
In the Matter of the Arbitration

- between -

The Ohio Civil Service Employees
Association/AFSCME, Local 11

- and -

State of Ohio,
Department of Corrections Medical
Center

Arbitrator: John J. Murphy
Cincinnati, Ohio

Date and Place
of Hearing: April 30, 2008, Westerville, Ohio

For the Employer: Victor Dandridge
Office of Collective Bargaining
100 East Broad Street - 14th Floor
Columbus, Ohio 43215

Also Present: Kay Northrup
Warden

Captain Robert Castle
Officer, Corrections Medical Center

Earlena Schorr
Labor Relations Officer

For the Union: Robert W. Steele, Sr.
OCSEA
390 Worthington Road, Suite A
Westerville, Ohio 43082

Also Present: Paul Salveto
Chapter President

Steve Nichols
Officer, Corrections Medical Center

Grievant

#1979

FACTUAL BACKGROUND:

This case involves the removal--a euphemism for discharge-- of a corrections officer with over twelve years of service with the Department of Corrections. The unfortunate skein of events began on Monday, August 6, 2007, the first of a two-day vacation for the Grievant, a corrections officer at the Corrections Medical Center in Columbus, Ohio. By his own testimony, he was driving home from a gymnasium, encountered a young lady, and, thereafter, was arrested for solicitation for prostitution in a police sting.

With media attention to the event and the Grievant's identification as a corrections officer, the Grievant was jailed and arraigned on Tuesday, August 7. With his regular shift commencing at 7:00 a.m. on Wednesday, August 8, the Grievant attempted to call the Medical Center. According to his testimony, he made three unsuccessful attempts to call the Medical Center from jail because the Center would not accept collect calls. He then arranged a 2-party telephone conversation between him and the medical center at 4:20 p.m. on Tuesday, August 7. He told the medical center that he would not be available for his regular shift on Wednesday because he was sick. This conversation was stipulated by the parties and supported by the record of employee calls to the Center on Tuesday, August 7.

From the Grievant's own testimony, and records of the Franklin County Sheriff's Department, the Grievant was released from jail on bail at 4:43 a.m. on Wednesday, August 8.

A second telephone call was made by the Grievant to the Medical Center on Thursday, August 9, 2007, at 5:07 a.m. By the Grievant's own testimony, and in part, the call-in logs of the Center, the Grievant made this call from his home and stated that he was sick and would not be at work for his Thursday shift on August 9.

The Grievant returned to work at the Corrections Medical Center on Friday, August 10 and filed a report on a form entitled "INCIDENT REPORT." On it he wrote:

On the above date and time (8-6-07 at 0735) I, C.O. _____ was arrested for soliciting. I am currently seeking counseling for my situation.

Captain Castle was assigned to conduct an Investigatory Interview with the Grievant and this interview occurred on August 10--the date the Grievant returned to work. There then followed a pre-disciplinary hearing as well as the grievance procedure. The result was a decision by the warden to issue a Notice of Removal to the Grievant effective September 12, 2007. The Notice stated:

The reason for removal is: Rule Violation No. 26. A last chance agreement was in effect from 4/12/2006.

The grievance challenging the removal of the Grievant was processed through arbitration, and the parties stipulated that the matter was properly before the arbitrator under the contract between the parties.

STIPULATED ISSUE:

Did the Grievant violate the Standards of Employee Conduct, specifically Rule No. 26, Failure to Immediately Report Any Personal Arrest or Criminal Charge?

RELEVANT PROVISIONS OF THE
STANDARDS OF EMPLOYEE CONDUCT

		Disciplinary Grid			
		PERFORMANCE TRACK			
		OFFENSE			
		<u>1st</u>	<u>2nd</u>	<u>3rd</u>	<u>4th</u>
. . .					
26.	Failure to immediately report any personal arrest or criminal charge.	2 ^{1/}	5	R	
. . .					
39.	Any act that would bring discredit to the employer.	R or 1 or R	2 or R	5 or R	R

OPINION:

This opinion is divided into three parts. First, this record includes limits on the inquiry in this arbitration.

^{1/} Elsewhere in the Standards of Employee Conduct, explanations for the various sanctions are stated. A number would be a fine, suspension, or working suspension; WR means "Written Reprimand"; and R means Removal.

After these limits are set forth and their basis explained, we turn to matters that divided the parties. The Union argued that the Employer failed its duty to apply Rule 26 evenhandedly, and treated the Grievant in a disparate way as compared to other employees. Finally, the Union raised other defenses such as the lack of awareness by the Grievant of Rule 26, and that Rule 26 only requires a written incident report on the Grievant's return to work.

A.) Shaping This Arbitration

As noted above, this arbitration concerns the removal of the Grievant. However, the statement of the issue, in and of itself, raises the question about the sanction of removal even if the record shows a violation of Rule 26.

This record shows that any such violation of Rule 26--if proven, would be the first offense by the Grievant of Rule 26. As such, the maximum sanction, and the only sanction for the first offense, is a 2-day fine, suspension, or working suspension. This brings us to the last chance agreement--a document included in the record and a document stated by the warden as a basis for the Notice of Removal.

The validity of the last chance agreement was not put in issue. It was signed by the Grievant, the warden, and a representative of the Union. This grievance, therefore,

challenged discipline in the form of removal emanating from the last chance agreement.

The terms of that agreement set limits on any arbitration of a grievance arising out of discipline under the last chance agreement. The Union, Institution, and the Grievant agreed that "if there is any violation of the SOEC (Standards of Employee Conduct) rules on the Performance Track, the appropriate discipline shall be termination . . ."

The last chance agreement then sets limitations on arbitrations on any grievances arising out of discipline under the last chance agreement.

- 1.) "[T]he scope of the arbitration of the grievance (is) limited to the question of whether the grievant did indeed violate . . . SOEC."
- 2.) The "Employer need only provide that the employee violated . . . SOEC."
- 3.) "The arbitrator has no authority to modify the discipline."

B.) Disparate Treatment

This defense rested upon the disputed facts concerning another corrections officer at the Corrections Medical Center, R.P. The facts concerning this case occurred during the tenure of the same warden who charged the Grievant with the violation

of Rule 26: "Failure to immediately report any personal arrest or criminal charge."

The record shows that R.P. was arrested twice in three days and that he did not call in and report either arrest. The first arrest occurred on the grounds of the Ohio State Medical Center where R.P.--while in uniform--shot a fellow corrections officer. A second arrest was for an incident involving a fight in a bar. The warden agreed that R.P. was not charged with a violation of Rule 26.

There is nothing in the Standards of Employee Conduct that requires the Employer to charge an employee with all possible charges that could arise from conduct prohibited by the Standards. As the warden conceded, R.P. did not immediately report either of the two arrests, and R.P. was not charged with the violation of Rule 26. On the other hand, the warden testified that she chose "the most egregious" rule with which to charge R.P. based upon the facts that had occurred in the two incidents.

Rule 39 includes "removal" as a permissible sanction for the first violation of Rule 39. This clearly distinguishes the facts concerning the case in R.P. from that of the Grievant in this case. Moreover, R.P. was not under a last chance agreement at the time of his two instances of explosive behavior in locations other than the Medical Center. This again

distinguishes the matter of R.P. from that of the Grievant. Consequently, the choice of the charge of the Grievant under Rule 26 was reasonable and quite distinguishable from the facts concerning R.P. that led to a charge under a different and "most egregious" rule.

C.) Defenses

The first defense is based upon the Union's reading the text of Rule 26: "Failure to immediately report any personal arrest or criminal charge." "Report" means a written report and that would be in the form of an Incident Report that the Grievant filed as soon as he returned to work on Friday, August 10, after the arrest on August 6. This interpretation of Rule 26 is not consistent with the text of the rule. The adverb "immediately" modifies the word "report," and this defies any interpretation that would leave to the employee the duty to report only whenever the employee returns to work. Furthermore, the Union's interpretation adds to the text of Rule 26 the phrase "in writing" following the word "report." There is no such language in Rule 26. Lastly, the Union's interpretation would add to the text of the rule that the "report" would be made "as soon as the employee returns to work." There is no such language in the text of the rule; furthermore, such an addition would be prohibited by the adverb "immediately" that modifies the word "report."

A major defense raised on behalf of the Grievant by the Union and in the testimony of the Grievant was that he was unaware of Rule 26. The record, however, supplies an ample basis for the finding that he was under the duty to be aware of Rule 26.

The record includes a "Certificate of Information Received" signed by the Grievant in which he certified that he had received the Standards of Employee Conduct, and further stated, "I understand that I am responsible for reading and following their policy as outlined."

This form may be treated lightly as one that all employees are to sign, and probably do so perfunctorily, that is to say, performed merely as a routine duty, hastily and superficially. There is more on the record, however, that ties this Grievant to the duty to be aware of Rule 26. The last chance agreement was personally signed with the Grievant ceremoniously with the Union and the Employer. Under this agreement, a removal (discharge) of the Grievant was held in abeyance, and the Grievant "specifically agrees and understands that 'he' must strictly adhere to (the Employer's) policies and work rules in order to retain (his) position."

The last chance agreement is an agreement that is particularized to this Grievant at a time where the Grievant had pending a decision by the Employer to discharge him. This

clearly establishes a duty upon the Grievant to be aware of Rule 26.

The Grievant recognized this duty in his cross-examination. "I failed to become familiar with all the performance-related work rules." "I should have been up on the rules." "I understood I had to strictly adhere to the rules."

Another corrections officer testified on an awareness of Rule 26 on behalf of the Grievant. He noted on cross-examination that he was aware of this rule, but considered it applying only work-related arrests or charges. The record contains an interesting appraisal by the Grievant of the connection of his arrest on August 6 to his work. The Grievant explained that he filed a written incident report on August 10 because "I saw a correlation between solicitation and my work."

Lastly, the record contains evasion by the Grievant as to the reason why he did not report the arrest until August 10. In the investigative interview that was conducted on August 10, the Grievant was asked about his failure to report the August 6 arrest prior to August 10.

Q: Why didn't you call in and report this incident sooner than today?

A: I was in jail until Wednesday morning.

The absence of an earlier report of the arrest was also raised at the Step 3 meeting and in testimony at the arbitration

hearing. Essentially, the Grievant provided the excuse that his high priority was his concern for his family given the media attention of the arrest.

The finding of some evasion is based upon the obvious difference between the two reasons given in the investigatory report from that given at Step 3 or the arbitration hearing. Moreover, the record shows that the Grievant was able through the assistance of his family to make a telephone call to the medical center on Tuesday, August 7, during which he requested a sick leave from his shift on the following day. In addition, the record shows a telephone call by the Grievant to the Medical Center from his home early on Thursday morning, again seeking a sick leave from his shift on Thursday. There was no mention in either of these telephone calls to the Medical Center about the arrest that had taken place on August 6.

CONCLUSION:

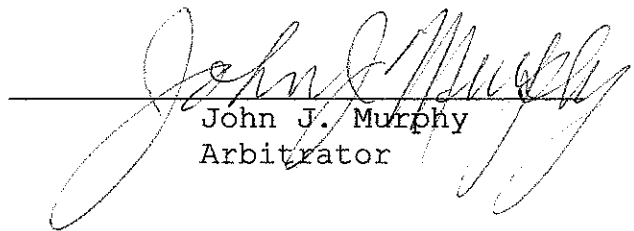
This is an unfortunate case involving the removal of a corrections officer that had more than a decade of service to the Employer. It was also apparent to the arbitrator that the publicity concerning this arrest for solicitation of prostitution caused personal and family turmoil. On the other hand, this arbitrator is limited by the rules which the Grievant accepted in the last chance agreement. The arbitrator has no authority to modify the discipline in this case. Rule 26, and

an SOEC Rule on the performance track of the disciplinary grid were violated by the Grievant. On such a finding, the Grievant himself agreed in the last chance agreement "that the appropriate discipline shall be termination from (his) position."

AWARD:

The grievance is denied.

Date: May 17, 2008



John J. Murphy
Arbitrator