

ARBITRATION PROCEEDING

In the Matter of Arbitration)
)
 between)
)
 ALASKA CORRECTIONAL OFFICERS) OPINION AND AWARD
 ASSOCIATION)
) ACOA #07-017
 and) STATE #08-C-143
)
 STATE OF ALASKA, DEPARTMENT)
 OF CORRECTIONS)
)
 Grievant: Audie Ellis)

The Undersigned was selected by the parties, Alaska Correctional Officers Association (Union) and State of Alaska Department of Corrections (State) to hear and decide a grievance of Audie Ellis (Grievant). A hearing was held on July 22 & 23, 2008 in Ketchikan, AK. Brad Wilson represented the Union. Kate Sheehan represented the State. At the conclusion of the hearing both parties elected to submit final arguments in writing. The matter was considered fully submitted upon my receipt of the post-hearing briefs.

During the course of the hearing both parties were afforded a full and complete opportunity to present evidence, cross-examine witnesses and develop argument. All witnesses appearing were duly sworn. No transcript of the hearing was taken.

ISSUES

The parties stipulated to the following statement of the Issues:

1. Did the State violate Article 12 of the Collective Bargaining Agreement when it suspended Correctional Officer III Audie Ellis for three days?
2. If so, what is the remedy?

The parties also stipulated that the grievance was properly before the Arbitrator for decision.

RELEVANT PROVISION OF THE

COLECTIVE BARGAINING AGREEMENT (CBA)

ARTICLE 12.1: NOTICE OF DISCIPLINE AND DISCHARGE

- A. Discipline and discharge of permanent employees shall be for just cause. ... Discipline is defined as personnel action against a permanent employee resulting from a just cause finding from the Employer. ...

STATEMENT OF RELEVANT FACTS

On September 27, 2007 shortly after the a.m. shift change a prisoner, Calvin Olsen (Olsen), was brought to the jail facility by the Ketchikan police. Grievant was the Shift Supervisor. The prisoner had observable dried blood on his ear, which was duly

noted on the intake medical record. Olsen was also noted to have been under-the-influence with a .133 BRAC. Grievant viewed the ear from a short distance away and asked Olsen if he needed medical care. Olsen stated he did not need care. When the nurse arrived, she was told of the dried blood and that Olsen either refused or declined medical attention. At around lunch time Olsen called out for the nurse to check his ear. She determined to do it after he returned from arraignment. The court noted that Olsen was in need of medical attention and he told the Department of Corrections to see to it. Olsen was seen by the nurse after his arraignment and she was concerned enough with the laceration to send him to the hospital, where the laceration was found to be minor, it was cleaned and Olsen returned to the jail facility.

After interviewing only Grievant and the nurse, (then) Superintendent Bailey (Bailey) suspended Grievant for three days for failure to properly visually inspect Olsen before accepting him for remand and for generally failing to inspect Olsen for "obvious injuries or illnesses and inquire about any medical problems". The failures alleged here, initially assessed at a Written Reprimand, resulted in a three day suspension based on a progressive discipline finding that this was an "inattention to duty" – a charge for which Grievant had received and served a one day suspension in 2005.

DISCUSSION

There is no dispute that Grievant and the booking officer both viewed the dried blood and it was noted on the intake record. Although at one point in his testimony Bailey suggested that the prisoner remand should not have been accepted, he later stated that Grievant's failure was that he didn't consult "up or down the chain of command". Grievant and the booking officer both testified that they had communicated about the dried blood and need for medical attention, albeit silently, and concurred that this was a minor injury.¹ Shift Supervisors apparently have training regarding what to do when serious medical problems are evident, but are left to exercise their reasonable discretion regarding minor ones. The facility could have, but does not have, a bright-line rule that all injuries must be seen at the hospital before remand is accepted. The outgoing night Shift Supervisor testified that he was still present when Olsen was brought in, that he observed the dried blood and that he also would have accepted the remand. There simply is no evidence that Grievant violated the cited rules mandating that injuries be observed and there is no evidence of any rule or written policy

¹ There is some difference in the testimony regarding the location of the dried blood but no more than would be expected, given the passage of time between the incident and their testimony, over a relatively unimportant detail to most of the witnesses.

mandating what should occur when one is observed that does not rise to the level of "serious". There is no substantial evidence that Grievant abused his discretion in accepting the remand of Olsen.

The real problem here, according to Bailey's testimony, was Grievant's failure to ensure that Olsen was seen by the nurse in a timely² fashion. Grievant could have, and possibly should have, had her check out Olsen's laceration reasonably promptly. There is no evidence regarding the expected result of Olsen either declining or refusing medical care, even in light of his being under-the-influence, but the nurse seems to have accepted with equanimity not taking steps to examine him at, or near, the time of his admission.

However, the arbitral issue here is that there is no charged violation of policy regarding the delay in having Olsen seen by the nurse. The evidence in the record does not show any rules, regulations, policies or even accepted practices from which I can determine what Grievant should have known his duty was regarding the needed medical attention beyond alerting the nurse that Olsen had dried blood on his ear. In order for the State to sustain discipline for "inattention to duty" it is necessary that the alleged "duty" be shown to have been known to Grievant. This record does not establish such a known duty.

² If the Union's argument is right, "timely" would at least be prior to Olsen's arraignment.

This record in this matter, perhaps, demonstrates a need for additional training of staff, but it does not constitute just cause for the three day suspension.

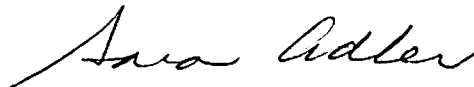
AWARD

Having carefully considered the evidence presented and the arguments made, it is the Award of the Arbitrator that:

1. The grievance of Audie Ellis is granted.
2. The State is ordered to restore the three days' pay and to conform all its personnel records to this Opinion and Award.
3. I will retain jurisdiction in this matter solely to resolve any disputes which may arise regarding the remedy ordered.
4. The State is assessed my fees and expenses.

DATED: September 9, 2008

Respectfully submitted,


Sara Adler, Arbitrator

SARA ADLER, ESQ.
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September 9, 2008

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RE: Audie Ellis Grievance – Case No. 08-C-143/07-017

Dear Representatives,

Enclosed is the Opinion and Award in the above-referenced matter. The fees and expenses due for my services are as follows:

2 days hearing	\$2,800.00	
2 days travel	\$2,800.00	
1 day review/writing	\$1,400.00	
Travel expenses	<u>\$1,811.56</u>	(receipts attached to State)
TOTAL	\$8,811.56	

DUE FROM STATE OF ALASKA \$8,811.56 (per Article 16.7 F)

I hope that I may be of service in the future.

Sincerely,



Sara Adler, Arbitrator