A R B I T R A T I O N

O P I N I O N A N D A W A R D

Arb. Date 11-4-87

STATE OF OHIO
DEPARTMENT OF REHABILITATION
AND CORRECTION

and

OHIO HEALTH CARE EMPLOYEES UNION
DISTRICT 1199, WV/KY/OH, National
Union of Hospital and Health Care
Employees, AFL-CIO

November 12, 1987

87-1726

ARBITRATOR: DONALD B. LEACH, appointed through the procedures of the Ohio Department of Administrative Services, Office of Collective Bargaining

APPEARANCES: FOR THE STATE:
Mr. Joseph B. Shaver, Assistant Chief, Labor Relations, Department of Rehabilitation and Correction, 1050 Freeway Drive, N., Columbus, Ohio 43229

FOR THE UNION:
Mr. Tom Woodruff, President, Ohio Health Care Employees Union, District 1199, 1313 East Broad Street, Columbus, Ohio 43205

B A C K G R O U N D

Grievant, Robert Lacy, was removed from employment effective June 13, 1987. Grievance was duly filed and proceeded to expedited arbitration under the Agreement of the parties.

Grievant had been employed for several years, first centered in Miami County and, for the last two or three years, primarily in Montgomery County. His duties as a Parole Officer focused on the preparation of reports of adult prisoners, bearing on their possible release from prison. About half of such reports included one of a "Community Attitude" type. That usully consisted of views expressed by the trial judge in the case, of the prosecutor who tried the case and of the police officer connected with the investigation of the crime. Those individuals could be contacted in person or by telephone to solicit their views.

Another part of the overall report was the original probation report, prepared for the assistance of the judge before sentencing.

First, Grievant was accused generally of discourtesy in treating employees in the Montgomery County Probation Department where he went frequently to obtain copies of the probation reports in cases he was working on.

In the course of investigating those complaints, Grievant's supervisor learned that he had been accompanied by a friend on one occasion when he went to the Probation Department. The supervisor also noted what appeared to him in some cases to be striking parallels in phrasing between the probation report on a prisoner and Grievant's Community Attitude report. He then investigated the cases in which his suspicions had been aroused.

Disciplinary charges were brought against Grievant as a result of the foregoing.

After following the regular procedures, Grievant was discharged as noted above, for having violated the Employer's Rules 11, 17b, 18 and 21. Those Rules are as follows:

> 11. Disorderly conduct, including the use of obscene language before the public.
> 17b. Commission of any act which has an adverse affect (sic) on one's ability to perform his/her duties.
> 18. Falsifying, unauthorized altering, or removal of any records arising out of employment with the DR&C.
> 21. Unauthorized release of official information.

The particulars were stated as follows:

(11) On March 10, 1987 at The Montgomery County Adult Probation Department (MCAPD) you acted in a rude and unprofessional manner towards Mr. Marvin Smith as he used a microfilm viewer.
(17b) On or around February 16, 1987, at MCAPD you did not follow proper procedures as explained by Ms. Ruby Gaylord, Record Manager, and established by MCAPD management for obtaining routine copies of microfilm.
(18) An investigation regarding contacts you made with Proscutor Connell, Prosecutor Patricoff, Detective Spitler, Judge Meagher and Sergeant Sand proved that your contact sheets and community action reports had been falsified.
(21) On March 10, 1987 at MCAPD Mr. Joe Glodura, not employed by Parole and Community Services, accompanied you during working hours, while you prepared an investigation.

D I S C U S S I O N

The first listed offense was stated as rude and unprofessional conduct toward a Mr. Marvin Smith.

Mr. Smith was called out of town unexpectedly and could not testify. No other witness appeared who could support the charge as a matter of his or her own knowledge. All that materialized was hearsay testimony which, of course, is insufficient, standing alone, to support the charge.

For the above reasons, that charge must be dismissed.

The last charge accused Grievant of having been accompanied to the Montgomery County Probation Department on March 10, 1987, by Mr. Joe Glodura, an individual not employed by the Employer.

The facts are undisputed, the Grievant testifying that Mr. Glodura did accompany him there. The express terms of the Employer's rule, which is said to have been violated by that conduct, however, is "unauthorized release of official information". Grievant denied that any information he had concerning an investigation had been released to Mr. Glodura, that the latter went along to see what Grievant's general duties entailed. Grievant said that Mr. Glodura sat far enough away from him that Mr. Glodura cound not see what Grievant was doing in any detail.

The only evidence that Grievant had discussed investigations with Mr. Glodura was hearsay of the most remote, stemming from Mr. Smith, who told someone else that Grievant and Mr. Glodura had talked together about a file or two. That must be disregarded.

Another leg of the charge was that unauthorized release of information is presumed under such circumstances. It was bad practice, no doubt, for Grievant to take Mr. Glodura with him into the Probation Department but bad or tactless practice is not enough to show that information was released in fact. Actual release had to be shown in order to demonstrate violation of the rule. None has been shown and that charge, too, must be dismissed.

The second charge alleges that about February 16, 1987, Grievant failed to follow proper procedure for obtaining routine copies of microfilm.

It appears that the Probation Department had decided not to allow copies of its data to be made in other court house departments when its own copier was not working, as was the case on that date. That was explained to Grievant. He proceeded, however, to arrange for such records to be copied in the Clerk's office and that caused the Probation Department to reiterate its views and deny him the privilege of doing so.

The preponderance of the proof is that Grievant was aggressive in trying to obtain the data he needed, to the point of irritating the office personnel in the Probation Department.

There is no dispute as to the facts and it is reasonable to conclude that Grievant did overstep the bounds of proper deportment and procedure that day.

The penalty set out in the rule violated calls only for a written reprimand on the first offense, as this was, so far as the record shows. The award, in this particular, may be entered as the required written reprimand.

The third charge accuses Grievant of falsifying his contact sheets and community attitude reports, respecting Prosecutor Connell, Prosecutor Patricoff, Detective Spitler, Judge Meager and Sergeant Sand.

Neither Mr. Connell, Mr. Patricoff or Judge Meager testified. There was no particularly pointed evidence respecting Mr. Connell or Mr. Patricoff. As to the Judge, the evidence, agreed to by both parties, was that he was on vacation on the day Grievant was supposed to have talked to him. Grievant freely acknowledged that he

always rewrote his contact sheets before turning them in, for the purpose of cleaning them up. In that connection, he said he believed he had mistakenly copied the date of the contact, having actually spoken to the judge the week before. The evidence on the point is simply not clear enough, one way or the other, to support a judgment on it.

Sergeant Sand testified and admitted on cross-examination that Grievant might have talked to him even though he had no recollection of it. Grievant testified that he had talked to the sergeant and explained the hour of the day and his own whereabouts when he made the telephone contact. No finding of falsificaiton can be made in those circumstances.

Detective Spitler had been severely injured some weeks before the hearing and was physically unable to attend. Several possible means of obtaining his testimony were discussed by the parties and the arbitrator, including reconvening the hearing at a later date, at Detective Spitler's residence. It was resolved that the parties' representatives first would interview him and then attempt to stipulate his evidence. That was successful.

The stipulation is that Detective Spitler never talked to Grievant about the case of Ethel Ware, that he may have talked to Lieutenant Meyer, but that Detective Spitler was not made aware of any such conversation.

Grievant's report on the Ethel Ware case, in pertinent part, was:

> "On 3/13/87, this officer interviewed Arson Investigator Spitler of the Dayton Police Department. Detective Spitler noted that the victim's blood alcohol level was .50 at the time of the crime and Ms. Ware, the defendant in the case, also appeared to be highly intoxicated. The detective stated that the defendant cooperated with the Dayton Police Department in admitting the crime and stated that he had no recommendation regarding length of incarceration. However, at the time of release, Detective Spitler strongly felt that the defendant was in need of alcohol counselling."

That report closely paralleled what Lieutenant Meyer was quoted as saying in the earlier Probation Report.

Nothing appeared to indicate a bias against Grievant by Detective Spitler. Grievant, on the other hand, had an interest in defending himself. His testimony generally was designed to create an image of devotion to his work of a high degree, bordering on near

perfection. As between his testimony and the stipulated testimony of Detective Spitler, the latter is more credible. In that respect, Grievant's report of having talked to Detective Spitler is inaccurate.

In a technical sense, that inaccuracy constitutes a falsification. That type of falsification, however, is not necessarily malicious. It can come from innocent error.

In connection with the possibility of error, the usual procedure was for the Parole Officer, including Grievant, to consult the written records before proceeding to question anyone. Often, after a lapse of months or years, an officer, prosecutor or judge will fail of his own knowledge to remember a particular case and recalls the details only after having his recollection refreshed by the Parole Officer from the information in the file of the earlier proceedings. Thus, Grievant could become confused on occasion between past and current data and confused on who said exactly what.

In other words, reports may be erroneous even though not falsified in an improper way. They could be erroneous from unavoidable error, lack of precision, negligence, shortcutting one's work or intentional malice.

Falsification in a disciplinary sense, as in a criminal sense, has to do with intentional malice. Since the penalty here is termination or discharge on the first offense, the rule obviously follows that same approach and implies serious wrongdoing.

The evidence here was that there was nothing inaccurate in the results reported and that no misapprehension of facts or attitudes was created by the Grievant's reports in the contested matters. In short, no intentional malice was shown.

Grievant has had no prior discipline of record. On the other hand, he has had long experience in this governmental agency and is aware of the need for careful reporting. He has failed respecting Detective Spitler. More discipline is warranted on this matter than a mere reprimand.

Accordingly, he shall be reinstated and made whole for loss of earnings, except for two weeks which shall be deemed to be a suspension for that period. (Two weeks are set here because of the retroactive period involved.)

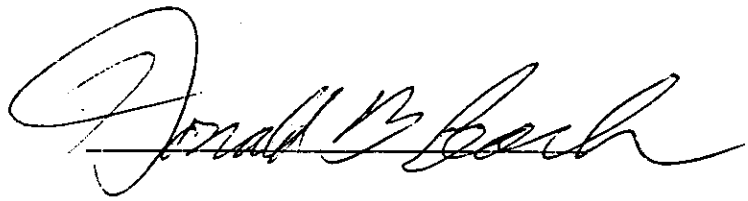
A W A R D

1. Grievance, dated June 15, 1987, of Robert Lacy, is hereby upheld in part.

2. The Employer shall reinstate Grievant in the position he held just prior to his removal June 13, 1987, with no loss of benefits
or seniority.

3. The Grievant is hereby reprimanded for his conduct in the Montgomery County Probation Department on or about February 16, 1987.

4. The Employer shall pay Grievant for his loss of earnings resulting from the said removal until the date of his reinstatement, provided that no payment is required for any period later than one week following the Employer's offer of reinstatement and provided further that the total amount as so computed shall be reduced by an amount equal to two weeks of salary, which period represents a suspension for inaccurate reports, constituting non-malicious falsification.



Donald B. Leach