

VOLUNTARY LABOR ARBITRATION TRIBUNAL

In the Matter of Arbitration	*	
Between	*	
	*	OPINION AND AWARD
OHIO CIVIL SERVICE	*	
EMPLOYEES ASSOCIATION	*	Anna DuVal Smith, Arbitrator
LOCAL 11, AFSCME, AFL/CIO	*	
	*	Case No. 27-14-20060621-2599-01-05
and	*	
	*	
OHIO DEPARTMENT OF	*	Jerome Watkins, Grievant
REHABILITATION AND	*	Removal
CORRECTION	*	

APPEARANCES

For the Ohio Civil Service Employees Association, Local 11 AFSCME:

Michael P. Scheffer, Staff Representative
Ohio Civil Service Employees Association, Local 11 AFSCME

For the Ohio Department of Rehabilitation and Correction:

Christopher Lambert, Labor Relations Officer
Ohio Department of Rehabilitation and Correction

I. HEARING

A hearing on this matter was held at 9:10 a.m. on November 21, 2006, at the Lorain Correctional Institution in Grafton, Ohio, before Anna DuVal Smith, Arbitrator, who was mutually selected by the parties pursuant to the procedures of their collective bargaining agreement. The parties stipulated the matter is properly before the Arbitrator and presented one issue on the merits, which is set forth below. They were given a full opportunity to present written evidence and documentation, to examine and cross-examine witnesses, who were sworn or affirmed and excluded, and to argue their respective positions. Testifying for the Ohio Department of Rehabilitation and Correction (the "State") were Joseph Kay, Vincent David Lee, Marcia Scott, and Christa Tomlin. Testifying for the Ohio Civil Service Employees Association, Local 11 AFSCME (the "Union") was the Grievant, Jerome Watkins. Joint Exhibits 107 were entered into evidence. The oral hearing was concluded at 1:00 p.m. on November 21, 2006. Written closing statements were timely filed and exchanged by the Arbitrator on December 8, 2006, whereupon the record was closed. This Opinion and Award is based solely on the record as described herein.

II. STATEMENT OF THE CASE

This case concerns the removal of a Correctional Food Service Coordinator ("FSC") for allowing an inmate to gain control of institutional security keys. At the time of his removal he was a two-year State employee assigned to the Lorain Correctional Institution. During the 22 months he was so-employed he acquired the following disciplinary record:

Date	Rule	Action
January 7, 2005	27 - Failure of a supervisor to properly supervise or enforce work rules	Written reprimand
January 7, 2005	8 - Failure to carry out a work assignment or the exercise of poor judgment in carrying out an assignment	Written reprimand

April 17, 2005	18 - Threatening, intimidating or coercing another employee or a member of the general public 19 - Striking, fighting or otherwise engaging in a physical altercation with another employee or member of the general public	2-day fine
June 28, 2005	24 - Interfering with, failing to cooperate in, or lying in an official investigation or inquiry 28 - Loss of control of any instrument that could result in a breach of security or jeopardize the safety of others, to include but not limited to weapons, class "A" tools, keys, communication devices, etc.	Written reprimand
December 8, 2005	7 - Failure to follow post orders, administrative regulations, policies or directives 8 - Failure to carry out a work assignment or the exercise of poor judgment in carrying out an assignment 22 - Falsifying, altering, or removing any document or record 28 - Loss of control of any instrument that could result in a breach of security or jeopardize the safety of others, to include but not limited to weapons, class "A" tools, keys, communication devices, etc.	Removal converted on January 30, 2006, to 24-month last chance agreement

(Joint Ex. 3, p. 2 and Joint Ex. 5)

Terms of the Last Chance Agreement include that "the Employee...agrees and understands that he/she must strictly adhere to the agency's policies and work rules in order to retain his/her position" and "if the employee violates this Last Chance Agreement or if there is any violation of the work rules as they relate to Performance Standards, the appropriate discipline shall be termination from his/her position. Any grievance arising out of this discipline shall have the scope of arbitration limited to the question of whether or not the grievant did indeed violate said policy and/or work rule. The Department of Rehabilitation and Correction need only prove that the employee violated the above Agreements(s) and/or rule(s). The Arbitrator shall have no authority to modify the discipline. All parties acknowledge the waiver of the contractual due process right to the extent stated above," (Joint Ex. 3, pp. 70-71)

The incident leading to his removal occurred on the morning of April 1, 2006, as breakfast was being cleared away. The Grievant had had a discussion with FSC Marcia Scott about putting coffee away which led to her handing off to him the keys so that he could do it himself. As she walked away, FSC Christa Tomlin came by accompanying two inmates who were on the way to putting dry foods into the storage area. They stopped in front of the office door where the Grievant was standing and loaded the coffee onto the approximately 3-by-5 foot cart carrying the foodstuffs. One of the inmates asked if he could have some of the cereal from the cart. FSC Tomlin agreed. While she was distracted by watching this inmate, the keys were passed to her and she secured them on her belt. She did not notice until she looked up that it was the second inmate, not the Grievant, who had given them to her. The Grievant says that this inmate snatched the keys from his hand while he was attempting to secure them on his own belt. This inmate says that the Grievant gave him the keys and he got rid of them as fast as he could, passing them to FSC Tomlin. FSC Scott, who was still in the area, testified she saw the Grievant hold his hand out in the direction of FSC Tomlin who was standing opposite him on the other side of the cart. Her vision was obscured the inmate and so she could not see which man, the inmate or the Grievant, put them into FSC Tomlin's hand. A security camera clearly shows the inmate handing the keys to Tomlin but not how he came to have them in the first place.

In any event, FSC Tomlin and the two inmates left with the cart, went down the hall and secured the food. The Grievant followed within minutes to get the inmate, bringing him back up the hall and telling him, the inmate testified, that his boss had seen what had transpired and he would have to write it up. FSC Tomlin caught up to them in the coat area and then she and the Grievant went to Food Service Manager II Joseph Kay to whom the Grievant reported his version of how the inmate came by the keys. The Grievant left to get the inmate and brought him to Kay's office. Here the inmate admitted having had the keys, but said he had not taken them. They were handed to him, he said. The inmate then spent time in segregation and came before

the Rules Infraction Board. He was found guilty of possession and given 10 days in segregation but the warden overturned that decision.

Meanwhile, the Institution's investigation of the food service employees proceeded with the collection of statements (including multiple statements from FSC Tomlin) and security camera recordings. A properly constituted pre-disciplinary conference was had on May 8, 2006. The hearing officer found just cause for discipline. The Grievant was subsequently removed on June 20, 2006 for violation of Rules 7 and 28, and his Last Chance Agreement.

This action was timely grieved and fully process to arbitration, where it presently resides free of procedural defect, on the stipulated issue of *Did the Employer appropriately terminate the Grievant for violation of his last chance agreement signed on January 30, 2006? If not, did the Employer have just cause to remove the Grievant? If not, what shall the remedy be?*

III. ARGUMENTS OF THE PARTIES

Argument of the State

The State's position is that the Grievant clearly violated his Last Chance Agreement in that he lost control of the keys to an inmate in violation of the Standards of Employee Conduct. Nothing supports the Grievant's version that the inmate snatched the keys out of his hand and that he immediately notified his supervisor. This testimony was self-serving and inconsistent with what the videos show and witnesses reported. No one reported the inmate lunging or even moving toward the Grievant. At the very least the Grievant offered no resistance when the inmate took the keys. Moreover, witnesses testified consistently that the Grievant held the keys out in front of the inmate. This is inappropriate handling of keys according to the Department's key control policy. The very fact that the inmate had them for however long constitutes loss of control. This is not a case of losing control by dropping the keys, but loss of control to an inmate. If the inmate did nothing to forcibly remove them (of which there is no evidence), the only conclusion is that the Grievant did not handle them properly, thus allowing the inmate to gain control.

The State points out that the Grievant was not discharged for failing to report the incident appropriately. He was terminated for loss of control. The Grievant was trained on proper handling of keys and he had a previous infraction on key control from which he should have learned. If he did not actively hand the keys to the inmate, he held them out in front of that inmate in clear violation of the policy.

The State asserts that even looking outside the Last Chance Agreement, this is the Grievant's sixth performance-related misconduct in his less than two years service with the Department. Thus, termination is warranted by virtue of his accumulated discipline. The State concludes by asking that the Last Chance Agreement be applied and the removal upheld.

Argument of the Union

The Union takes the position that the record shows no inappropriate action by the Grievant which justifies termination. There was no testimony by any witness except the inmate that reflects wrongdoing on the part of the Grievant. The Union urges the Arbitrator not to credit the inmate's testimony because he changed his story throughout the history of the case and disputed the testimony of Supervisor Kay. The Grievant's testimony, on the other hand, was clear and concise. All witnesses except the inmate corroborated the Grievant's testimony in that they did not see him hand the keys to the inmate. Moreover, logic is on the Grievant's side. Why would an employee on a last chance agreement, with witnesses and a security camera in the area, hand keys to an inmate? In addition, Supervisor Kay testified that even he has dropped keys. This was no violation of key control policy. In fact, there was no threat to institutional security for the inmate had the keys for mere seconds and the Grievant reported the incident within ten minutes. As for the Grievant's reluctance to use force, this is understandable in that he had his last chance agreement lurking in the background. Even so, it would not have changed the situation as the inmate voluntarily gave the keys to another employee.

The Union argues that it is not fair to terminate an employee for the actions of another. Moreover, the State did not bring evidence of improper key handling or why the Grievant's actions warrant termination.

The Union concludes that the totality of the evidence in the case must result in the Arbitrator sustaining the grievance, reinstating the Grievant, and making him whole.

IV. OPINION OF THE ARBITRATOR

The central question of this case is whether the Grievant lost control of the keys through no fault of his own, not whether he correctly reported the incident. Multiple reviews of the testimony of the witnesses, their incident reports and interview transcripts, the hour-long recording of the RIB hearing and the seven video clips persuade me that the Grievant did, in fact, hold the keys out over the cart, offering them to FSC Tomlin as Inmate Lee claimed and FSC Scott corroborated. Not one witness supported the Grievant's claim that he was securing the keys to the right side of his belt when the inmate gained control. Since Tomlin was going to take the food to storage, why would the Grievant be securing the keys instead of transferring them to her one way or the other, by reaching across, coming around or using an intermediary? At the RIB hearing he said he was securing them because Tomlin argued with him about taking the food to dry storage, but it was Scott who had argued with him about it before Tomlin arrived from the big side of the chow hall. Moreover, only the Grievant claims he was close enough to accomplish the transfer himself, saying in his RIB testimony the distance was six inches whereas the others said three or more feet because of the intervening flat-bed cart. For the left-handed inmate to snatch the keys while the Grievant was in the process of securing them to the right side of his belt, he would have had to reach across his own body, the cart and the Grievant's body. Alternatively, he could have used his right hand, reaching across the Grievant's body, grabbing the keys, transferring them to his left hand and then passing on to Tomlin. No possible motive has been suggested nor is there any testimony or video evidence supporting either scenario.

While I do not believe the Grievant intended to lose control of the keys, this was not just an accident. At the least he Grievant used poor judgment in holding the keys in front of the inmate and then letting him take them without protest. His actions afterwards suggest he knew he had made a mistake and was trying to cover it. He said repeatedly he was so concerned about having the keys snatched from him that he went immediately to his supervisor¹ and yet he allowed the inmate to walk away, not once but twice, first to go with Tomlin and the other inmate down the back hall to the storage area and then again (for nine minutes) after he got the inmate and his identification while he and Tomlin went to Kay's office to report the incident.

To a certain extent I agree with the Union that these are not actions in-and-of-themselves warranting termination. Even the grid provides for as little as a written reprimand. But a proven act of misconduct must be viewed in its context. The context here includes that this is not the Grievant's first offense and he was on a last chance agreement strictly limiting an arbitrator's authority to that of reviewing whether he violated the Last Chance Agreement and/or the rule. Having found that he broke the Last Chance Agreement when he violated the rule, I have no authority to modify the discipline. For these reasons I must uphold his removal.

V. AWARD

The grievance is denied in its entirety. The Grievant violated his last chance agreement. The Employer therefore had the right to terminate his employment.



Anna DuVal Smith, Ph.D.
Arbitrator

Cuyahoga County, Ohio
April 5, 2007

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¹There is no evidence supporting three trips to Mr. Kay's office, just the two he made with FSC Tomlin after the food had been stowed and the inmate's identification gotten from the coat area.