In the Matter of the
Arbitration Between

OCSEA, Local 11
AFSCME, AFL-CIO,

Union

and

Ohio Department of
Rehabilitation & Correction

Employer.

Grievance 27-08
(6-14-89)-014-01-03

Grievant (Elza Johnson)

Hearing Date: December 15, 1989

Award Date: January 16, 1990

For the Union: Carol Bowshier

For the Employer: Nick Menedis

Present in addition to advocates named above and the Grievant Elza Johnson were Ron Young, CO (witness), Robert Massie, Document Examiner (witness), Arthur Gooden, CO (witness), Michael Duco, OCB, Patrick Huley, Deputy Warden, John G. Carroll, Polygrapher, Ray Fraley, Document Examiner (witness), and Laura Crowe (witness).

Preliminary Matters

The Arbitrator asked permission to record the hearing for the sole purpose of refreshing her recollection and on condition that the tapes would be destroyed on the date the opinion is rendered. Both the Union and the Employer granted their permission. The

Arbitrator asked permission to submit the award for possible publication. Both the Union and the Employer granted permission. The parties stipulated that the matter was properly before the Arbitrator. Witnesses were sequestered. All witnesses were sworn.

Issue

Was Grievant removed for just cause? If not, what shall the remedy be?

Facts Stipulated to by Both Parties

1. Grievant was employed by the Department of Rehabilitation and Correction on or about July 6, 1982
2. Grievant worked first shift (6:20 a.m. until 2:30 p.m.) until March 11, 1989.
3. Grievant worked second shift (2:20 p.m. until 10:30 p.m.) from March 12, 1989 until he was removed.
4. Grievant's days off were Friday and Saturday on second shift until he was removed.

Joint Exhibits

J#1 - Contract

J#2 - Grievance trail

J#3 - Disciplinary trail

J#4 - Standards of Employee Conduct

J#5 - Schematic of Housing Unit 4 of the Franklin Pre-Release Center

Relevant Contract Provisions

§ 24.01 - Standard

Disciplinary action shall not be imposed upon an employee except for just cause. The Employer has the burden of proof to establish just cause for any disciplinary action. In cases involving termination, if the arbitrator finds that there has been an abuse of a patient or another in the care or custody of the State of Ohio, the arbitrator does not have authority to modify the termination of an employee committing such abuse.

§ 24.02 - Progressive Discipline

The Employer will follow the principles of progressive discipline. Disciplinary action shall be commensurate with the offense. Disciplinary action shall include:

A. Verbal reprimand (with appropriate notation in employee's file)
B. Written reprimand;
C. Suspension;
D. Termination.

§ 24.05 - Imposition of Discipline

Disciplinary measures imposed shall be reasonable and commensurate with the offense and shall not be used solely for punishment.

§ 25.08 - Relevant Witnesses and Information

The Union may request specific documents, books, papers or witnesses reasonably available from the

Employer and relevant to the grievance under consideration. Such request shall not be unreasonably denied.

Relevant Sections of Joint Exhibit 4: Standards of Employee Conduct

Employees shall recognize the limitations of their authority and at no time use the power of their position for their own personal advantages.

It is essential to the orderly operation of a correctional system that employees conduct themselves in a professional manner. Below are several types of behavior that cannot be tolerated within a correctional environment. (This is not intended to be an all inclusive list.)

1. The use, possession, conveyance, or unauthorized distribution of illegal drugs, narcotics, or controlled substances is strictly prohibited at any time. Use of alcoholic beverages while on duty or being under the influence of alcohol or drugs while on duty are prohibited.

2. Employees shall not, without authorization from the Appointing Authority, allow themselves to show partiality toward or become emotionally, physically, or financially involved with inmates, parolees, probationers, furloughees or their families, or establish a pattern of social fraternization with same.

   a. An employee shall not offer or give to an inmate, parolee, probationer, furloughee, or a member of his/her famil--, or to any person known to be associated with him/her any article, favor, or service which is not authorized in the performance of the employee's duties and which conflicts or appears to conflict with the employee's duties. Neither shall an employee accept any gift, personal service or favor from an inmate, parolee, probationer, furloughee, or his/her family, or person known to be associated with him/her which is not authorized in the performance of the

employee's duties and which conflicts or appears to conflict with the employee's duties.

b. An employee shall not visit an inmate, parolee, probationer, or furloughee while such an individual is under the custody and control of the Department, unless such a visit is given prior authorization by the employee's Appointing Authority, or the visit is part of the employee's job duties. Employees must indicate on the visitor's application that they are employed or have been employed by the Department of Rehabilitation and Correction.

c. An employee who becomes involved in a set of circumstances as described above must advise his supervisor, who is responsible for informing the Appointing Authority or personnel officer.

3. No employee shall show favoritism or give preferential treatment to one or more inmates, parolees, probationers, or furloughees.

	Offenses				
	1st	2nd	3rd	4th	5th
*40. Engaging in unauthorized personal relationship(s) with inmates, ex-inmates, furloughees, parolees, probationers, or family or friends of same nexus required i.e. tied to employment.	5-10/R	R			

Procedural Matters

The Union pleads two procedural irregularities: 1) Failure of Employer to make documents and a witness available prior to the

Arbitration. 2) Improper behavior of employer with respect to obtaining the Grievant's telephone records.

The Union contends that the Employer should have furnished medical and psychiatric records of the main Employer witness, an inmate, (See E-2) and should have made the inmate available for cross-examination at Step 3. The Union claims, not without merit, that preparation of its case was severely hampered by these denials.

The Employer maintains that it has a higher duty, namely the preservation of inmate privacy. Moreover, Ohio Administration Regulations specifically exempts such prison records from the "public records" (See E-1). ORC § 5120.21 mandates (shall) that the records of inmates "are accessible only to its employees, except by consent of the department" (E-1).

The Employer also maintains that it has no duty to produce a witness at Step 3.

The lack of access to records about the witness-inmate and the lack of access to the inmate-witness herself raise a serious procedural issue. The Union cannot adequately prepare without that information. Yet, the Employer has an important interest to protect as well, the privacy rights of inmates. The key question is how to balance these rights. Perhaps, the use of one of the Arbitrators on the panel to review the evidence and the need for examination prior to the hearing would be a reasonable solution. In this Grievance, such procedural error is harmless because, as will be evident below, the Arbitrator gave little weight to the

testimony of the inmate.

Second, the subpoena for the telephone records is proper under ORC § 5120.30.

Facts

The Grievant was a 7 year employee of ODRC when the issue at question arose. He was a Corrections Officer. At the time of the alleged incidents, he was stationed at Franklin County Pre-Release Center, a women's correctional institution. This assignment was his first at a women's institution. The Grievant was accused of an improper relationship with an inmate and was terminated from his employment.

The inmate alleged that the Grievant had

1. given her cigarettes in return for kisses on a regular basis,
2. sexually fondled her one morning in her cell,
3. accepted numerous phone calls from her at his home,
4. asked her to live with him when she was released,
5. sent her an Easter card with candy and intimate remarks written thereon.

The Employer maintained that it was well-aware of the problem of false accusations made by inmates against CO's. Therefore, the Employer maintained that it had gone to extraordinary lengths to corroborate the inmate's story by polygraphing her and by hiring a handwriting expert to examine the Easter card (no. 5 above). At

the hearing, the Employer sought to introduce the "fact of the polygraphing" solely for the purpose of proving the good faith investigation of the Employer and not for the issue of the inmate's credibility. The Arbitrator accepted the fact that the inmate was polygraphed solely as evidence of the Employer's good faith investigation. The Union raised no objection to the evidence for this narrow purpose. Both parties called expert witnesses to testify about the handwriting on the card; did it belong to the Grievant? Both experts were qualified and apparently honest and not surprisingly, disagreed. The Arbitrator found their testimony interesting but not determinative of the issue.

The testimony of the inmate was credible to establish some kind of relationship with the Grievant, but incredible as to many specifics (i.e., breast fondling, etc.). The Arbitrator placed little weight on her testimony about specific incidents and only valued her testimony as corroboration of the Grievent's own testimony.

The Union argued that the Grievant's "motives" were "not sexual but he was attempting to assist an inmate in her rehabilitation". The Arbitrator agrees that no specific sexual abuse was proven clearly and convincingly.

However, the Arbitrator finds that the Grievant did have, and fail to report, "an unauthorized relationship with an inmate". This conclusion is based on two pieces of evidence. The telephone bills of the Grievant reveal 6 telephone calls collect from the

prison to the Grievant's home. The Grievant's testimony about these phone calls changed at least four (4) times.

1. Once he denied them altogether.
2. Once he maintained they were from another employee.
3. Once he inferred that someone else in his home might have accepted them.
4. At the hearing, he admitted personally receiving the calls on at least 6 occasions from the inmate.

The calls (E-6) lasted

3/22 6 minutes

3/24 62 minutes

3/28 18 minutes

3/30 18 minutes

4/1 14 minutes

4/3 19 minutes

During the period under review, the calls were frequent and of lengthy duration.

Secondly, the Grievant admits going to the Union representative and asking "if he would get in trouble by allowing the inmate to live in his home after release"

These two actions alone, eliminating all other alleged actions, show conclusively to this Arbitrator an "unauthorized relationship with an inmate" (#40).

The Union argues that termination was not commensurate with the offense, that the Grievant was a 7 year employee with a clean record, that, if guilty, only a suspension was warranted. The

Union excuses the Grievant's behavior on the ground that he was not properly trained to supervise women inmates.

The Arbitrator is unpersuaded. The rules about fraternization with inmates are among the most well-known and are clearly and at length stated in the Rules of Conduct. The Grievant admits receiving the Rules.

The discipline grid specifies 5 to 10 days suspension or removal for the first offense, indicating the severity of this behavior. The Grievant was on notice of possible removal.

The Grievant has lied at every stage of this process. His admission of the telephone calls at Arbitration was only in the face of incontrovertible evidence. His explanations of his behavior were feeble and unbelievable. All the calls were "collect"; he need not have accepted any and certainly none after the first. The conversations were lengthy. The Grievant claims he was helping "rehabilitate" the inmate. The Grievant clearly knows that is not his job. His behavior indicates that he knew his actions were improper and yet he refused to stop them or report them to get help.

Award

Grievance denied.

January 16, 1990
Date

Rhonda R. Rivera
Arbitrator