 & RULE 24

Rule 7: Failure to follow post orders, administrative regulations, policies or directives.

Rule 24: Interfering with, failing to cooperate in, or lying in an official investigation or inquiry.

POSITION OF THE PARTIES

POSITION OF THE UNION

The Grievant is a relief officer and this was only her fourth time working this post in the segregation unit. The cage officer post specifies a thirty (30) day orientation period, which the Grievant did not receive. Additionally, on December 29, 2001 the Grievant was an officer-in-training to the regular assigned officers who on this shift were CO's Schmidt and Dauer.

Pennington, consistent with past practice in this unit, relied upon the range officers to restrain inmates prior to requesting opening of the cell door. A visual check by the cage officer to ensure all inmates are restrained is impossible due to an obstructed view of the ranges. Simply, whenever a range officer requests that a cell be opened the cage officer complies without actual confirmation. No written records are maintained by the cage officer indicating the time specific cells are opened and Pennington, being a relief officer, was unfamiliar with the inmate names or cells numbers on the SC, DC or LC ranges. The past practice as testified by

CO's Douglas, Schmidt, Dauer and Vanderpool, is that the cage officer does not visually see the inmates in restraints but relies solely on the range officers.

Regarding the December 29, 2001 incident no version of CO's Schmidt or Dauer statements indicate that the Grievant was informed of what occurred in Seaunier's cell or that Seaunier verbally made Pennington aware of his injuries prior to her leaving at 2:00 a.m. the following day.

The alleged inconsistencies in her statements, regarding her inability to recall every instance she opened a cell for porters or inmates on December 29th or 30th is unrealistic. A review of her interviews only support she couldn't recall with clarity the opening of cell 246 – not that she lied or failed to cooperate with the investigation.

The investigation was flawed in that evidence to support that inmate Seaunier was not injured on December 29, 2001 was not pursued. Namely, Vanderpool made several rounds and visually observed Seaunier at 11:00 p.m. (December 29, 2001) and 12:20 a.m. (December 30, 2001) with no injuries to his face. Incident reports that Seaunier's cellmate (Lass) caused his injuries were not considered nor included in Knight's report (Un. Exh. 7). Moreover, if Seaunier was injured around 10:30 p.m. why wait until 11:30 a.m. the next day to report the problem? Investigator Knight was unaware that a thirty (30) day orientation period was required or that Pennington was a relief officer. The employer relied upon inmate statements but fail to consider **all** the evidence prior to the removal decision including statements of witnesses that infer Seaunier baited CO Schmidt with the note and cellmate Lass had a motive to support Seaunier claim of assault against CO Schmidt.

In short, just cause was not met and reinstatement with restoration of the Grievant's benefits and back pay is sought.

POSITION OF THE EMPLOYER

The Grievant position requires the highest of public trust and confidence and her credibility was permanently damaged when she failed to tell the truth on three (3) separate

occasions about opening cell 246. The evidence indicates that Pennington in going along with CO's Schmidt and Dauer's initial version was a cover up so she wouldn't be viewed as a rat, and demonstrating her complicity.

Her statements provided to investigators Knight and OSP Vinson were creative half-truths masked by convenient memory lapses that suited her various versions.

The post orders for the segregation unit are required to be followed by **all** officers. These orders are more stringent due to the inmates who are housed there and require the mandatory adherence to protect both staff and inmates. All COs assigned to this unit must be assured that the inmates are restrained prior to opening any cell door, including the cage officer.

Upon learning of the alleged assault the employer conducted a thorough and fair investigation into this matter which led to CO's Schmidt and Dauer recanting their earlier versions which resulted in discipline to both officers.

With respect to the investigation, the Grievant in her first interview on December 30, 2001 admitted to opening the cell doors of the porters only and didn't recall anything unusual happening. CO Dauer and CO Schmidt, on December 30, 2001 denied anything unusual occurred or that inmate Seaunier's cell door was opened or that CO Schmidt was inside the cell at any time. Officers Schmidt and Dauer recanted their earlier versions and admitted that unrestrained inmates were present in cell 246 when the door was opened. On January 2, 2002 Sgt. Michael Vinson ("Vinson") of the Ohio State Patrol ("OSP") was contacted and commenced a separate investigation due to the nature of the allegations. Vinson testified that it was his opinion that the Grievant was untruthful in her recall of cell 246 events based upon his interaction with her.

As a result of Pennington's providing three (3) different versions of her involvement removal was just based upon the credibility divide present in this matter. CO Pennington was apparently instructed by Schmidt and Dauer to cover up this incident and despite officers Schmidt and Dauer changed position, Pennington continues to deny the obvious. Her

continued evasiveness during the investigations further justified the employer's action because she did not tell the truth.

Accordingly, due to the high standards required of a CO and the necessity to guard the public trust, removal was appropriate. A violation of Rules 7 and 24 occurred and the evidence supports the removal for just cause.

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).

DISCUSSION AND CONCLUSIONS

After careful consideration including all of the testimony and evidence of both parties, I find that the grievance is granted. My reasons are as follows:

Pennington as a relief officer rotated among numerous posts based upon institutional needs. There is no evidence of what actual training Pennington received regarding the uniqueness of the segregation unit except the O.J.T. of eight (8) hours and CO Dauer's vague testimony in the record. There is no evidence to support institutional compliance with the thirty (30) day orientation period or that CO Dauer's efforts in showing her around was an intended consequence of the orientation requirement. As a relief officer Pennington would spend

anywhere from two (2) up to four (4) hours per post. Pennington, testified that she worked in the segregation unit on maybe four (4) to six (6) times prior to December 29, 2001. The Grievant was aware of the post orders governing the segregation unit and the cage. The employer argues that Pennington's failure to ensure that the inmates were properly restrained prior to opening the cell could result in security issues and violated the post order. A cursory review of how the post order is applied fails to support the position of the employer.

The cage officer opens the cell door when requested by a range officer and no evidence was presented to suggest that the cage officer must **visually** confirm restraints on the inmates prior to opening the door. Aside from visual confirmation, no alternative methods modeling actual confirmation was offered. Moreover, considering the relief status of Pennington and her "training" through CO Dauer indicates that she followed the well established practice confirmed by CO Douglas. No evidence suggests that Pennington's conduct in following the lax enforcement of the post order, applied to **cage** officers as well. See, In Re: IBEW, 89 LA 1129 (Collins, 1987). Clearly, DR&C has condoned the practice of cage officers in this regard and no evidence is present that the employer impose discipline in the past as a signal to cage officers that such conduct was unacceptable, i.e., a visual or actual confirmation of restraint is required by the cage officer prior to opening any cell door.

The evidence fails to support a violation of Rule 7 based upon the past condonation by DR&C regarding the cage officers' role. There exists no evidence which infers that Pennington's training at the academy or O.J.T. supplanted the well established practice at NCCI regarding reliance upon the range officers by the cage officer, to ensure proper restraint of inmates. All officers who testified uniformly stated that the cage officer relies exclusively on the range officers to ensure compliance with this post order. The failure to strictly comply with the post orders under these facts is not grounds for discipline until NCCI gives clear notice to the cage officers that reliance upon range officers is insufficient and visual or actual knowledge is required.

What occurred between December 30, 2001 and January 9, 2002 is not a matter of considerable factual dispute but one of interpretation. Any analysis regarding credibility requires a filtering of who has a reason or motivation to be untruthful or selectively tell the story. Pennington in her first interviewed denied opening all cell door(s) except for the porters. Subsequent interviews with Knight and Vinson revealed that **she** recalled opening other doors on December 29th – 30th – but did not recall specifically opening cell 246. At the hearing Pennington testified that she may have opened cell 246 but can't specifically recall.

The weight given to Pennington's testimony and her prior statements requires a sorting to find credible evidence in this matter. Clearly, Pennington's self-interest is at state and she could be motivated to be evasive under these circumstances for the obvious reasons. On the other hand, if two cage officers were working the same shift on December 29, 2001 and the issue centered on who opened the door without written documentation, selective memory would clearly serve both officers' interest, making the determination of who opened the door problematic. In this case, the only individual on the face of the earth that could open a cell door on December 29, 2001 between 10:00 p.m. and 2:00 a.m. was Pennington. Therefore, no logic exist for the Grievant to categorically deny opening **any** door between 10:00 p.m. – 2:00 a.m. because she was the **only** officer who could. The Grievant's selective memory, according to the employer, changed by January 9, 2002 enabling her to recall opening the doors for the porters, opening additional doors around 2:00 a.m.; and opening a door so a mattress could be extracted. Once Schmidt and Dauer changed their stories then Pennington was exposed, and her changed versions undermined her credibility and public trust, according to the employer. I disagree. Her memory although not as accurate regarding each cell door open, I find her testimony to be credible and realistic regarding her ability to recall what she can remember.

It is undisputed that Pennington as a relief officer had been assigned to this unit around four (4) to six (6) times in twenty (20) months. The SC, DC and LC ranges combined contains approximately fifty (50) cells. Evidence indicates that inmates rotate in and out of the

segregation unit consistently, therefore the shift and day counts are subject to constant change. No evidence was offered to infer cage officers are required to document specific **cell numbers** when doors are opened. No evidence was offered to infer that Pennington's training or orientation would enable her to remember a specific cell door she opened at a particular time. On December 29, 2001 porters were being released around the **same** time CO Schmidt requested cell 246 to open, and it's plausible to conclude that Pennington's failure to specifically recall opening cell 246 is reasonable. In any event, the preponderance of the evidence does not support a claim of untruthfulness or that she lied as part of an official investigation to protect her co-workers.

Additional evidence to mitigate the removal surrounds the effectiveness of the investigation(s). The conduct of Pennington is at issue before this Arbitrator – not officers Schmidt and Dauer. No evidence was offered to demonstrate that Grievant had knowledge or involvement with respect to what occurred in cell 246. Officers Schmidt and Dauer testified consistent with their interviews with Knight and Vinson, that Pennington was not aware of what happened. Inmates Lass and Seaunuier's statements are void of any activity that links the Grievant to the incident. (JX 1, pp 20-22).

If the assault occurred around 10:30 p.m., why didn't inmate Seaunier report it until 11:30 a.m. the following day? I found CO Vanderpool's testimony credible particularly in that a clear view of inmate Seaunier's face occurred around 11:00 p.m. and 2:00 a.m. as part of his documented rounds, and no facial cuts were visible. (Un Ex 6). In addition, when the shift change at 6:00 a.m. on December 30, 2001 occurred, why didn't the range officers notice the cuts to Seaunier's face? The suggestion that cellmate Lass caused the assault was either ignored or given no weight by NCCI. If an assault occurred in which the noise level included loud "whooping" and "hollering" all inmates including Pennington would have been alerted. Finally, Seaunier between 10:30 p.m. – 2:00 a.m., if desirous of Pennington's attention, could have shouted loud enough to attract her attention. The Arbitrator's visit to the NCCI segregation

unit allowed an appreciation of the physical layout and if Seaunier needed Pennington's attention he could have obtained same by simply using his voice. The investigation failed to consider evidence that provided other explanations which distant Pennington farther from the incident. The investigator's report does not include CO Vanderpool's statement or other statements that suggest cellmate Lass could have caused Seaunier's injuries. I concur with the union, that all of the evidence was not considered and serves as another factor for mitigation by this Arbitrator.

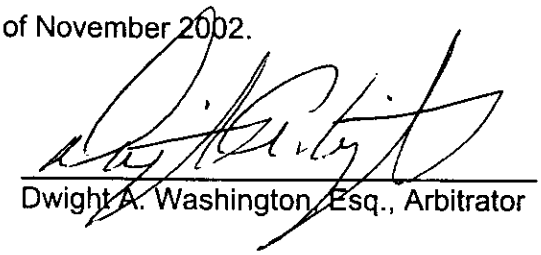
Although a short time employee of twenty (20) months, the Grievant had no prior discipline at the time of removal and this fact was also viewed as favorably impacting mitigation.

Therefore, for all the reasons above the grievance is granted.

AWARD

The grievance is granted. The Grievant was not removed for just cause. Pennington is to receive back pay, benefits and reinstated with all applicable seniority rights.

Respectfully submitted this 4th day of November 2002.



Dwight A. Washington, Esq., Arbitrator