

ARBITRATION AWARD SUMMARY

OCB Award Number: 116

OCB Grievance Number: 87-1616

Union: 1199

Department: R+C

Arbitrator: Leach

Management Advocate: Menedis

Union Advocate: Robinson

Arbitration Date: 11-17-87

Decision Date: 11-30-87

Decision: Granted

ARBITRATION

OPINION AND AWARD

STATE OF OHIO
DEPARTMENT OF REHABILITATION AND CORRECTION

and

Arb. Date 11-17-87

November 30, 1987

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

OCB Grievance No. G87-1616

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

APPEARANCES: FOR THE STATE:
Nicholas Menedis, Esq., Chief of Labor Relations, and
Felicia Bernardini, Co-Advocate, Department of
Rehabilitation and Correction, 1050 Freeway Drive,
North, Columbus, Ohio 43229

FOR THE UNION:
James Robinson, Esq., Kircher and Phalen, 125 East
Court, Cincinnati, Ohio 45208, and Brenda Shelley,
Organizer, 1313 East Broad Street, Columbus, Ohio 43205

BACKGROUND

Grievant, Zakee Mu Min was removed from the position of Social Program Specialist, effective April 13, 1987. He had been employed continuously from about June 1984 until his removal as a social worker at the State's Marysville Reformatory for Women.

The removal was based on the following recitation of improprieties:

"***it was determined that you have made sexual advances towards inmates, threatened inmates, engaged in sexual harrassment against inmates, engaged in physical contact with inmates, requested sexual favors of inmates upon their release, and made other inappropriate comments towards inmates."

Two inmates testified in direct support of the charges.

Cynthia Fields, one of the inmates, said that, starting in late 1985, some kind of flirtatious relationship began with Grievant through eye contact, winking, etc.; that about the end of 1985, while she was in his office, he had embraced and kissed her, saying "Happy Birthday"; that he had touched her breasts on occasion and her buttocks once, the last being in early 1987. She said also that he had called her to his office often and that they had talked "bullshit".

Ms. Fields said that she had described him to an instructor of hers, a cosmetologist, as a "cutie pie". (That was supported by the instructor and corroborated by Grievant who said that the instructor had told him of it so that he could guard himself appropriately.) She had rubbed up against his back once which, she said, he did not object to. In one conversation, she said, he had told her he would have intercourse with her after she got out and that she had thought that to be "cute".

When she was interviewed by him in his office, she said she always unbuttoned the top of her blouse and that he looked at her blouse, crotch and buttocks.

Ms. Fields testified in a rather loud voice, a characteristic she said was common with her. As a result of her voice, one or two others overheard her talking about the matter to a friend and the investigation of Grievant began at that time.

Grievant had threatened her with "tickets" on a number of occasions (a ticket constituting a black mark on an inmate's

record which could lead to loss of privileges.)

In the investigation, she had been interviewed by a Mr. Kendall. She said his attitude made her "mad" because he had threatened her with being required to stay for her full sentence and also had promised to get her out earlier if she cooperated. After that, Ms. Lorie Smith, Grievant's immediate supervisor, talked to her. She said that Ms. Smith had asked no leading questions. Afterward, however, Ms. Fields felt that she could then "stand up" to Grievant.

On cross examination, Ms. Fields acknowledged that Grievant had ordered her at one time, while others were present, to button her blouse.

The memo Ms. Fields wrote in the course of the investigation reflects some of the things to which she testified. The last paragraph, however, casts some light on the sequence of events which were somewhat garbled in her testimony. It is:

"He always made sexual advances toward me. He made me feel as tho I was special the only one he was liking. Now he dogs me."

The other inmate, Michelle Murdock, also testified at some length, although less discursively so.

She said that Grievant made comments from time to time about her buttocks and how big they were and that he wanted to see her when she got out; once, when she was cleaning his office, he had touched her in the "vagina area" and said once that he wanted her to "suck his dick"; that he also fondled her breasts once.

Once, she said, she was in the recreation room when he was showing a movie. She continued to play cards with some others. Grievant then threatened her with tickets because she was making too much noise.

On cross examination, Ms. Murdock said that Grievant had made a number of telephone calls for her to Cincinnati about the custody of her children. He was not successful, she said, in accomplishing her wishes on custody but, she said, she was grateful for his efforts.

Grievant's sexual remarks to her began in late 1985, just as in the case of Ms. Fields. She said that she had started to dislike him the night he had threatened her at the card game. She said that Grievant always closed the door when she was in his office.

In the investigation, she also signed a statement.

She was interviewed by Mr. Kendall in the course of his investigation. She said he promised to do all he could to get her released early and that he would put a letter of recommendation in her file because of her cooperation.

The other individual directly involved, of course, was the Grievant. He testified also.

He said he had worked in the administration building from the time of his employment until the middle of 1986 when the Unit Management form of organization was adopted and he was moved to another building. In the administration building, he had been under the direct supervision of Ms. Turley and after that, of Ms. Smith, while continuing under Ms. Turley's general professional supervision.

He said that Ms. Smith's office was only about ten feet from his but that she never spoke to him, leaving him notes instead, and repeatedly had snubbed him.

He said he had had both accusers on his caseload and did the initial "work-up" on Ms. Fields, i. e., family, social, etc., history.

The cosmetology instructor mentioned above, who told him of Ms. Fields' fondness for him, had objected to his calls for Ms. Fields to come to his office but he could not call inmates from class and that had made it necessary to see her late in the day. That, in turn, had required the calls to the instructor. He had had frequent conferences with her at one time, he said, because she and her cellmates were not getting along and he was attempting to resolve the problem, a result not accomplished until they were separated.

Grievant said he had found Ms. Fields to be highly emotional and had sent her to talk to the psychologist, although not for treatment by him.

He said that Ms. Fields was constantly flaunting herself in front of him. On one occasion, at least, he had told her to stop such conduct or he would give her a ticket.

Grievant denied any emotional involvement or any sexually suggestive relationship with her at all, never having touched or kissed her.

With Ms. Murdock, Grievant said he had the same type of relationship as with all other inmates.

He said there was a conflict about the custody of her children when he was unsuccessful in his attempts to have it changed at her request. She had said then that she would "get him" for it. That had occurred, he said, in late 1986.

As to the card game incident, he had asked her to go to the back of the room so as not to disturb those who wanted to watch the movie. He hadn't realized, he said, that she was upset by the incident.

Ms. Murdoch did flirt with him, he said, but he denied any touching or sexually motivated statement to her.

Grievant added that he is married and has three children.

On cross examination, Grievant said that he always kept inmates at more than arm's length away from him and that he always kept the curtains open in his office. He also denied seeing Ms. Fields more frequently than other inmates except probably during the period of trouble with her cellmates. Otherwise, he said, he tried to see her less often than the others on his case load.

A controversy arose concerning tickets that he had written respecting inmates. Grievant said he had only written eight or nine during his entire employment, none having been against either complainants. (No tickets were produced and most of the controversial evidence of tickets was clearly remote hearsay.)

The instructor alluded to above, Ms. Reynolds, testified to Ms. Fields' statements to her that were consistent with the latter's testimony. She was very vague about dates, however, 'saying repeatedly that it was in one or another of a two year span.

Ms. Rogers, another employee, also testified concerning statements by Ms. Fields that were consistent with her testimony. Generally, Ms. Rogers' knowledge was gained from her investigation of the charges, she being one of those appointed to do so.

The Union requested two inmates be produced for testimony. The State refused to do so as a matter of policy. Solution of sorts was found in a mixed tender of proof and stipulation.

One tender was that Jeanne Taylor would testify that she had heard Ms. Smith say in September 1986 before both officers and inmates that she would get Grievant removed, and that Grievant had a good reputation for honesty among the inmates.

As to that proffer, the State agreed that she would so testify as to the first point but that it did not know how she would testify on the matter of reputation.

The Union proffered as to Marilyn Hampton that she would testify:

1. That within a short span of days, she had heard Ms. Fields say to another inmate that she wanted to have intercourse with Grievant and then later that she wanted to "write him up".
2. That she had overheard Grievant tell Ms. Fields to close her blouse; that Ms. Fields refused; and that Grievant had told her to stop that conduct or he would give her a ticket.
3. That Grievant tried to enforce the rules, even those that had been ignored; that he was not always taken seriously by the inmates, as a result of which he had threatened to write tickets.
4. That at some time in the past, she had heard Ms. Fields and Ms. Murdock talk about getting the Grievant.
5. That Grievant has a good reputation for truth and veracity among the inmates and that Ms. Fields and Ms. Murdock do not.
6. That Ms. Smith told five inmates "Fuck him" when she was told of Grievant's efforts to enforce a posted rule about lounging in unauthorized areas.
7. That she had agreed to take a polygraph test to support her statements.

The State agreed that she would testify as stated in 2, 3, 4, 6 and 7. As to some of the others, the State objected to admission, as hearsay, and in one as without foundation.

It must be observed here that had the two inmates been allowed to testify, it might now be determined that their testimony was incredible. Since observation was not possible, there is no device available for weighing it for credibility. Since their testimony was refused by the State, it is the party responsible and must bear the consequences accordingly, consequences that entail acceptance of the proffer and acceptance of the proffered testimony as fully credible.

The Union also called the former nurse in charge of admissions at the institution, Ms. Sayer, who testified that she had heard Ms. Smith say she would get Grievant removed before the first

of July 1987. She also said that she had sent Ms. Fields for psychiatric evaluation when she first was committed to the institution because of her behavior problems. (Other evidence established that she had progressed to minimum security status in the meantime.)

Ms. Turley testified as Grievant's immediate supervisor for the first two years and professional supervisor after that. When he was under her direct supervision, she said his office was right across the hall from hers; that there was a rule forbidding a man to have an inmate in his office with the door closed unless another staff member was present; that she had never seen his door closed and that she was in her office most of the time.

As to the later period, she said that his office door had a glass panel so that one could look in freely from the outside and that Grievant's curtains were always open.

On cross examination, she said that Grievant's work was satisfactory and that under her supervision he had continued a slow improvement.

Several matters, other than the immediate problem, warrant comment.

First, a question arose as to Grievant's basic credibility in that he did say on his job application that he had never had a felony conviction, whereas he had had. The Administrative Assistant to the Superintendent said that he learned of the conviction some six weeks to two months after Grievant started his employment. On the other hand, he did say that the Superintendent had earlier knowledge of the conviction. Grievant said it had come up on his first day of employment, at which time the Superintendent had decided to retain him because of his years of schooling and work without recidivism after his conviction. The Administrative Assistant concurred that the Superintendent had decided to continue Grievant in employment after she became aware of his record.

Another matter is that of the lie detector tests given the accusing inmates and refused by Grievant.

Reports were submitted by the polygraph tester on the accusers who, in the tester's view, were telling the truth. The individual who did the testing did not appear to testify so that his qualifications could not be ascertained, his method of questioning, the last test of the machine, etc.

Finally, under the category of general matters is Grievant's prior discipline. A written reprimand was issued on

August 5, 1986 dealing with tardiness and lapse in key security. Those types of offense do not seem to have been repeated.

In early 1987, Grievant was suspended for infraction of some other rule. It is still pending, however, in the grievance process and has not become final.

Similarly, there has been a Civil Rights Commission finding that the State has discriminated against Grievant but that, too, has not become final.

D I S C U S S I O N

It is apparent from the foregoing that the problem here is essentially one of credibility.

The State recognizes the problem of credibility where prison inmates are concerned and, hence, uses a lie detector test to check on their veracity and to support their credibility. The use of such devices thus rests on a substantial practical footing.

It is a reasonable precaution for the State to subject inmates to polygraph tests in the course of an investigation as an aid in determining credibility for its purposes. As to the use of such results to support inmates' testimony in an adversarial hearing, such as this, an entirely different problem exists. The reliability of such test has not been adequately demonstrated to produce an accurate report. Thus, they are not generally used in court proceedings. While arbitration need not be as strict as judicial proceedings, the same problem of reliability remains. Moreover, in this case, the operator was not present to support the objectivity of his report. In light of both factors, the polygraph reports must be excluded. As to Grievant's refusal of such test, that certainly was within his right, it being recognized that the results are not always accurate.

The accusing inmates, by their testimony, continued, over a long period, a relationship that didn't seem at all intense, to wax, to wane, or, in short, to go anywhere. In Ms. Fields' case, for example, an embrace and kiss in December 1985 or January 1986 was followed by a pat on the buttocks in early 1987. Nothing else occurred in between except non-physical flirtation. Both inmates, however, by their own admission, started to dislike Grievant, Ms. Fields when she found out she wasn't "special" and Ms. Murdock when he talked to her about her card playing during the movie. Only then was anything said. The alleged relationship seems odd and the timing of the complaint is suspicious.

The investigation started because Ms. Fields was overheard. She always talked loudly by her own statement and didn't seem inclined to keep her thoughts to herself, as witness her earlier comments to her instructor about him as a "cutie pie".

Starting an investigation apparently wasn't difficult in that an overheard remark started this one. It is interesting that only after a year or more was Ms. Fields overheard so that an investigation could begin.

The investigator that talked to them first apparently threatened and promised. That was enough to stimulate details. In that connection, there is the unrebutted allegation by the Grievant of bias against him by his immediate supervisor. That finds some support in the absence of discipline in his record during the first two years of his employment and the incidence of two actions in the nine months he worked under Ms. Smith.

That raises the question of the testimony of the former admissions nurse about Ms. Smith's overheard threat against him and the supporting evidence of the witnesses whose evidence could only be received through tender. All concurred that, at different times, Ms. Smith expressed her disregard for and threats against him, this before others, including inmates. That could well have stimulated the accusing inmates to act to support Ms. Smith and thus improve themselves.

Grievant, on the other hand, would naturally deny any wrongdoing even if he had engaged in it. Moreover, he has prevaricated on his application for employment. Internally, however, his testimony does not reveal inconsistency.

Moreover, his past supervisor expressed great confidence in him and incredulity at the possibility that the accusing inmates' testimony of encounters could be true.

Almost certainly, there are at least two strong factions in the personnel of the institution, one adverse to Grievant and the other favoring him.

The truth of the matter is impossible to determine on this evidence.

The State's charges were supported by two inmates. The corroborative testimony of others generally demonstrated only that the two inmates had given a similar account earlier. The cosmetology instructor offered some supporting evidence of an independent nature but she was vague as to when the events had happened. In that uncertainty, Grievant's testimony that his frequent contacts with Ms. Fields in the

cellmate matter becomes a rationale, exculpating him from the guilt the instructor's testimony implied.

The evidence also indicates that the charges could have been stimulated by Ms. Smith's attitude.

Finally, the promises and threats made by Mr. Kendall to both Grievants cast doubt on the charges.

A comment is required on the State's objection to some of the impeachment testimony as "hearsay". Impeachment evidence, however, is different than evidence designed to prove a material issue. Admission of impeachment matters is much more liberal.

Grievant's testimony was not supported by corroborative evidence either.

It is the State's burden, however, to establish its charges. It has not done so, regardless of the standard or quality of proof used. There is simply too much rational doubt about the testimony of the two inmates to support the State's burden.

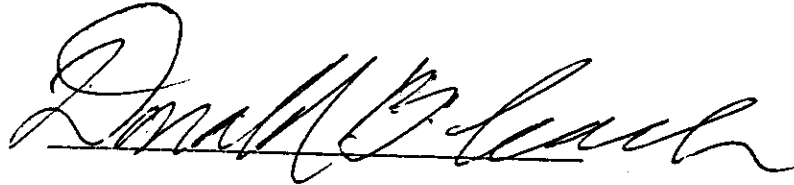
In these circumstances, the Grievant must be absolved, his Grievance upheld and he be reinstated in employment and be made whole for his loss of earnings.

A W A R D

1. The Grievance, dated April 16, 1987, of Zakee Mu Min is hereby upheld.
2. Grievant forthwith shall be reinstated in the position he held just prior to the removal effective April 13, 1987, with no loss of seniority or benefits.
3. The State shall pay Grievant for all loss of earnings he incurred as a result of his removal between said date and the date of

his reinstatement, provided that no payment need be made for any period of time more than one week following the State's offer to Grievant of immediate reinstatement.

4. Jurisdiction is reserved to the extent necessary to carry into effect paragraph 3 of this Award.

A handwritten signature in cursive script, reading "Donald B. Leach", written over a horizontal line.

Donald B. Leach