

STATE OF CONNECTICUT
DEPARTMENT OF LABOR

STATE BOARD OF MEDIATION AND ARBITRATION

ARBITRATION AWARD

In the matter of:

STATE OF CONNECTICUT
DEPARTMENT OF CORRECTION

CASE NO. [REDACTED]

and

Hearing Date: November 16, 2005
Award Date: February 23, 2006

AFSCME CO. 4, LOCAL 1565,
AFL-CIO
(Grievant: [REDACTED])

Location of Hearing:
Department of Labor
Wethersfield, CT

APPEARANCES:

For the State: Paul Bodenhofer, Labor Relations Specialist
For the Union/Grievant: Albert J. Chiucarello, Staff Representative

ISSUE

The parties stipulated to the following issue to be decided by this Arbitrator:

Was the dismissal of Grievant, [REDACTED] for just cause?
If not, what shall the remedy be, consistent with the NP-4 contract?

BACKGROUND

On May 9, 2004, an inmate at the [REDACTED] Correctional Center committed suicide in his cell by tying a sheet around his neck and hanging himself from the wall-mounted smoke detector. The time of the death was between 5:30 p.m. and 7:00 p.m. [REDACTED] (hereinafter referred to as Grievant) discovered the inmate when Grievant was performing a tour of the area at about 7:00 p.m. As there was no videotape of the inmate's cell, there is no way of determining the exact time of his death or whether or not if Grievant had performed his tours as required, the timing would have been such that the suicide would not have been successful. On the day in question, Grievant had been employed by the State of Connecticut for approximately 2-1/2 to 3 years. The tour Grievant was making at the time was one of the duties of the CO (correction officer) position that he held. Grievant was also responsible, as part of his duties, for maintaining the unit logbook. The logbook showed that the tours were made every fifteen minutes from 5:30 p.m. to 7:00 p.m. The logbook also showed that the Supervising Lieutenant, [REDACTED] made a tour at approximately 5:15 p.m. on the day in question. Although the logbook, maintained by Grievant, showed that all the tours that were supposed to be performed had been executed, evidence at the hearing established that Correction Officer [REDACTED] did a tour at about 5:30 p.m. on the day in question and the next tour of the area was the one made by Grievant at 7:00 p.m. The evidence at the hearing did confirm that Grievant and Lt. [REDACTED] both lied about making their respective tours. Furthermore, the videotape confirms that Officer [REDACTED] was the last person that would have seen the inmate alive.

The inmate's suicide on May 9, 2004 was investigated by Capt. [REDACTED] who filed an investigatory report. In his report, he noted that he had viewed the videotape that was taken of the area. His reports stated that his review of the videotapes showed there were no tours made between the hours of 5:30 p.m. and 7:00 p.m. and that the tour made by Lt. [REDACTED] at 5:15 p.m. was not a full tour as it did not include the area in which the inmate's cell was located. Both Lt. [REDACTED] and Grievant, when interviewed on this matter, indicated that they performed and completed the tours which they were to make pursuant to their job description. Capt. [REDACTED]' report notes that Grievant did not make the tours

as shown in the logbook between 5:30 p.m. and 7:00 p.m. and that Grievant lied in his interview about this matter. In reference to Lt. [REDACTED] the Captain's investigatory report states that Lt. [REDACTED] did not make the tours he was suppose to have made and, although the investigation showed that the lieutenant lied about making the tours, this fact was not reported by Capt. [REDACTED].

Grievant was sent a letter dated November 5, 2004 from [REDACTED], the warden of the facility, informing Grievant as follows: "You are being dismissed from state service for just cause as evidenced by your violation of Administrative Directive 2.16-Employee Conduct in Violation of Administrative Directive 6.1-Tours and Inspections". (The parties agreed that there was a typographical error and that 2.16 should have been 2.17.) The date of Grievant's dismissal was November 19, 2004. It is pointed out, at this time, that Grievant continued to work from the date of the incident, May 9, 2004 through November 19, 2004.

Lt. [REDACTED] received a letter from [REDACTED] dated November 17, 2004 which states that "This letter of formal counseling is being issued for failure to conduct complete tours when your logged tours as being completed... . A formal counseling will not, by itself, have any effect on a subsequent employee service rating. Counseling is not considered disciplinary action against an employee."

Grievant filed a grievance in reference to his termination and the matter was heard before this Arbitrator on November 16, 2005.

STATE'S POSITION

At the hearing, the State pointed out the following: (1) Grievant admitted that he did not make the tours he was suppose to make; (2) Grievant had written in the logbook that the tours had been made; (3) Grievant lied in his interview in stating that he had made the proper tours. Although Lt. [REDACTED] was not disciplined at all in this matter, the State maintains that this was based upon the fact that it did provide, at the Loudermill hearing, sufficient differences between the responsibility of Lt. [REDACTED] and Grievant to

justify the treatment received by both individuals. In addition, the State stated that it showed that other correction officers received discipline ranging from a 30-day suspension to termination for failing to perform their tours as done by Grievant. In the State's Step Three Answer to the grievance filed by Grievant, the hearing officer agreed to the following statement made by the Union: "That a supervisor had also not properly completed his tours of the unit and he was not dismissed." The hearing officer went on to state "This is correct, but the agency's position is that the inmate was seen alive and well after the time the supervisor would have toured and his failure to complete his tour did not contribute to the inmate's death."

UNION'S POSITION

The Union's position is that Grievant did fail to perform the tours that were part of his duty, did falsify the logbook and did lie to the investigating officer performing an interview of Grievant. The Union maintains that the penalty prescribed for Grievant's termination was excessive. The Union also points to the lack of discipline given to Lt. [REDACTED] and other individuals who failed to make tours, however, were not terminated for failing to make tours.

RELEVANT ADMINISTRATIVE DIRECTIVES

Administrative Directive 6.1, Tours and Inspection

Section 1. Policy: Tours and inspections shall be conducted by staff throughout each facility to increase safety and security and to encourage and facilitate the lines of communications between administrators, managers, employees, the public and inmates.

Section 5.A. General facility tours and inspections shall be as follows:

Subsection 4. Correction Officers shall tour an assigned general population housing area at least every 30 minutes.

Section 5.B. Tours and inspections of all facility specialized housing units shall be as follows:

Subsection 2. Special management inmates shall be personally observed by a correctional staff member at least every 15 minutes on an irregular schedule and on a more frequent basis for problem inmates.

Administrative Directive 2.17, Employee Conduct

Section 1. Policy: Each employee of the Department of Correction shall engage in appropriate and ethical conduct while carrying out official duties and while engaged in off-duty activities which directly reflect on the Department.

Section 5.A. Standards of Conduct. Each Department employee shall:

Subsection 18. Cooperate fully in any inquiry or investigation conducted by the Department of Correction and any law enforcement or regulatory agency.

Section 5.B. The following behavior shall be strictly prohibited:

Subsection 27. Lying or giving false testimony during the course of a departmental investigation.

Subsection 28. Failure to properly conduct tours and/or inmate counts.

ARBITRATOR'S FINDINGS

This Arbitrator finds that Grievant did admit his failure to make the proper tours which were required by his position, did improperly maintain the logbook and did make false statements when interviewed about the incident by the investigating officer, Capt.

While it is impossible to know the exact time of death of the inmate, it is obvious that it occurred between 5:30 p.m. and 7:00 p.m. on May 9, 2004. It is impossible to know whether or not Grievant's failure to make the tours was a contributing factor to the inmate's death. During the hearing, there was evidence produced by the State showing that correction officers had been disciplined from a 30-day suspension to termination for failure to make a tour. There was no evidence produced at the hearing, by either party, as to the exact facts and findings which were involved in the "comparable" cases referred to by the State. Therefore, this Arbitrator finds that he is unable to compare the facts of this particular incident squarely and properly with the facts in the cases presented. Although this Arbitrator knows what the discipline was in all cases, he does not know the background of the cases or the personnel

records of the persons involved in the other cases so that it is impossible to make a proper comparison between the case to be decided and the other cases to which he has been referred. It is noted that a 30-day suspension was given to a correction officer who failed to conduct a tour during his shift. During the time the tour was to have been made an inmate killed himself. The letter of discipline sent to him states "There were mitigating circumstances taken into consideration, which warrant this suspension. However, be forewarned, any future occurrence would warrant dismissal". In another case, a correction officer was terminated when an inmate committed suicide, being found by a nurse at 3:45 a.m. when the investigation, supported by video record, revealed that the correction officer did not tour as required at 12:30 a.m., 2:00 a.m. or 3:30 a.m. This correction officer was disciplined for just cause by a letter stating "with the termination of his employment with the Department of Correction as evidenced by your violation of Administrative Directive 2.17, 6.1...". This Arbitrator finds this particular termination (Exhibit State #18) has a fact pattern much closer to the facts involved in this incident than the inmate who received the 30-day suspension but there are no facts as to the personal records of either of the correction officers to whom reference was made.

This Arbitrator finds it appalling that Lt. [REDACTED] received no discipline for his part in the incident on May 9, 2004 whereas Grievant was terminated. The actions of Lt. [REDACTED] and Grievant were very similar and, in this Arbitrator's opinion, although there may have been mitigating circumstances in reference to Lt. [REDACTED] it is difficult for this Arbitrator to believe that said mitigating factors would have eliminated discipline entirely.

In its brief, the State says that Grievant never admitted his wrongdoing from the time of the incident in May 2004 until testifying before this Arbitrator in November 2005. It is noted that Grievant did not testify at the Step Three hearing and, in fact, did not discuss the May 9, 2004 incident from the time the incident occurred until the date of the hearing other than during the interview Grievant gave to Capt. [REDACTED]. The State also maintains that Grievant was not terminated for lying as that is not mentioned at all in his discipline letter (Joint #2). This Arbitrator finds that the State is in error in this

statement as the first paragraph of the letter of Joint #2 which is a letter from Warden [REDACTED] to Grievant states that "You are being dismissed from state service for just cause as evidenced by your violation of Administrative Directive 2.16...". (The parties agreed that there was a typographical error and that 2.16 should have been 2.17.) A reading of Administrative Directive 2.17, Employee Conduct states in Section 5.B "The following behavior shall be strictly prohibited: Sub-Section 27, lying or giving false testimony during the course of a departmental investigation". Nowhere in the Warden's letter does it eliminate this section and sub-section as areas which have not been violated by Grievant.

The questions being asked by this Arbitrator are as follows:

- 1) Was Capt. [REDACTED] attempting to hide a wrongdoing (lying) by Lt. [REDACTED]?
- 2) Was the State wrong when Lt. [REDACTED] was not disciplined for his wrongdoings?
- 3) Are the facts of Lt. [REDACTED] participation or lack of participation the same or similar to the acts of this incident in reference to Grievant?

Lt. [REDACTED] did not make his tours as required and did lie about whether he made his tours. It is true, therefore, that Lt. [REDACTED] violated Administrative Directive 2.17 as shown in a review of the videotape by Capt. [REDACTED]

Again, this Arbitrator finds there are differences between the incident report in reference to Grievant and Lt. [REDACTED] but to state that the lieutenant should not have been disciplined and Grievant terminated is beyond all reason. Based on that, what is this Arbitrator to do? This Arbitrator finds that there is no evidence which justifies Grievant being terminated and the lieutenant receiving no discipline. Does this mean that Grievant was correct in what he did or failed to do? Does it mean Grievant should have been terminated as other correction officers have been or should Grievant been given a 30-day suspension as other correction officers received? It is noted that the only case pointed out to this Arbitrator in reference to the conduct of Grievant in this matter, that is almost a direct comparison, is the action or lack of action by Lt. [REDACTED] on the day in question. It is also noted by the Union and rigorously questioned by this Arbitrator as to why Grievant

was not terminated until November 19, 2004 approximately six months after the date of the incident, May 9, 2004.

This Arbitrator finds that Grievant did not make the tours he was suppose to make, lied about the fact that he did not make the tours when being interviewed by a superior officer and failed to keep a proper logbook. There is, however, no finding made by this Arbitrator that Grievant's actions contributed to the inmate's suicide.

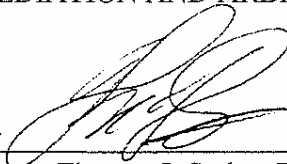
Based on all the findings made by this Arbitrator in reference to the incident itself and the comparable incidents as put forth by the State of Connecticut and by the Union, it is found that the State of Connecticut did not have just cause to terminate Grievant.

AWARD

The dismissal of Grievant, [REDACTED] was not for just cause. The dismissal shall be reduced to a suspension, which suspension will commence on November 19, 2004 at the close of business to February 28, 2006. Said suspension shall be without pay and without any and all employee benefits set forth in the labor contract between the parties. Grievant shall be reinstated on March 1, 2006 to the position and grade he held on November 19, 2004 and shall, effective as of March 1, 2006, begin to receive any and all employee benefits set forth in the labor contract between the parties affecting employees working as of March 1, 2006

CONNECTICUT STATE BOARD OF
MEDIATION AND ARBITRATION

By



Thomas J. Staley, Esq.