

## ARBITRATION PROCEEDING

In the matter of arbitration between:	)	#DRC-2018-00721-03
	)	
STATE OF OHIO, DEPARTMENT OF	)	Hearing: July 26, 2018
REHABILITATION AND CORRECTION	)	at Marysville, Ohio
OHIO REFORMATORY FOR WOMEN	)	
	)	Date of Award:
and	)	September 4, 2018
	)	
OHIO CIVIL SERVICE EMPLOYEES	)	Before Mitchell B. Goldberg,
ASSOCIATION, LOCAL 11, AFSCME	)	Arbitrator
AFL-CIO	)	

### Appearances:

#### For the Union:

Derek Urban,	Staff Representative
Thomas Holden,	Grievant
Charlie Hacker,	Scribe
Scott Dye,	Union
Walter H. Leistriz,	Union
Corey Cunningham,	Corrections Officer
Todd Crowe,	Former Captain
Brett Gaines,	Chief Steward

#### For the Employer ("Agency"):

Garland E. Wallace,	Labor Relations 3
James Adkins,	Labor Relations 2
Victor Dandridge,	Labor Administration, OCB
Lucas Johnson,	Labor Relations Intern
Cassandra Bufkin,	Labor Relations Intern
Anthony Haynes,	Deputy Warden
Leon Hill,	Deputy Warden
Destin Nos,	Lieutenant
Andre Shellow,	Lieutenant
Garrett Carter,	Lieutenant

## OPINION AND AWARD

### I. Introduction and Background.

This is a labor arbitration proceeding conducted under the terms of the collective bargaining agreement between the State of Ohio and OCSEA covering the period from July 1, 2015 through February 28, 2018. The parties selected the undersigned as the arbitrator of this labor dispute in accordance with Article 25, Section 25.03. The Agency issued Thomas Holden ("Grievant") a notice on January 12, 2018 that he was removed from his position as a Correction Officer effective February 27, 2018, based upon his unsatisfactory work performance. Specifically, he was found to be in violation of Standards of Employee Conduct, Rules 7 and 8. The Rule 7 violation alleges that the Grievant failed to follow his post orders, administrative regulations, policies, or written or verbal directives. Rule 8 alleges that the Grievant failed to carry out a work assignment or he exercised poor judgment in carrying out an assignment. The Notice describes the Grievant's violations as follows:

On September 19, 2017 you disrupted radio traffic when you made a statement to the shift commander about overtime. Your post orders clearly state, "Radio traffic shall be kept as brief as possible. Any situations that would require excessive radio traffic should be conducted via telephone."

On 10/26/17 and 11/6/17 you were observed out of your assigned zone and did not sign into the DRC 6011 as required.

The Union filed a timely grievance on the Grievant's behalf alleging that he was removed from service without just cause in violation of the CBA. The parties stipulated that the issue in this dispute is whether the Grievant was disciplined for just cause? If not, what remedy is justified for the Agency's contract violation? The parties further stipulated that; (1) the grievance is properly before the Arbitrator; (2) the Grievant was hired on March 28, 2005; (3) the Grievant was issued a Removal through the Union on February 27, 2018; (4) the Grievant had three written reprimands, a 2 DWS, and a 3 DWS on record for the performance track prior to

this removal; (5) the Removal was issued for the violations set forth on his Notice of Removal; and (6) that the Grievance alleges a violation of Article 24 - Discipline, of the CBA.

The Agency denied the grievance throughout each step of the Grievance Procedure (Article 25), and the matter proceeded to hearing on July 26, 2018. There was no transcription of the proceeding or official record. The parties submitted joint exhibits and party exhibits. Witnesses were examined and cross-examined. Post-hearing written closing arguments were filed after all of the evidence was received.

## II. Applicable Contract Provisions.

Article 24, Section 24.01 requires that disciplinary action shall not be imposed upon an employee except for just cause. The Agency has the burden of proof to establish just cause for its action. Section 24.02 requires that the Agency follow the principles of progressive discipline. Disciplinary action shall be commensurate with the offense. Disciplinary action shall include:

- a. One (1) or more written reprimand(s);
- b. One (1) or more working suspension(s). A minor working suspension is a one (2) day suspension, a medium working suspension is a two (2) to four (4) day suspension, and a major working suspension is a five (5) day suspension. No working suspension greater than five (5) days shall be issued by the Employer.

## III. Factual Background.

The Grievant's disciplinary history shows that he was issued a written reprimand for violating Rule 8 on April 14, 2017. He was issued a 2-day suspension for violating Rules 7 and 24 on May 1, 2017. He was issued a 5-day suspension that was reduced to a 3-day suspension through a non-traditional arbitration ("NTA") on August 16, 2017. The charge was that the Grievant violated Rule 7. He also was charged with violating Rules 8 and 5b, and those charges were reduced to a written reprimand on August 16, 2017. The Grievant was issued another 5-day suspension on November 15, 2017 for violating Rules 7,8, and 24. That charge

was reduced to a written reprimand. Accordingly, the Grievant's work record before his removal included 3 written reprimands, a 2-day suspension and a 3-day suspension.

The Agency contends that the Standard of Employee Conduct ("SOEC") justifies the Grievant's removal. It states that this arbitration involves one discipline decision being imposed based upon three separate investigations that were combined into one pre-disciplinary meeting. This was due to the minimal timeframe between the three incidents.

The Union, however, contends the the progressive discipline criteria was not followed by the Agency. Under the SOEC, the Grievant's highest level of discipline when he was removed was a 3-day working suspension. This is a medium level suspension. It believes that the commission of three distinct offenses within the same time period are on three separate progressive disciplinary tracks. It believes that even if the misconduct charge for removal is proven, the Grievant would not be subject to removal based upon his existing 3-day suspension. It cites SOEC language that requires the Agency to consider the similarity and proximity in time of the offenses. The Agency may repeat disciplinary penalties for repeat violations of a similar nature when offenses occur in close proximity in time. However, the Union contends that the allegations and charges against the Grievant are of a "minor" nature, and that a removal decision, even if the charges are proved, would not be discipline that would be commensurate with the offenses that were committed.

#### *The Radio Incident On September 19, 2017*

The Grievant was a Yard Patrol Officer who was assigned to zone 402 with a radio call Number 2-402. According to the Post Order, his use of his radio was limited. Radio traffic shall be kept as brief as possible. Any situations that would require excessive radio traffic should be conducted via telephone. Officers are prohibited from transmitting sensitive and/or confidential

information on the radio. Professional etiquette shall be used when transmitting non-emergent information.

It is undisputed that Lt. Carter was conducting his roll call - podium pick for staffing the third shift. It is important for security purposes that all placement areas for correction officers be staffed on each of the three shifts. If there is a shortage of personnel, staffing must cover the shift with employees who work on other shifts. They would be assigned overtime work. Staffing can also be done on short notice by holding over or retaining employees who are leaving after working their second shift. There is a factual dispute over whether an employee should have been held over from second shift after Lt. Carter received a late call from an officer who was to report for work on the third shift, but could not be present. Lt. Carter decided to hold over Officer Marshall from the second shift to staff this vacant position.

While this was occurring, the Grievant, who serves on the Union Overtime Review Committee, was in the yard and heard the radio call from Lt. Carter to Marshall. The Grievant called Lt. Carter over the radio to inform him that there were volunteers on the existing overtime list who were available to work the third shift and that it would not be necessary to hold over Officer Marshall to work overtime on the third shift.

The dispute is over the nature of the radio transmission and whether it violated the Post Order on radio usage. Lt. Carter testified that the Grievant stated over the radio: "You can't do this! You need to call for overtime, as there is still overtime in the book to be called." "You cannot retain Officer Marshall." Lt. Carter believes that the Grievant's use of the radio, which is broadcasted to all personnel, was improper and was not to be used to discuss an overtime selection issue. He stated that this type of issue should be communicated over the telephone or personally, and use of the radio for this purpose "was not professional." Lt. Carter stated during his investigative interview that this type of communication between an officer and a supervisor

should be not be conducted over the radio. He characterized the Grievant's tone as being "loud and rude." Lt. Carter was near a telephone in the Roll Call room, and he was available to speak with the Grievant on the phone.

The Grievant's version of what transpired is not materially different than Lt. Carter's version in terms of the words that were used. He stated that he used the radio to inform Lt. Carter that there were still officers working on the second shift that volunteered to work overtime and they should have been called from the overtime list instead of retaining Marshall. He stated that he had access to a phone. He tried to call Lt. Carter first, but the line was busy. Lt. Carter did not respond to his radio call, but they met later in the shift office to discuss the Grievant's radio call. Lt. Carter stated that he did not appreciate being called to discuss the overtime issue over the radio. The Grievant reiterated his concern about the retention of Marshall when others were available to work overtime. He also complained about the work schedules that he and other staff felt were being "messed up on a daily basis."

#### *The Charge That The Grievant Was Working Outside His Assigned Zone*

The Post Order that was in effect on October 26, 2017 for area 402, the Grievant's assigned area, did not include Hale Cottage within his area. A change was made in the Post Order in March that removed Hale from the Grievant's assigned area. The Agency believes that the Grievant should be responsible for reviewing his Post Order on a regular basis. If he did so, he would have known that Hale was removed from area 402 to 403. He was observed in Hale on October 26 when Lt. Nos was reviewing video footage of the areas.

The Grievant admits that he was in Hale conversing with Hale staff on October 26, but he believed that Hale was within his assigned area. He did not see the change on his Post Order, and believes that he received insufficient notice of the change. The Post Order is clear that Yard Patrol Officers are required to "maintain a constant patrol of all areas within [their]

assigned zone when not performing other duties.” They are required to conduct “periodic checks inside all buildings/areas within [their] zone at least twice per shift.” Hale was not within his assigned area of responsibility based upon the existing Post Order on that date.

The Grievant and the Union, however, believe that the Grievant received insufficient notice of the change in his area. Prior to that time he checked the Hale Cottage on each day he worked on the second shift. He was never told of the change. Moreover, there is confusion about the issue. Yard Patrol Check Sheets continued to list Hale as part of the Grievant’s 402 area assignment before and after October 26. The check sheet is mandated by the Yard Post Order, and is turned in each day to the Captain’s Office for review.

#### *The Failure to Sign DRC Form 6011*

Form DRC 6011 is an employee visit record. The form is required for purposes of staff accountability. It is undisputed that the Grievant failed to sign the Employee Visit Record on October 26 and November 6. The Union contends that the rule requiring both sign-ins and sign-outs for visits is a technical requirement that is repeatedly violated by many employees, including management employees, without any discipline being issued.

#### IV. Analysis.

##### *The Concept of Progressive Discipline*

The doctrine of progressive discipline as a component of “just cause” in the labor relations world is simply that discipline should be corrective in nature such that employees have the opportunity to conform with the rules of conduct and the expectation of employers with respect to work performance. Except for more serious offenses, warnings should be given before suspensions and suspensions must be issued before terminations. One must examine the CBA language that addresses the subject because CBAs contain differences in the manner in which progressive discipline is issued.

Section 24.02 contains the progression in this CBA. It provides for written reprimands that progress to working suspensions, that in turn contain longer suspensions for more serious rule violations or misconduct. The language, however, does not state or require that the progressive discipline requires only an escalated penalty for subsequent offenses of the same or similar nature. In other words, the language does not require that increased penalties for subsequent offenses must be applied only within the framework of parallel disciplinary tracks for different types of offenses. The language instead merely requires that the disciplinary action must be commensurate with the offense.

The Standards of Employee Conduct (“SOEC”) does identify two separate disciplinary tracks, the “Absenteeism Track” and the “Performance Track.” The Performance Track contains the progression of discipline for rule violations. The SOEC states that while consistency of discipline will be applied to the progression, the Agency is not required to administer the exact same level of disciplinary action “in the same way each and every instance.” “Each instance of a violation of the SOEC turns on its own facts and distinguishing variables such as prior disciplinary history, length of time since the last discipline and mitigating and aggravating circumstances.” The Agency will consider “the similarity and proximity in time of offenses when contemplating employee disciplinary action.” It “may repeat disciplinary penalties for repeat violations of a similar nature when offenses occur in close proximity in time.”

The offense must be judged under the overall principle of just cause, which requires an analysis of a number of factors. These factors include (1) the nature and seriousness of the found offense; (2) the length and quality of the employees work history and record; (3) the discipline issued to other employees in similar cases; (4) aggravating factors; and (5) mitigating factors. Moreover, the discipline must not be issued with the intent to discriminate against the



employee by reason of his protective status under the law, which includes his right to engage in union activities or other concerted activity.

### *The Grievant's Work History and Record*

The Grievant is a 13-year employee, who attained positive performance evaluations over his career, including an award for being the Corrective Officer of the Month. The Employer, however, justifies its decision because of the Grievant's repeated rule violations in a relatively short period of time in 2017. The first discipline was issued on April 14, 2017. The Grievant was issued a written reprimand for violating Rule 8. He was ordered to wait for a Supervisor before he used force on a female inmate. The second discipline occurred on May 1, 2017 for violating Rules 7 and 8. The Grievant authored a false report and routed it to the Regional Director, contrary to policy. The Grievant used social media to criticize the Warden of ORW. He stated that the Warden was awarded a "B.S." award. He received a 2-day suspension. The Union filed a grievance contesting the discipline and the matter proceeded to arbitration. The grievance was denied. The Grievant thereafter on November 1, 2017 received two 5-day suspensions. The first involved the Grievant's violation of Rule 7. He was found to have brought contraband into the confines of the ORW. That discipline was reduced to a written reprimand. The second 5-day suspension involved allegations of violations of Rules 7, 8 and 24. He again routed another incident report to the Regional Director. He was further accused of defacing the side of a state building. This discipline was also reduced to a 3-day working suspension and a written reprimand.

### *The Current Charges*

I find with respect to the three current charges of misconduct, that the Agency proved that discipline is warranted on the first charge that the Grievant misused the radio when he communicated with Lt. Carter over an overtime selection dispute. I find that the Grievant did not

violate the work rules when he was inside Hale Cottage on October 26, after the reassignment of Hale from zone 402 to zone 403. I further find that the Grievant failed to sign the Employee Visit Record on October 26 and November 6, but that there were sufficient mitigating factors to vacate the issuance of any discipline for these omissions.

#### *The Misuse of the Radio on September 19*

One must first analyze this charge in the context of the Grievant's position as a Corrections Officer. He works in a military-type environment that requires strict compliance with the directives from his chain of command. He is prohibited from disrespecting his commanding officers with conduct or actions that border on being insubordinate. Trained police officers and corrections officers are required to execute their duties in accordance with the orders of their superiors in chaotic and dangerous situations. Operating in these conditions requires strict discipline. They must obey and follow the orders within the chain of command.

While I agree with the Union's positions that the Grievant's statements in the call were not particularly excessive in length, or even that the subjects themselves were prohibited. The evidence shows that radio call subjects routinely involved matters of overtime staffing and selections. However, the evidence warrants a finding that the Grievant's remarks to Lt. Carter were improper. I find that the Grievant's remarks were made in the form of a challenge to Lt. Carter's authority and bordered on the Grievant being insubordinate. I agree with Lt. Carter's assessment that the Grievant was challenging his overtime selection and that he was demanding that his decision be overturned by stating in a "loud and rude" manner that he "could not retain" the holdover officer to work the next shift. The Grievant's demand over the radio was heard by the other staff. It is reasonable to conclude that the Grievant's statements were disrespectful and they amounted to a direct challenge to Lt. Carter's authority.

There is no question that the Grievant's status as a Union representative, and his position as an Overtime Review Officer, entitles him to vigorously represent the rights of his fellow employees. His comments would be well within his acceptable rights and actions if they occurred in a private meeting or telephone call with Lt. Carter, or with other management personnel. However, his right to fairly represent the membership in the manner he chose was improper when his manner and tone was broadcasted to the entire staff, and was in the form of a direct challenge to Lt. Carter's authority.

It must further be taken into account that the Grievant's manner would reasonably be judged by the administration as a continuance of his disrespectful behavior that was exhibited when he criticized the Warden in his use of social media, and his failure to respect his chain of command in routing incident reports, behavior for which he received progressive discipline.

#### *The Zone Assignment Dispute*

The Agency recognizes the discrepancy between the Grievant's formal changed work assignment in his post orders that moved the Grievant's inspection of Hale from Zone 402 to other officers in 403, and the fact that the Grievant's daily yard officer security check sheets continued to list Hale in Zone 402 under the Grievant's assigned duties. Nevertheless, the Agency believes that the Grievant should have reviewed his post orders between March and November. Officers are required to read their post orders on a daily basis.

However, management and supervisors must accept responsibility for the Grievant's actions. They received the Grievant's daily security check sheets each day that showed Hale within the Grievant's zone. One would reasonably expect that supervisors would notice that the Grievant was checking off Hale each day, when in fact Hale inspections were removed from his zone. Post orders are lengthy documents, but the security check sheets represent the Grievant's daily working orders.

The Agency now accuses the Grievant misconduct beyond that contained in his charge. The charge is merely that the Grievant was “observed out of [his] assigned zone.” The Agency alleges that he was not performing his required inspection duties of conducting a building check. Instead, it contends that the Grievant was neglecting his duties by merely socializing with other officers who were in Hale. The Grievant was speaking with other officers in Hale when he was observed. The Grievant stated that he was briefly conversing with the officers during his building check.

The Agency contends that the Grievant knew of his post order change because other officers from Zone 403 conducted Hale building checks. It places the responsibility of producing the check sheets for October 26 and November 6 upon the Union to show that the Grievant in fact conducted inspections of Hale on those dates. However, the sheets were turned in to the Agency each day and should be available to show whether the Grievant checked off Hale in accordance with the instructions on his sheets on those days.

Lt. Nos testified that the Grievant was observed in Hale during a mass movement of inmates. Building checks are not to be made during mass movements. The Agency believes this evidence warrants a finding that the Grievant was untruthful when he stated that he was conducting a building check. He was outside of his Zone socializing instead of conducting an inspection of Hale. This belief about the nature of his conversations with the other officers cannot be substantiated because there is no audio recording of what was discussed.

These facts, however, could merely indicate that multiple inspections were made by the officers in Zone 3 and the Grievant, who still thought he was required to inspect Hale in accordance with his check sheets. More importantly, the Grievant was not charged with being untruthful about his whereabouts on the days in question. He was not charged with neglecting

his duties by socializing with other officers instead of performing his work. He was only charged with being observed outside of his work zone.

Accordingly, it cannot be found that the Grievant intentionally violated Rules 7 or 8 by merely being observed out of his assigned work zone during the time he was in Hale conversing with other officers.

#### *The Failure to Sign DRC Form 6011*

The Grievant's Post Order requires that officers sign the Employee Visit Record (DRC 6011) in each area they visit during their shift. Under 310-SEC-08 Permanent Log Maintenance, all employees are required to sign in upon entering the housing unit at all times. The Institution must maintain accountability for those persons entering and leaving housing units. The Grievant is charged with failing to sign into Hale on October 26 and November 6. The Agency cites these omissions as evidence that the Grievant knew that he was entering an area out of his zone, and that his intention was not to inspect Hale in accordance with his check sheets. It infers that the Grievant knew of the change in his Post Order and that he knowingly went out of his zone in order to socialize with other officers. While I cannot find that he intentionally violated the rules for the above stated reasons, there is no question that he violated the sign-in rule on the stated dates.

While the evidence shows that officers have been disciplined for violating the sign-in and sign-out rules at various times, It also must be found that there have been many occasions when the rule has not been strictly enforced. There are clearly important reasons while the rule should be enforced on a regular and consistent basis, but there have been many instances where the rule violations were not treated as infractions that warranted discipline. Accordingly, if the Agency wants to bring enforcement of the rule back into line, it must provide sufficient

notice to the employees that discipline will be imposed for sign-in and sign-out violations so that the employees will know that enforcement of the rule will be done on a consistent basis.

Again, the Grievant was not charged with violating the rule so that he could visit with other employees out of his assigned zone, as part of some overall charge that he was neglecting his duties. He was only charged with failing to sign-in or out, infractions that have not been met with discipline on any consistent basis.

V. Award.

The grievance is sustained in part. The termination or discharge shall be vacated and removed from the Grievant's work record. However, the Grievant is issued a 30-day work suspension without pay for the above found misconduct in violation of the SOEC. The Grievant shall be reinstated to his former position with a restoration of his lost seniority.

*Remedy Issues*

The Union requests a make-whole remedy that includes: (1) lost pay; (2) loss of overtime pay that would have been earned in the interim period until the Grievant's reinstatement; (3) accrued leave balances; (4) missed matched payments to OPERS; (5) payment for uninsured medical expenses; and (6) restoration of money that the Grievant withdrew from his retirement and/or his inheritance to meet his living expenses

The Grievant shall recover any lost pay or back pay except for the period of his suspension. The back pay shall include any overtime pay that the Grievant would have earned in the interim period. This shall be computed in accordance with accepted NLRB methods that either uses a comparison with a similar employee who worked during the interim period, or by some reasonable projection of the Grievant's average earnings.

The Grievant had a duty to reasonably mitigate or reduce his damages by seeking interim employment. The back pay shall be reduced by the Grievant's interim earnings and the

recovery of any unemployment compensation benefits. He shall recover any other employment benefits such as leave accruals and missed payments to OPERS by the Agency if they occurred during the interim period except for his suspension period.

The Grievant's claim for the recovery of payments for medical, vision, or dental expenses for himself and his family that were uninsured is denied because the Grievant was required to mitigate his damages for his loss of medical insurance by obtaining substitute coverage through COBRA or otherwise. The Grievant's claim for the recovery of other monies he used to live on during the period between his removal and his reinstatement is also denied. These types of damage claims were not within the contemplation of the parties when the CBA was agreed upon, and therefore are beyond what the Grievant should recover under traditional breach of contract damages.

Jurisdiction is hereby reserved for a period of 60 days after the issuance of this award in order to resolve any issues that may arise with respect to the above remedy for the Agency's contract violation.

Date of Award: September 4, 2018

Mitchell B. Goldberg  
Mitchell B. Goldberg, Arbitrator

## CERTIFICATE OF SERVICE

The above Opinion and Award was served upon the following persons by electronic mail this 4th day of September, 2018:

Garland Wallace, Labor Relations Officer, [garland.wallace@odrc.state.oh.us](mailto:garland.wallace@odrc.state.oh.us)

Derek Urban, Staff Representative, OCSEA, [durban@ocsea.org](mailto:durban@ocsea.org)

Mitchell B. Goldberg  
Mitchell B. Goldberg