

STATE OF OHIO AND OHIO CIVIL
SERVICE EMPLOYEES ASSOCIATION
LABOR ARBITRATION PROCEEDING

IN THE MATTER OF THE ARBITRATION BETWEEN:

THE STATE OF OHIO, OHIO DEPARTMENT OF
REHABILITATION AND CORRECTION

#1640

-AND-

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

GRIEVANT: BRYAN SPEAKMAN
GRIEVANCE NO.: 27-25 (02-04-16)-2050-01-03

ARBITRATOR'S OPINION AND AWARD
ARBITRATOR: DAVID M. PINCUS
DATE: FEBRUARY 21, 2003

APPEARANCES

For the Employer

David Morgan

Shasta Cocus

Roger McAllister

David See

Kaye Carryein

Lisa Haynes

Captain

Correction Officer

Captain

Investigator

Second Chair

Advocate

For the Union

Bryan E. Speakman

Dorian Cox

Ed Curtis Campbell

Don Sargent

Grievant

President

Steward

Advocate

INTRODUCTION

This is a proceeding under Article 25, Section 25.03 and 25.04 entitled Arbitration
Procedures and Arbitration/Mediation Panels of Rehabilitation and Correction
(hereinafter referred to as the "Employer") and the Ohio Civil Service Employees

Association, Local 11, AFSCME, AFL-CIO (hereinafter referred to as the "Union") for March 1, 200 – February 23, 2003 (Joint Exhibit 1).

The arbitration hearing was held on October 30, 2002 at the Southern Ohio Correctional Facility, Lucasville, Ohio. The Parties had selected Dr. David M. Pincus as the Arbitrator.

At the hearing the Parties were given the opportunity to present their respective positions on the grievance, to offer evidence, to present witnesses and to cross-examine witnesses. At the conclusion of the hearing, the Parties were asked by the Arbitrator if they planned to submit post-hearing briefs. Both Parties indicated that they would not submit briefs.

PERTINENT CONTRACT PROVISIONS

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.

(Joint Exhibit 1, Pgs. 64-64)

24.02 – Progressive Discipline

The Employer will follow the principles of progressive discipline. Disciplinary action shall be commensurate with the offense.

Disciplinary action shall include:

- A. one or more oral reprimand(s) (with appropriate notation in employee's file);
- B. one or more written reprimand(s);
- C. working suspension;
- D. one or more fines in an amount of one (1) to five (5) days, the first fine for an employee shall not exceed three (3) days pay for any form of discipline, to be implemented only after approval from OCB.
- E. one or more day(s) suspension(s);
- F. termination

Disciplinary action shall be initiated as soon as reasonably possible consistent with the requirements of the other provisions of this Article. An arbitrator deciding a discipline grievance must consider the timeliness of the Employer's decision to begin the disciplinary process.

The deduction of fines from an employee's wages shall not require the employee's authorization for withholding of fines.

If a bargaining unit employee receives discipline which includes lost wages or fines, the Employer may offer the following forms of corrective action:

1. Actually having the employee serve the designated number of days suspended without pay; or pay the designated fine, or;
2. Having the employee deplete his/her accrued personal leave, vacation, or compensatory leave banks of hours, or a combination of any of these banks under such terms as may be mutually agreed to between the Employer, employee, and the Union.

(Joint Exhibit 1, Pg. 65)

24.04 – Pre-Discipline

An employee shall be entitled to the presence of a union steward at an investigatory interview upon request and if he/she has reasonable grounds to believe that the interview may be used to support disciplinary action against him/her.

An employee has the right to a meeting prior to the imposition of a suspension, a fine, leave, reduction, working suspension or termination. The employee may waive this meeting, which shall be scheduled no earlier than three (3) days following the notification to the employee. Absent any extenuating circumstances, failure to appear at the meeting will result in a waiver of the right to a meeting. An employee who is charged, or his/her representative, may make a written request for a continuance of up to 48 hours. Such continuance shall not be unreasonably denied. A continuance may be longer than 48 hours if mutually agreed to by the parties. Prior to the meeting, the employee and his/her representative shall be informed in writing of the reasons for the contemplated discipline and the possible form of discipline. When the pre-disciplinary notice is sent, the Employer will provide a list of witnesses to the event or act known of at that time and documents known of at that time used to support the possible disciplinary action. If the Employer becomes aware of additional witnesses or documents that will be relied upon in imposing discipline, they shall also be provided to the Union and the employee. The Employer representative recommending discipline shall be present at the meeting unless inappropriate or if he/she is legitimately unable to attend. The Appointing Authority's designee shall conduct the meeting. The Union and/or the employee shall be given the opportunity to ask questions, comment, refute or rebut.

At the discretion of the Employer, in cases where a criminal investigation may occur, the pre-disciplinary meeting may be delayed until after disposition of the criminal charges.

(Joint Exhibit 1, Pgs. 65-66)

JOINT STIPULATIONS

1. The grievance is properly before the Arbitrator
2. The Grievant was hired on November 6, 2000
3. The Grievant was removed on April 15, 2002
4. The Grievant's prior discipline consists of the following:

NONE

5. The grievant was removed for violation of the following Standards of Employee Conduct rule 38: Any act or commission not otherwise set forth herein which constitutes a threat to the security of the facility, staff, any individual under the supervision of the Department, or a member of the general public.

STIPULATED ISSUE

Was the Grievant, Bryan Speakman, removed from his position as a Correction Officer for just cause? If not, what shall the remedy be?

CASE HISTORY

Bryan Speakman, the Grievant, had been employed as a Correction Officer at the Southern Ohio Correctional Facility (SOCF) for approximately sixteen (16) months at the time of his removal. SOFC is a maximum-security institution that houses some of the most dangerous inmates in the state of Ohio. As a Correction Officer, the Grievant was required, in pertinent part to:

Dispatch equipment/safety sirens/alarms, medical emergency equipment. He was to enforce facility rules, regulations and policies...And he was to prevent escapes or incidents which threaten the security or safety of the facility/inmates/staff or general public includes when necessary using physical force, unarmed self-defense, fire arms or other force to detain or secure inmates.

The Department of Rehabilitation and Correction had purchased an alarm security system called Spider Alert. The record indicates that the Department spent approximately \$1,203,000.00 on the new system for SOCF alone. This is a dual technology alert and locating system with wireless technology monitored by a computer. When a wireless transmitter is activated, an alarm signal is transmitted to the computer. The signal is then interpreted by the computer and an alarm tone is initiated triggering a response by control personnel. Other information is displayed by the computer: type of alarm, location of the receiver, and the name of the individual activating the transmitter.

The facts for the most part are not in dispute. On March 4, 2002, during roll call, the Grievant and other officers were given instruction on the new "Spider Alert" alarm system. The Grievant was issued an alarm and was told to wear it at all times while inside the institution. He was told the alarm was a personal issue and should be deemed part of his uniform.

The Grievant and Correction Officer Shasta Cocus were assigned to the L-1 cellblock. Cocus was in the central booth, while the Grievant was walking the range. The alarm system was accidentally set off by the Grievant, and he noticed a light which followed his movements. The Grievant then contacted Cocus by utilizing the block cordless telephone to determine whether she saw the same light. While talking to Cocus, the Grievant began to converse with Inmate Robinson about the workings of the alarm system. During the course of this discussion, the Grievant turned the telephone off, which prevented Cocus from hearing the entire conversation.

Cocus reviewed another incident she overheard, which took place shortly after the first incident. Another Inmate Robinson, this one wheelchair bound, was being loaded onto a lift in preparation for lunch. Inmate Robinson asked whether the new alarm system worked like the old one. The Grievant purportedly discussed the fifteen (15) second delay used to cancel an alarm triggered by an accidental tilt. He, moreover, demonstrated the two-button alarm system and the pull cord.

Cocus viewed the Grievant's conduct as totally inappropriate. She authored an Incident Report and notified her supervisor of the events.

On April 15, 2002, the Employer issued a Notice of Disciplinary Action, which removed the Grievant from his position of Correction Officer. The document contained the following charge:

This constitutes a violation of Rule 38 of the Standards of Employer Conduct effective October 1, 2001. Therefore, I am removing you from the position of correction officer.

(Joint Exhibit 4)

It should be noted Rule 38 deals with security issues and states:

38. Any act or commission not otherwise set forth herein, which constitutes a threat to the security of the facility staff, any individual under the supervision of the Department, or a member of the general public.

(Joint Exhibit 4)

Any first offense of this rule may result in a penalty ranging from a two (2)-day suspension to removal.

In response to the removal decision, the Grievant filed a protest on April 16, 2002, which contained the following Statement of Facts:

The grievant was removed from his position as a corrections officer on April 15, 2002. The grievant was removed for an alleged violation of Rule 38 of the Standards of Employee Conduct. The removal constitutes excessive discipline, Rule 38 was not proven, therefore there was no just cause to remove the grievant.

(Joint Exhibit 2)

Neither party raised procedural nor substantive arbitrability issues. As such, the grievance is properly before the Arbitrator.

THE MERITS OF THE CASE

The Employer's Position

The Employer maintained it had just cause to remove the Grievant. This conclusion was based on notice considerations, certain admissions made by the Grievant, the severity of the Grievant's misconduct, and counters to the Union's procedural defect claims.

All employees, including the Grievant, were forewarned about the sensitive and serious nature of the newly distributed transmitter and associated alarm system. The Grievant received the Spider three-function man-down transmitter during roll call and was trained in transmitter use. He signed a Spider Equipment Receipt (Employer Exhibit 1), which contained specific guidelines and instruction. Captain Morgan, who provided the orientation, instructed all participants not to take pertinent documents and instructions to their posts, but the third floor or home.

The Grievant admitted virtually to all of Cocus's allegations. At the administrative investigation, and the arbitration hearing, the Grievant admitted to the conversations in question. The only item denied by the Grievant was the discussion surrounding the fifteen-second delay. The denial, itself, was not absolute, but conditioned in some respect. The Grievant had continually asserted he could not recall whether he shared this information with the inmate. By not recalling this utterance, he never denied the possibility; which itself, is condemning.

The Grievant's security breach was extensive and severe. Within hours of receiving the transmitter and instructions, the Grievant managed to compromise a substantial monetary investment. He, moreover, jeopardized the safety of co-workers, staff and inmates with this egregious act.

The due process arguments raised by the Union should not be used to overturn or modify the Employer's decision to remove. He had more than sufficient training and notice regarding the transmitter's operation and security requirements. The Grievant, moreover, was not charged with any training-related violation or for the accidental triggering of the transmitter. These matters beg the issue since security-related misconduct was the primary focal point of the investigation and consequent security breach. Section 24.04 was misinterpreted by the Union. Some related claims were not articulated as plausible due process violations.

The Union's Position

The Union maintained the Employer did not have just cause to terminate the Grievant. It alleged the Employer failed to substantiate the charge, and offered a

number of due process violations and mitigating circumstances in support of reinstatement.

The matter is highly disputed with the Grievant's perspective in direct conflict with Cocus's version. Cocus was in no position to observe and accurately recount the Grievant's activities and alleged misconduct. She was sitting in the control room booth with only a speaker and a receiver enabling her to overhear the interaction between the Grievant and inmate. With limited accessibility, her testimony should be given little weight and the Grievant's version given greater credibility.

Section 24.02, which deals with progressive discipline, was violated in the event some form of discipline is deemed appropriate. Rule 38 has a range of potential penalties from a two-day suspension to a removal. With no prior discipline in the Grievant's disciplinary history, and commendable work performance evaluations, some discipline other than removal should have been imposed. The disciplinary action, as such, was not commensurate with the offense and was, therefore, excessive and punitive, a clear violation of Section 24.05 of the Agreement (Joint Exhibit 1).

The Employer should have considered other charges, which carry lesser penalties for a first offense. For example, Rule 8, which deals with the exercise of poor judgment, requires a written reprimand or a two (2)-day suspension for a first offense. Rule 21 concerns unauthorized use, release or misuse of information. The penalty assigned to a first offense is a written reprimand to two (2)-day suspension or removal.

The Employer, by its own actions, indicated the Grievant's conduct did not require removal. On March 8, 2002, four days after the disputed incident, the Employer

placed the Grievant on administrative leave with pay. If the matter in dispute was so egregious, then the Grievant's removal should have been immediate.

Rule 38, itself, has additional due process issues. It is written vaguely and fails to specify an explicit forewarning that an employee cannot tell an inmate about an alarm system. Also, the range of penalties articulated mislead any employee about the probable consequences associated with misconduct.

The imposed discipline was additionally improper because of Section 24.04 violations. Neither Cocus herself, nor her Incident Report (Employer Exhibit 2), were available at the Pre-Disciplinary Hearing. The Report (Employer Exhibit 2) was eventually made available prior to the arbitration hearing, but not at the earliest stage of the process. Both defects handicapped the Union in its ability to represent the Grievant.

The training, which took place at roll call on March 4, 2002, was deficient. No one ever advised the bargaining unit about the secrecy surrounding the new alarm system. Also, the instructions, themselves, were cursory at best leading to the incident on the day in question.

THE ARBITRATOR'S OPINION AND AWARD

From the evidence and testimony adduced at the hearing, a complete review of the record, including pertinent contract provisions, it is this Arbitrator's opinion that the Employer did have just cause to remove the Grievant. He clearly violated Rule 38 (Joint Exhibit 4), by discussing and informing two inmates about the workings of the new alarm system. His comments constituted a threat to the security of the facility, staff and any individual under the supervision of the Department. The Grievant's misconduct struck at the essence of any corrections facility; its security. This impropriety, at the

very facility which faced one of the worst riots in the Department's history, was extremely serious, justifying the imposed penalty. The penalty was not excessive within this context.

The Employer obtained substantial evidence of proof that the Grievant was guilty as charged. Cocus's testimony was clearly articulated, convincing and credible. She was able to consistently review her observations under severe cross-examination. The Arbitrator's viewing of L-1 confirmed Cocus's testimony. In my view, she was able to observe and hear the various conversations in dispute, which reinforced her credibility. Also, Cocus never exhibited any prior animus toward the Grievant. She was merely shocked by the Grievant's insensitive approach toward the safety and security of his co-workers and others.

The Grievant's testimony and related admissions reinforce Cocus's review of the incident. At the disciplinary interview, the Grievant admitted to Cocus's entire version other than discussing the fifteen-second delay. At the arbitration hearing, the Grievant, after some evasiveness, confirmed Cocus's observations. The following exchange fortifies this conclusion:

Q: Her question was why didn't you dispute what was being read to you and you had an opportunity to read the day of the investigatory interview?

A: What she wrote down was what happened.

The Arbitrator was only able to conclude after this response that the Grievant admitted to all the security breaches raised by Cocus; including the fifteen-second delay issue.

The Union raised a litany of due process related issues. Each will be addressed, but none justify modification of the imposed penalty.

The Union argued the training during roll call was ineffective, which led to the Grievant's eventual accident. The Employer, however, never charged the Grievant with negligent use of the transmitter. A "break-in" period was anticipated after initial instructions during roll call as the Employer recognized accidents would take place. Security breaches at the facility were the focus of the termination decision not accidental triggering of the transmitter.

The Union would have the Arbitrator believe the Grievant was not properly forewarned about the security needs surrounding the new system. This contention was rebutted by the Grievant's own testimony. The Grievant was asked about orders he was given during roll call dealing with security of the transmitter. He remarked:

A: We were given a pamphlet to read and was told to keep the pamphlet secure.

The pamphlet referenced was the Spider Equipment Receipt (Employer Exhibit 1), which contained specific directions regarding the system's functioning. The employee's were not to take this document to their work area, but to the locker room for security purposes. Ironically, the Receipt's contents were the very instructions discussed by the Grievant and the inmates.

The Grievant was extremely evasive regarding divulging information to inmates. The following exchange not only lessened the Grievant's credibility, but exposed the weakness of the Union's proposition:

Q: Were you ever trained about divulging information to inmates?

A: I'm not sure.

Q: Can you answer that question?

A: There's been instances where situations were brought up to where we (were) told about inmates do things.

An offense of this sort does not require the application of progressive discipline. As such, Section 24.02 was not violated by the imposition of the removal decision. Not all security-related breaches may necessarily support removal. But the type of activity under review is the most egregious type of security breach. It far exceeds poor judgment in terms of facility-wide ramifications. In fact, the Employer recognized the seriousness of the Grievant's conduct by allowing him to work a few days, but not in his normal assignment. He was placed at a location which precluded any inmate contact.

In the opinion of the Arbitrator, any Section 24.04 violation is viewed as de minimus because the information requested by the Union was eventually conveyed prior to the arbitration hearing. Cocus's Incident Report (Employer 2) was discussed at lower levels of the grievance procedure, and it was read to the Grievant during the administrative investigation. These events reconcile any surprise allegation raised by the Union. Also, Cocus's non-presence at the Pre-Disciplinary Conference is not required by this provision. The parties never negotiated language allowing the Union to cross-examine witnesses at this stage of the grievance procedure.

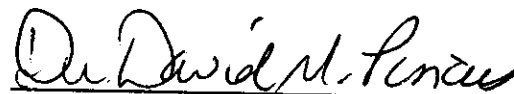
It is axiomatic that an employer may justifiably impose a lesser penalty on an employee with long credible service than on an employee whose service is short or whose work record is poor.¹ Here, the Grievant's sparse length of service serves as an aggravating circumstance in support of removal.

¹ Air Treads, Inc., 86 LA 545 (Allen, 1986); Deer Lake School Dist., 94 LA 334 (Hewitt, 1993).

AWARD

The grievance is denied. The Employer had just cause to remove the Grievant for violating Rule 38.

February 21, 2003
Moreland Hills, OH 44022


Dr. David M. Pincus
Arbitrator