

#1899

IN THE MATTER OF ARBITRATION
BETWEEN
STATE OF OHIO – DEPARTMENT OF REHABILITATION & CORRECTION
AND

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

Grievant: Todd Jackson

Case No. 27-32-(20051123)-0830-01-03

Date of Hearing: July 18, 2006

Place of Hearing: Noble Correctional Institution

APPEARANCES:

For the Union:

Advocate: Jamie Kuhner
2nd Chair: Mike Hill

Witnesses:

Grievant

For the Employer:

Advocate: Dave Burris
2nd Chair: Ray Mussio

Witnesses:

Christopher C. Baker
Jeremy Harris
Earnest Hathaway
John Woods, Jr.
John Hutchinson
Roger Sleeth
John Dake

ARBITRATOR: Dwight A. Washington, Esq.

Date of Award: September 11, 2006

INTRODUCTION

The matter before the Arbitrator is a Grievance pursuant to the Collective Bargaining Agreement (“CBA”) in effect March 1, 2003 through February 28, 2006, between the State of Ohio Department of Rehabilitation and Corrections (“DR&C”) 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, Todd Jackson (“Jackson”), for violating Standards of Employee Conduct Rule 45 – Without express authorization, giving preferential treatment to any individual under the supervision of the department.

The discipline was issued because the Grievant was alleged to have provided items of contraband and gave preferential treatment to inmates under his supervision.

The removal of the Grievant occurred on or about November 21, 2005 and was appealed in accordance with Article 24 of the CBA. This matter was heard on July 18, 2006 and both parties had the opportunity to present evidence through witnesses and exhibits. Post-hearing briefs were submitted by both parties on or about July 31, 2006.

BACKGROUND

Jackson was employed as a Corrections Officer (“CO”) and worked for over nine (9) years for the DR&C prior to his removal on November 21, 2005. CO Jackson worked the first shift at Noble Correctional Institution (“Noble”) and was assigned as a yard officer at all times relevant to this matter. As a yard officer CO Jackson monitored the movement of inmates between their housing units and other buildings within the sector (area) that he and other yard officers were reduced to maintain surveillance. CO Jackson

was removed for violations of the Standards of Employees Conduct (“Standards”) Rule 45.

Without express authorization, giving preferential treatment to any individual under the supervision of the Department, to include but not limited to:

- A. The offering, receiving, or giving of favor.
- B. The offering receiving, or giving anything of value.

Beginning in early 2005 according to DR&C, CO Jackson provided food to inmates in exchange for information on drug related activity in the institution. Other yard COs were knowledgeable of CO Jackson’s activity but failed to report his behavior because of their desire to facilitate a drug bust if the information was valid. At no time was CO Jackson or the other yard officers authorized by the Warden or the Investigator to assist in obtaining drug related information from inmates.

DR&C contends that CO Jackson gave food items to inmates that he either purchased or obtained from the Officers Dining Room (“ODR”) without authorization. In addition, Jackson personally escorted an inmate with contraband to his dormitory, and informed the CO on duty that it was permitted for the inmate to have the contraband. It also appears that Jackson was obtaining food for his personal use, from an inmate who also worked in the ODR.

Due to CO Jackson’s conduct, his removal was in accord with the Standards and the DR&C seeks that his removal be upheld. The Union, on the other hand, contends that Article 24.01, just cause for removal is not supported by the facts.

At the heart of this dispute are the events which occurred on August 31, 2005. It appears that prior to August 31, 2005, DR&C was unaware of any contraband being

provided to inmates in exchange for drug related information. The sector had a building referred to as the yard shack that allowed the yard officers to maintain surveillance of inmates' movement.

On August 31, 2005, Lieutenant Christopher Baker ("Lt. Baker") observed inmates Jennings and Webb eating Little Debbie Snack Cakes inside the yard shack in front of CO Jackson. Lt. Baker did not immediately confiscate the contraband but when the inmates exited the yard shack they were stripped searched, where inmate Jennings was discovered with an open box of "Little Debbie" snack cakes on his person. It appears that CO Jackson purchased 6 boxes of Little Debbie from the distributor earlier that day. An issue exists over the number of Little Debbie boxes that were purchased by Jackson, i.e, 6 and the boxes which were confiscated by DR&C, i.e, 8.

The Union further contends that other COs were aware of Jackson's activity in providing contraband to inmates. None of the other COs were disciplined for failure to report. Purportedly, Jackson was attempting to gather information on drug activity from the recipients of the contraband. Nonetheless, the failure to report by Jackson's co-workers and the approval by John Dake ("Dake"), Institutional Investigator, for encouraging Jackson to get back with him (Dake) when additional drug related intelligence was obtained demonstrates complicity by DR&C. Simply, DR&C failed to discipline anyone other than Jackson and far less discipline under Standards 45 was warranted. Finally, at the time of removal no prior discipline existed on CO Jackson's record.

ISSUE

Was the removal of the Grievant in violation of the Standards of Employee Conduct, Rule 45 (A) & (B). If not, what shall the remedy be?

RELEVANT PROVISION OF THE CBA AND ARTICLE 24 – DISCIPLINE

24.01 – Standard

Disciplinary actions 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).

24.02 – Standard

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

24.05 – Standard

Disciplinary measures shall be reasonable and commensurate with the offense and shall not be used solely for punishment.

DR&C STANDARDS OF EMPLOYEE CONDUCT (2004 Ed.)

OFFENSE

STANDARD OF EMPLOYEE CONDUCT Conveying or Trafficking in Contraband

For purpose of this document contraband is define as “any” article which is intended for the unauthorized use or possession of any inmate or which is prohibited by law or which Department policy prohibits from being carried onto the grounds of any institution, detention facility or office under the control of the Department of Rehabilitation and Correction. Examples of contraband which could be intended for an inmate’s unauthorized possession or use include, but are not limited to, letters, stamps, tools, paper, food, messages, cards, and money.

The introduction of contraband into or upon the grounds of any institution or office, or taking or attempting to take contraband therefrom, or otherwise trafficking in contraband without knowledge and consent of the Appointing Authority of such institution is prohibited.

OFFENSE

Rule 45. Contraband	1st	2nd	3rd	4th	5th
Without express authorization, giving preferential treatment to any individual under the supervision of the Department, to include but not limited to:					
A. The offering, receiving, or giving of favor.	2 or R	5 or R		R	
B. The offering receiving, or giving anything of value.	2 or R	5 or R		R	

INVESTIGATIONS

All Department employees are required to immediately report to their Appointing Authority or designee, any violation or attempted violation of any law, regulation, act, or omission by any person, which may result in a breach of institutional security or jeopardizes the safety of others.

Rule 25. Failure to Report	1st	2nd	3rd	4th
Failure to immediately report a violation of any work rule, law, or regulation.	WR or 1	2	5	R

POSITION OF THE PARTIES

POSITION OF THE EMPLOYER

The nature and duration of CO Jackson's misconduct justified removal. It was a decision by DR&C not to discipline the other COs for failure to report because once realizing CO Jackson's actions were not facilitating a drug bust they reported the misconduct immediately.

There is unrebutted testimony by other yard COs and inmate statements that CO Jackson gave contraband such as onion rings, french fries and snack cakes to various inmates. Even though CO Jackson denied any involvement, there is credible evidence in the form of testimony through witnesses Lt. Baker; CO Jeremy Harris ("Harris"); CO Ernest Hathaway ("Hathaway"); CO John Woods ("Woods"); CO John Hutchinson ("Hutchinson"); and CO Roger Sleeth ("Sleeth") to the contrary. CO Jackson's conduct progressed in that he escorted an inmate with contraband to his dormitory and was benefiting from inmates because they brought CO Jackson food items from the ODR as

well. At the hearing, five yard COs testified that either they observed various food contraband supplied by CO Jackson or were informed by CO Jackson that he gave items such as cookies to inmates. It was also established that CO Jackson had no authority from Warden or Drake to provide inmates with any sort of contraband as part of an durg related investigation.

DR&C further argues that the other yard COs did not report the earlier violations because of their belief that CO Jackson was obtaining information to facilitate a drug bust. The other COs trusted CO Jackson until it became clear that the drug bust was not making progress. The other COs were aware of the 'duty to report' but "... they acknowledge what CO Jackson was doing was wrong but could be overlooked if it resulted in another drug bust." (Post Hearing Statement, DR&C p. 2) It was DR& C's position not to reprimand the correction officers based upon the fact that they trusted their co-worker and was truly expecting a drug bust. This behavior by the other yard COs is not a justification, but the reasoning behind their actions is explainable.

As a consequence of all the relevant facts, removal was justified and should be upheld by the Arbitrator.

POSITION OF THE UNION

CO Jackson worked at DR&C from July 1996 until November 21, 2005 with no prior record of discipline at the time of removal. CO Jackson was removed based upon a violation of the Standards Rule 45 (A) & (B). However, the discipline is excessive and not based on just cause because other employees were not disciplined even though some

of CO Jackson's co-workers were aware that contraband was being provided for several months prior to August 31, 2005.

The testimonies of the other yard officers at the hearing were solicited by the DR&C through subpoenas. Therefore, the witness testimonies i.e., Lt. Baker, CO Harris; CO Hathaway; CO Woods; CO Hutchinson and CO Sleeth, who all accused CO Jackson of providing contraband to several inmates must be viewed suspiciously. The alleged contraband consisted of cookies, onion rings, hamburgers and Little Debbie snack cakes according to the DR&C. However, each of these witnesses also testified that they were aware of the conduct by CO Jackson and did not report this violation to anyone of authority. Witnesses also testified that they were not directly in the guard shack to observe any of the alleged incidents, nor did they personally observe CO Jackson give any contraband to the inmates. The COs also testified that they did not report this conduct immediately due to a potential drug bust that Jackson was pursuing.

DR&C had many opportunities to correct the behavior of Jackson as early as Spring 2005. Lt. Baker had an opportunity to report the situation when he allegedly confronted the Jackson in the guard shack. Also, Institutional Investigator, Dake had an opportunity to report the misconduct when he told Jackson to report to him if he had any additional intelligence dealing with the drug bust.

Dake also testified that officers are unauthorized to do investigations on their own, however, this standard was never upheld by the department and it was in months prior that Jackson brought forward a drug bust case and not disciplined by DR&C. If DR&C was lacking in the past to uphold their policies, it cannot crack down all of a sudden for a practice which the COs held in their minds as acceptable behavior.

The witnesses to the behavior of CO Jackson had a duty to immediately report the misconduct to the appropriate supervisor. None of the COs who failed to timely report their observance or knowledge of contraband in the possession of inmates were disciplined.

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” (6th ed., 2003).

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

After thoughtful consideration of the testimony, exhibits and post hearing statements of both parties, I find that the grievance is granted in part, and denied in part. My reasons are as follows:

DR&C presented six (6) witnesses who either observed the contraband or were told by CO Jackson that he had provided food items to inmates in support of a violation of Standards – Rule 45 (A)(B). Their testimony provided direct evidence of numerous violations by CO Jackson. CO Jackson's testimony was the only evidence offered by the Union at the hearing to refute the testimony of Lt. Baker, CO Harris, Co Hathaway, CO Woods, CO Hutchinson and CO Sleeth. Consistent with CO Jackson's investigatory interviews of September 9, 2005 and September 23, 2005 (Joint Exhibits ("JX") p. 14-22), he testified at no time did he give food items to inmates while employed at Noble. Further CO Jackson testified, in effort to reconcile his testimony with the other witnesses, they conspired against him by lying of his alleged involvement with contraband.

The issue of credibility must be addresses between CO Jackson and all the other DR&C witnesses. Suffice it to say, that if Lt. Baker's testimony was the only evidence contrary to CO Jackson, I would resolve the credibility issue in favor of DR&C. CO Jackson's testimony and investigatory interviews based upon the record, I conclude were untruthful beginning with the snack cakes incident.

A box of snack cakes was confiscated from an inmate who was in the yard shack when Lt. Baker observed the inmate eating a snack cake. CO Jackson testified that Lt. Baker did not see the inmate eating anything and the inmate was only in the yard shack to clean it up. The facts infer that Lt. Baker must have seen something because he informed the shift captain and when the inmates exited the yard shack they were strip searched. The open box of Little Debbie's was in the possession of inmate Jennings. The Little Debbie incident occurred on August 31, 2005 which is the first date that a supervisor became aware of CO Jackson's contraband scheme. In addition, inmate Jennings and

inmate Webb provided statements that CO Jackson had given them snack cakes, hamburgers, onion rings and fries in the past. (JX pp. 86-92)

In addition, the testimony of the other yard COs is found to be forthright and credible, as opposed to CO Jackson whose testimony of the events preceding his removal, I conclude are simply lies. The determination of credibility under these facts was relatively easy based on the record. Do I believe CO Jackson or the other witnesses and/or exhibits? CO Jackson's testimony was not credible when he denied providing any contraband to inmates in light of the weight of the credible contra evidence in the record. The evidence, and I so find, overwhelmingly supports a finding that CO Jackson provided contraband, on numerous occasions to inmates in violation of Standard – Rule 45(A)(B).

The Union argues that Rule 45 does not require automatic removal for a first offense, and under these facts the discipline is excessive. For reasons that will be stated below, part of the discipline from the Arbitrator's viewpoint also includes his inability to tell the truth. Once CO Jackson committed to his made up story and maintained his lies throughout the proceedings, such behavior is part of the discipline that CO Jackson brought upon himself. I find that removal, as discipline, was not excessive under these facts.

If the analysis was concluded at this point, the removal would be sustained in total. However, the conduct of all the COs surrounding CO Jackson's drug investigation must be analyzed. It's clear that, Dake nor anyone of authority at Noble, empowered any of the yard COs who testified in this matter, the ability to solicit drug related information from 'snitches' by offering inmates food or favors. Therefore, all of the COs assigned to

the yard are on an equal plane regarding their individual conduct attendant to the drug investigation.

On August 31, 2005, Lt. Baker's interaction with the Little Debbie matter triggered the subsequent events leading to CO Jackson's removal. Contrary to DR&C's position that the other yard officers came forward when they realized the drug investigation was a scam is not supported by the record. Prior to August 31, 2005 the record is silent regarding any incident report prepared by CO Harris, CO Woods, CO Hutchinson or CO Sleeth regarding their first hand knowledge of contraband provided by CO Jackson to inmates. The other yard officers involvement only commenced after Lt. Baker's intervention. Therefore, DR&C's investigation surely reviewed the actions of all the yard officers were analyzed to ascertain in determining if they violated any Rules(s) during the period that CO Jackson was involved in the drug investigation.

The Union raised disparate treatment, in that, other yard officers were aware of CO Jackson activity but failed to do anything and received no discipline. The burden is upon the Union to demonstrate this affirmative defense, and based upon the following I find that the evidence as a whole supports a finding of disparate treatment.

At the hearing CO Sleeth, who retired in October 2005, recalls searching inmates in June 2005 and found onion rings and fries that were given to the inmates allegedly by CO Jackson. CO Hutchinson testified that he could visually observe the yard shack from his post and over a "period of time" saw inmates leave the yard with food that CO Jackson provided. CO Woods further testified that CO Jackson told him that he gave cookies to inmate Gibson for information. Neither CO Hutchinson nor Woods informed their supervisor of CO Jackson's behavior.

CO Hathaway on August 25, 2005 (JX p. 31) prepared an incident report that indicated inmates were obtaining food from CO Jackson in exchange for information. This document is the only record that indicates another CO formally notified his supervisor of CO Jackson's conduct. The record is silent as to what action, if any, did DR&C pursue regarding CO Hathaway's incident report. CO Hathaway testified that he prepared JX p. 31 because he was concerned with the frequency of inmates in the yard shack, and that he saw inmates with food provided by CO Jackson as early as February 2005. Why no incident reports in February, March, April, May, June, or July 2005? Therefore, to prepare his first incident report after observing this conduct for six (6) months fails to comply with Standards – Rule 25 or Rule 45.

The record is clear that several COs were complicit in the investigation to garner drug related information through CO Jackson's snitches. In plain view of other yard COs, contraband was exchanged in the yard shack from CO Jackson to inmates without any intervention by any yard COs prior to August 31, 2005. Clearly, CO Jackson's conduct was in violation of Standard – Rule 45. Retired CO Sleeth, recalls a shakedown of an inmate where onion rings/fries were found in June 2005. CO Sleeth did not report this incident to any supervisor. The facts are unrebutted that anywhere between two months and six months all of the yard officer's involved in the backyard drug investigation consciously allowed contraband to be traded for information. Investigator Dake credibly testified that food items are never exchanged to secure a drug bust and the Chief Inspector's Office forbids offering or giving anything to obtain information. The record indicates that other yard COs were culpable and the DR&C by implementing a reasonable investigation should have known of their conduct through the investigatory

process. Unfortunately, the record is silent as to DR&C reason why the other yard COs were not disciplined when their behavior played a prominent role in perpetrating this alleged drug investigation.

The remaining question is what's the impact of DR&C treatment of the grievant differently from other employees similarly situated? Clearly, other COs were aware of CO Jackson activity, failed to report the conduct, and were not disciplined. All of the COs who were knowledgeable of CO Jackson's behavior but remained passive violated Standard Rule 25 (failure to report) and Rule 45 (contraband), in my opinion. The facts are un rebutted that several yard COs testified that they were present when contraband was given to inmates. Their presence not only supported CO Jackson's conduct, but also by not intervening, explicitly condones the favoritism which the inmate(s) received. Despite the laudable goal to eradicate drugs from Noble no rational explanation exists to explain the enforcement of Rule – 45 against the grievant, and ignoring the numerous Rule 25 violations against the other COs. See, In Re: State of Ohio and AFSCME, Local 11 99 LA 1169 (Riviera 1992), Maybe, CO Jackson lied to the other yard officers to encourage their involvement. However, based upon CO Jackson's veracity, the other yard officers could have been misled about the drug investigation. Unfortunately, the granting of favors and the duty to report are serious rule violations and with no exceptions for COs who are deceived by a lying co-worker. The record is absent of any mitigation, for the other COs not being disciplined and DR&C has simply failed to enforce its rule on an equal basis.

I find that the treatment of the other yard officers differently from CO Jackson mitigates the remedy; however, the reinstatement of CO Jackson will not occur.

Considering the trust and reliance necessary of correction officers to work as a team, the reinstatement of CO Jackson at Noble is rejected. CO Jackson lied about his involvement to the detriment of his fellow workers, and it would be impossible in the future to determine if and when he's telling the truth. Also, CO Jackson was apparently not candid with his fellow yard COs regarding whether inmates were actually providing him with useable information in exchange for contraband. The Arbitrator is also troubled by co-workers who were not hesitant to testify against the grievant. To reinstate CO Jackson back into that environment is not an option when (1) he violated Standard – 45 on numerous occasions; and (2) his trustworthiness to serve in a position requiring veracity is moot. Rehabilitation was considered and rejected because of CO Jackson's lack of contrition and acceptance of any responsibility despite the mountain of credible evidence against him.

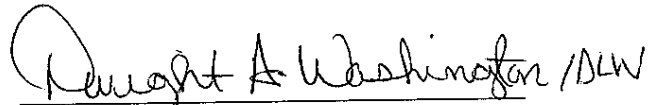
In any event, not due to CO Jackson's behavior but because of DR&C's failure to enforce its Rules on an equal basis, CO Jackson shall be paid \$5,000 back pay, with no deduction for interim earnings. All other remedies sought by the Union are rejected. The payment indicates a finding that DR&C failed to enforce its Rules in a consistent manner and thorough investigation would have demonstrated other violations by yard officers warranty discipline.

AWARD

The Grievance is denied in part and granted, in part, subject to the following conditions:

1. Reinstated is denied and removal by DR&C is upheld.
2. Grievant shall receive a \$5,000, back pay, with no deductions for interim earnings.
3. Payment shall occur within thirty (30) calendar days of this Award.
4. All of other remedies sought by the Union are denied.

Respectfully submitted this 11th day of September, 2006.


Dwight A. Washington, Esq., Arbitrator