

IN THE MATTER OF THE ARBITRATION BETWEEN

GRIEVANCE NO.: 27-11-20081226-0151-01-03

The Ohio Civil Service Employees
Association, AFSCME Local 11

GRIEVANT: Reva Puckett

AND

Ohio Department of Rehabilitation and Correction
Lebanon Correctional Institution

OPINION AND AWARD

ARBITRATOR: Meeta Bass Lyons

AWARD DATE: August 6, 2009

APPEARANCES FOR THE PARTIES

Management: Christopher Lambert, Labor Relations Officer
Management Advocate
Marissa Hartley, Office of Collective Bargaining

UNION: Michael Muenchen, Ohio Civil Services Employees
Association, AFSCME Local 11,
Union Advocate
Mark Spencer, Chapter President

PROCEDURAL HISTORY

Lebanon Correctional Institution is hereinafter referred to as "Management". The Ohio Civil Service Employees Association, AFSCME, Local 11 is hereinafter referred to as "Union". Reva Puckett is the "Grievant".

Grievance No. 27-11-20081226-0151-01-03 was submitted by the Union to Management in writing on December 26, 2008 pursuant to Article 25 of the parties' collective bargaining agreement. Following unsuccessful attempts at resolving the grievance, it was referred to arbitration in accordance with Article 25, Section 25.03 of the 2006-2009 Collective Bargaining Agreement.

Pursuant to the collective bargaining agreement between the Union and Management, the parties have designated this Arbitrator to hear and decide certain disputes arising between them. The parties presented and argued their positions on July 13, 2009 at the Lebanon Correctional Institution. During the course of the hearing, both parties were afforded full opportunity for the presentation of evidence, examination and cross-examination of witnesses, and oral argument. Witnesses were sequestered during the hearing. The hearing was concluded on July 13, 2009.

The parties stipulated that the grievance and arbitration were properly before the Arbitrator.

The parties did stipulate to the issues as follows: Did the employer appropriately terminate the grievant for violation of her last chance agreement signed on July 21, 2008? If not, did the employer have just cause to remove the grievant? If not, what shall the remedy be?

PERTINENT PROVISIONS OF THE 2006-2009 AGREEMENT

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...

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. Agencies shall forward a copy of any fine issued to employees, to OCB. Should a grievance be filed over the issuance of a fine and the grievance is settled prior to Step 4, the Agency shall forward a copy of the settlement to OCB. OCB shall maintain a database involving fines and share this information with the Union no less than quarterly.
- e. One or more day(s) suspension(s);
- f. Reduction of one (1) step; This shall not interfere with the employee's normal step anniversary. Solely at the Employer's discretion, this action shall only be used as an alternative to termination.
- g. 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...

Work Rule 7

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

General Post Order, rev July 1, 2006

...Pat down search of males (clothed search)-The pat down search is the most common method of search used to control contraband in an institution. Whenever an employee conducts a pat down search of an inmate's person, caution shall be exercised to avoid the risk of injury from sharp objects

concealed within the inmate's clothing. A pat down search will be conducted in the following manner...

- (4) The employee will stand behind the inmate and begin the search by inspecting the inmate's shirt collar (by sight and by touch).

BACKGROUND

Set forth in this background is a summary of undisputed facts and evidence regarding disputed facts sufficient to understand the parties' positions. Other facts and evidence may be noted in the discussion below to the extent knowledge of either is necessary to understand the Arbitrator's decision.

The facts in this case are largely undisputed and are hereinafter summarized. Where, however, relevant evidence regarding pertinent facts conflicts, the evidence is summarized.

Grievant was a Correctional Officer at Lebanon Correctional Institution, a penal institution of the Ohio Department of Rehabilitation and Correction, until December 23, 2008. Grievant had approximately ten years and 4 months of service at the time of her removal.

Grievant was removed from her position regarding an incident that occurred on October 22, 2008. On said date Grievant was assigned as the security officer in the infirmary. Post Order Number 38, effective January 1, 2008 describes her duties at the infirmary security post. In accordance with the post order, "any inmate, including infirmary porters, who is admitted beyond the infirmary front security gate and who is not under constant supervision of the escorting officer shall receive a pat-down search and wanded with the hand held metal detector, to be performed by the infirmary officer prior to the inmate being permitted to pass through the infirmary front security gate and again upon leaving the area." The Order further mandates that pat down searches are conducted while standing.

At approximately 8:25 a.m., Amy Weiss, the healthcare administrator, observed Grievant performing pat-down searches of three inmates while seated in her chair. Ms. Weiss contacted Captain Brunson, regarding the manner in which the pat-down searches were conducted. Captain Brunson then instructed Lieutenant Sherman to report to the infirmary to make sure Grievant was using proper techniques in administering pat downs. At

approximately 8:40 a.m., Lieutenant Sherman informed Grievant that for safety reasons pat-down searches had to be properly performed in the institution. Grievant acknowledged the instruction. Grievant had prior training on the technique. While the Lieutenant was present, Grievant properly performed pat-down searches of the inmates. Lieutenant Sherman left the premises. At approximately 10:38, Amy Weiss and Doctor David Donnelly, Assistant Dental Director observed Grievant performing pat-down search(es) while seated, and filed a joint incident report.

Grievant was terminated from her position due to charges of failure to follow work rule 7 which also constituted a violation of the last chance agreement executed on July 21, 2008. The Last Chance Agreement specifically prohibited Grievant from violation of performance Rules #5 through #49 of the Standards of Employee Conduct and specified that Grievant adhere to all agencies policies.

The Union filed its grievance on December 26, 2008 alleging a violation of Article 24. The grievance was not resolved within the procedure established by the collective bargaining agreement, and was properly advanced to arbitration.

POSITIONS OF THE PARTIES

MANAGEMENT

Management contends that Grievant executed a valid Last Chance Agreement on July 21, 2008. The Last Chance Agreement specifically provided for removal from employment for a violation of any performance-based rules #5 through #49 of the Standards of Employee Conduct. Grievant was observed performing pat-down searches while seated which is contrary to policy and post orders that require pat down searches to be performed while standing. Said action is a violation of work rule 7 of the Employer's Standards of Employee Conduct, failure to follow post orders, administrative regulations, policies or directives. Grievant had knowledge of the work rule that required a pat-down search to be conducted while standing, and was cautioned by her Lieutenant of the reason for the work rule. If it is determined that Grievant violated work rule 7 as supported by the witness testimony and admission of Grievant, the arbitrator has no authority to modify the discipline under the terms of the Last Chance Agreement.

Management requests that Grievance No. 27-11-20081226-0151-01-03 be denied.

UNION

Union contends that Management improperly invoked the Last Chance Agreement and terminated the Grievant without sufficient evidence of a work rule violation. Grievant performed the pat-down searches, and was able to conduct proper searches while seated. The union maintains that due to the high congestion of inmates in the infirmary and other duties of the officer at the post, pat-down searches are often conducted while seated without discipline.

Union contends that given the Grievant's ten-year tenure and substantial compliance with the work rule, the termination was made without just cause.

Union requests that Grievance No. 27-112008-12-26-0151-01-03 be sustained, and that Grievant be reinstated to her position as a correction officer, with full back pay and benefits.

DISCUSSION

On July 21, 2008, Grievant and Management executed a Last Chance Agreement. The agreement provides in pertinent part:

..."The Department agrees to hold in abeyance the removal order dated July 16, 2008, for a violation of Rule 22- Falsifying, altering or removing any document or record, and 24- Interfering with, failure to cooperate in, or lying in an official investigation, of the Standards of Employee Conduct.

The Employee specifically agrees and understands that she must strictly adhere to the agency's policies and work rules in order to retain her position as they relate to performance; she also agrees and understands that a violation of any performance-based rule (#5-49) of the Standards of Employee Conduct during the life of this agreement will result in the termination of her employment from the Department of Rehabilitation and the Lebanon Correctional Institution.

It is agreed by all of the parties hereto that if the employee violates this Last Chance Agreement or if there is any violation of the work rules (Standards of Employee Conduct) as they relate to performance, the appropriate discipline shall be termination from her position. Any grievance arising out of this discipline shall have the scope of the arbitration of the grievance limited to the question of whether or not the employee did indeed violate said policy. The agency/employer need only prove that the employee violated this agreement(s) and/or rule(s). The arbitrator shall have no authority to modify the discipline. All parties here acknowledge the waiver of the contractual due process rights to the extent stated above...

The employee agrees she has signed this Last Chance Agreement voluntarily, without coercion or under duress."

The Last Chance Agreement represents a modification of the discipline procedure outlined in Article 24 of the collective bargaining agreement. Management agreed to hold in abeyance the removal order dated July 16, 2008 in exchange for strict adherence to the agency's policies and work rules in order for Grievant to retain her position. The agreement specifically establishes that a violation of work rules #5 through #49 will result in termination of her employment. The agreement limits the scope of the arbitration of the grievance to the question of whether or not the employee did indeed violate said policy. In accordance with the terms of the agreement, the arbitrator has no authority to modify the discipline if a violation is determined. Grievant, her union representative and the Warden signed the Agreement. The validity of the Last Chance Agreement is not in issue, and therefore is enforceable.

It is not disputed that Rule 7 of the Employer's Standards of Employee Conduct, failure to follow post orders, administrative regulations, policies or directives falls within the category of infractions which can result in termination. On October 22, 2008 Grievant signed the post assignment acknowledging that she read and understood the attached post orders and related policies for the post. The post order and work rule at issue clearly states "the employee will stand behind the inmate and begin the search by inspecting the inmate's shirt collar (by sight and by touch)." Grievant admits that she conducted pat-down searches while seated but denies that the healthcare administrator and the dentist observed her conducting pat-down searches while seated from the positions that they were standing. The testimony of the healthcare administrator and dentist are credible, and is supported by the inspection of the infirmary.

The Union argues that Grievant substantially complied with the post order because she was able to conduct a proper search while seated. Grievant demonstrated her ability to conduct a search of a person who was

the same height and size of her advocate. The demonstration did not comply with the search requirements of the post order. The Order defines a pat-down search as "a search involving manual and visual inspection of body surfaces, mouth, ears, nostrils, hair, clothing, wigs, briefcases, purses, prosthetics and similar items." Doctor Donnelly further opined that while seated and dependent on the size of the inmate, an officer could not conduct a proper search from the midchest area upward. Grievant's witness concurred with Doctor Donnelly's opinion that dependent on size, weight and other variables that it may be possible to conduct a search in accordance with the mandates of the post order. The Arbitrator is not persuaded that a proper search was conducted, and it is not disputed that search was conducted while standing.

The post assignment in this case is located in the infirmary. Surgical tools and other equipment are kept in the infirmary. This suggested relaxed practice of performing searches while seated could endanger the public, fellow correctional officers, and inmates by failing to detect hidden tools that could be crafted by inmates into weapons. The infirmary also stores medication, and if undetected, can become contraband within the institution. The Union's argument, that the violation was not material because Management did not conduct follow-up searches of the inmates, lacks merit. Substantial compliance in this instance would mean to ignore the rule requirement that Grievant stand to conduct searches, the safety risks associated with improper pat-down searches and the last chance term of settlement that she strictly adhere to agency's policies and work rules.

The Union argues that pat-down searches while seated are often conducted in the infirmary, and employees are not disciplined. Mark Spencer, the chapter president, recalled an incident where an improper strip search was conducted, and a written reprimand was issued, but did not recall any disciplinary measures issued for improper pat-down searches.

However, Mr. Spencer could not recall any incident where pat-down searches conducted while seated were observed by or reported to Management. Management cannot be held accountable for violations of which they have no knowledge. Amy Weiss originally reported the conduct of Grievant to Captain Brunson because she had not observed a pat-down search conducted while seated in a chair in the past, and thought it was improper. Grievant was cautioned and reminded about proper procedure by her supervisor, but elected to return to her relaxed practice.

The Arbitrator finds that Grievant violated work rule 7 when she conducted pat-down searches while seated, and Grievant was appropriately removed for violation of her last chance agreement signed on July 21, 2008 and therefore Grievance no. 27-112008-12-26-0151-01-03 is denied.

AWARD

Having heard, read and carefully reviewed the evidence and argumentative materials in this case and in light of the above Discussion, Grievance no. 27-11-20081226-0151-01-03 is denied.

Dated: August 6, 2009

____/s/ Meeta Bass Lyons_____

Meeta Bass Lyons, Arbitrator
Steubenville, Ohio