

STATE OF OHIO AND OHIO CIVIL SERVICE
EMPLOYEES ASSOCIATION LABOR
ARBITRATION PROCEEDING

IN THE MATTER OF THE ARBITRATION BETWEEN

THE STATE OF OHIO, OHIO DEPARTMENT OF
REHABILITATION AND CORRECTION, LIMA
CORRECTIONAL INSTITUTION

-and-

OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION,
Local 11, AFSCME, AFL-CIO

GRIEVANCE: Virginia (Reed) Werling - Discharge

OCB Case No.: 27-12-890224-0029-01-03

ARBITRATOR'S OPINION AND AWARD
Arbitrator: David M. Pincus
Date: May 7, 1990

APPEARANCES

For the Employer

Harry Russell	Warden
Jerry Dunnigan	Labor Relations Officer II
James Lucas	Food Service Manager II
Clinton Skivers	Correction Officer III
Stephen Bivona	Correction Supervisor II
Greg Davis	Food Manager I
John Tornes	Second Chair
Rodney Sampson	Second Chair
Lou Kitchen	Advocate

For the Union

Virginia (Reed) Werling	Grievant
Kenneth Terry Hawk	Chief Steward
Yvonne Powers	Associate General Counsel
Bob Rowland	Staff Representative

INTRODUCTION

This is a proceeding under Article 25, Sections 25.03 and 25.04 entitled Arbitration Procedures and Arbitration Panel of the Agreement between the State of Ohio, the Ohio Department of Rehabilitative Services, Lima Correctional Institution, hereinafter referred to as the Employer, and the Ohio Civil Service Employees Association, Local 11, AFSCME, AFL-CIO, hereinafter referred to as the Union for July 1, 1986 - July 1, 1989 (Joint Exhibit 1).

The arbitration hearing was held on November 29, 1989 and December 27, 1989 at the office of the Ohio Civil Service Employees Association, Columbus, Ohio. The Parties had selected David M. Pincus as the Arbitrator.

At the hearing the Parties were given the opportunity to present their respective positions on the grievance, to offer evidence, to present witnesses and to cross examine witnesses. At the conclusion of the hearing, the Parties were asked by the Arbitrator if they planned to submit post hearing briefs. Both Parties indicated that they would not submit briefs.

STIPULATED ISSUE

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

PERTINENT CONTRACT PROVISIONS

ARTICLE 24 - DISCIPLINE

Section 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.

Section 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.

Disciplinary action taken may not be referred to in an employee's performance evaluation report. The event or action giving rise to the disciplinary action may be referred to in an employee's performance evaluation report without indicating the fact that disciplinary action was taken.

Disciplinary action shall be initiated as soon as reasonably possible consistent with the requirements of the other provisions of this Article. An arbitrator deciding a discipline grievance must consider the timeliness of the Employer's decision to begin the disciplinary process.

...

Section 24.04 - Pre-Discipline

An employee shall be entitled to the presence of a union steward at an investigatory interview upon request and if he/she has reasonable grounds to believe that the interview may be used to support disciplinary action against him/her.

An employee has the right to a meeting prior to the imposition of a suspension or termination. Prior to the meeting, the employee and his/her representative shall be informed in writing

of the reasons for the contemplated discipline and the possible form of discipline. No later than at the meeting, the Employer will provide a list of witnesses to the event or act known of at that time and documents known of at that time used to support the possible disciplinary action. If the Employer becomes aware of additional witnesses or documents that will be relied upon in imposing discipline, they shall also be provided to the Union and the employee. The employer representative recommending discipline shall be present at the meeting unless inappropriate or if he/she is legitimately unable to attend. The Appointing Authority's designee shall conduct the meeting. The Union and/or the employee shall be given the opportunity to comment, refute or rebut.

At the discretion of the Employer, in cases where a criminal investigation may occur, the pre-discipline meeting may be delayed until after disposition of the criminal charges.

Section 24.05 - Imposition of Discipline

The Agency Head or, in the absence of the Agency Head, the Acting Agency Head shall make a final decision on the recommended disciplinary action as soon as reasonably possible but no more than forty-five (45) days after the conclusion of the pre-disciplinary meeting. At the discretion of the Employer, the forty-five (45) days requirement will not apply in cases where a criminal investigation may occur and the Employer decides not to make a decision on the discipline until after disposition of the criminal charges.

The employee and/or union representative may submit a written presentation to the Agency head or Acting Agency Head.

If a final decision is made to impose discipline, the employee and Union shall be notified in writing. Once the employee has received written notification of the final decision to impose discipline, the disciplinary action shall not be increased.

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

The Employer will not impose discipline in the presence of other employees, clients, residents, inmates or the public except in extraordinary situations which pose a serious, immediate threat to the safety, health or well-being of others.

An employee may be placed on administrative leave or reassigned while an investigation is being conducted, except in cases of alleged abuse of patients or others in the care or custody of the State of Ohio the employee may be reassigned only if he/she agrees to the reassignment.

(Joint Exhibit 11, Pgs. 34-37)

ARTICLE 25 - GRIEVANCE PROCEDURE

...

Section 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.

...

(Joint Exhibit 1, Pg. 42)

JOINT STIPULATIONS

"...

- FACTS:
1. The matter is properly before the arbitrator.
 2. Virginia Reed was hired as a Corrections Food Service Coordinator 1 January 4, 1988.
 3. Virginia Reed was removed February 17, 1989.
 4. Virginia Reed had no prior discipline.

The foregoing has been agreed to by the undersigned on the 29th day of November, 1989.

Louis E. Kitchen
EMPLOYER

Nov. 29, 1989
DATE

Bob J. Rowland
UNION

Nov. 29, 1989
DATE

...

1. On November 29, 1989, there was a meeting between the Advocates Mr. Rowland (For the Union) and Mr. Kitchen (For the Employer) and documents available were exchanged, witnesses to be used and the nature of the parties respective witnesses testimony was discussed.
2. Mr. Kitchen gave Mr. Rowland a copy of Sgt. Bivonas' October 14, 1988 Report and indicated it would be used.

3. Mr. Kitchen indicated to Mr. Rowland that certain exhibits were unavailable to give to him at that time and would be made available the day of the hearing.
4. The Union raised no objections regarding discovery prior to the arbitration hearing.
5. Mr. Kitchen gave Mr. Rowland Mrs. Jarreau's letter from inmate Jarreau's mother on November 29, 1989.

FOR THE EMPLOYER

FOR THE UNION

Lou Kitchen 12/27/89
Lou Kitchen

Bob J. Rowland 12/27/89
Bob J. Rowland

(Joint Exhibit 8)

CASE HISTORY

Virginia (Reed) Werling, the Grievant, was employed as a Corrections Food Service Coordinator I, at the Lima Correctional Institution, the Employer, at the time of the incident in question. She served in this capacity for approximately one year prior to her removal on February 17, 1989. The Employer primarily houses 1,720 medium-security inmates. It performs its custodial responsibilities by employing a staff of 400 individuals.

On or about October 21, 1988, James Lucas, the Grievant's supervisor, was contacted by a fellow employee concerning a potential involvement between the Grievant and an Inmate Oyler. The nature of the involvement dealt with the Grievant receiving flowers from Oyler. An investigation was initiated with a conference held on October 21, 1988. During the course of the conference, the Grievant was informed that the questioned action, if affirmed, could result in violations of the Standards of

Employee Conduct, Rule Nos. 39 and 40 (Joint Exhibit 5). The Grievant admitted that she received flowers at her residence from Oyler. She, moreover, asserted that she told Oyler that if he engaged in similar conduct in the future she would have him confined. Other allegations dealing with the degree of the alleged involvement were refuted by the Grievant. She also maintained that she never realized that this contact served as a possible violation of the Standards of Employee Conduct (Joint Exhibit 5) (Joint Exhibit 3(D)).

As a result of this interview, Lucas authored a Report of Employee Corrective Action on October 21, 1988. He requested further disciplinary action and cited the following reasons:

"...

By her own admission, Ms. Reed acknowledges receiving flowers sent to her residence by Inmate Oyler 194-558. After receiving the flowers, she did not notify any of her supervisors or write a conduct report on the inmate. Receiving such a gift is in violation of Standards of Employee Conduct #39, "... the receiving of anything of value from an inmate ... without expressed authorization of DR&C." An investigation into an alleged personal relationship between Ms. Reed and Inmate Oyler did not reveal any reciprocating acts on her part.

See attached reports.

..."

(Joint Exhibit 3(C))

On November 7, 1988, Harry Russell, the Warden and Hearing Officer, conducted a pre-disciplinary conference (Joint Exhibit 3(A)). Russell testified that he only had two documents in his possession: a Special Incident Report authored by Dennis Core (Joint Exhibit 3(D)) and Lucas' Report of Corrective Action (Joint Exhibit 3(C)). These documents and the Grievant's tes-

timony indicated that a violation of Rule 39 had indeed occurred. Russell maintained that he was contemplating the issuance of a three-day suspension, but never followed through with this decision. In the interim, Russell was informed that additional information was forthcoming which indicated a more extreme degree of alleged involvement. As a consequence, he authorized an additional investigatory attempt.

While the above investigation was taking place, the Grievant submitted a Special Incident Report on November 19, 1988. She wrote the report because an inmate named Bauer had approached her and told her that another inmate named Johnson had conveyed some information. Inmate Johnson had purportedly told Bauer that Oyler had given him the Grievant's address and several phone numbers (Joint Exhibit 3(B)). It appears that Bauer also had this information at his disposal. Lucas maintained that the Grievant provided this information so that she could have her side of the story.

Some related information was uncovered by an investigation conducted by Stephen Bivona, a Correction Officer II. Bivona was contacted on November 19, 1988 and was told that a shakedown of Inmate Johnson resulted in the confiscation of certain items related to the Grievant's involvement with Oyler. On November 21, 1988, Bivona interviewed Johnson. It appears that certain pictures, addresses, phone numbers and letters (Employer Exhibits 2-6) were found in Johnson's possession. Johnson, moreover,

admitted that Oyler gave him these items prior to his confinement in security control (Joint Exhibit 3(J)).

Based upon this additional information, Bivona and Lucas interviewed the Grievant on November 21, 1988. The Grievant was asked to identify the photos encased in a picture frame. She stated that the photo with two boys and one girl were those of her children. The Grievant maintained, however, that she did not give the photo to Oyler (Joint Exhibits 3(I) and (J)).

The Grievant testified that the interview process engendered a certain amount of guilt and anxiety; which caused her to recant her testimony in a meeting held on November 22, 1988. She submitted a statement (Joint Exhibit 3(H)) where she admitted to receiving flowers, passing notes and photographs.

On November 23, 1988, the Grievant allegedly submitted additional information. She supposedly supplied two letters given to her by Oyler. She also admitted carrying these letters out of the institution by hiding them in her socks and pocket (Joint Exhibit 3(J)).

A Request for Corrective Action was submitted on November 29, 1988 (Joint Exhibit 3(L)). This request was based upon the documents and interviews previously described, and an additional interview and related Incident Report (Joint Exhibit 3(K)) authored on November 28, 1988.

On January 4, 1989 a pre-disciplinary conference was held to review a series of related allegations. Russell testified that the Grievant failed to deny any of the contested particulars.

She merely asserted that she recognized her mistakes and would not engage in similar activity in the future.

On January 25, 1989, a Notice of Disciplinary Action was issued which resulted in the Grievant's removal. The notice contained the following relevant particulars:

"...

You are to be removed for the following infractions: violation of DR&C Standards of Employee Conduct, Rule 39 - Giving preferential treatment to an inmate, the offering, receiving or giving of a favor or anything of value to an inmate...without expressed authorization of DR&C; Rule 22 - Interfering with or failing to permit an official search of person or property or failing to cooperate in any official inquiry or investigation; and Rule 40 - Engaging in an unauthorized personal relationship with an inmate...."

- #1 On or about September 4, 1988, you did receive flowers from Inmate Oyler, 194-558, at your residence. You did not notify your supervisors of this fact nor did you write a conduct report on the inmate.
- #2 You have admitted giving Inmate Oyler personal photographs of yourself and your three children, two religious cards and a personal note indicating you did have feelings for him.
- #3 In addition to receiving flowers, you also admit to receiving a "couple of notes" in which Inmate Oyler states his love for you.
- #4 During the investigation concerning a personal relationship with Oyler, you denied receiving any notes from Oyler or giving him anything. You stated you lied to protect your job.

..."

(Joint Exhibit 3(M))

On February 22, 1989, the Grievant filed a grievance contesting the removal order.

"...

Statement of Facts (for example, who? what? when? where? etc.):

AFSCME/OCSEA and Virginia Reed grieves Management is in violation of Article 24, Sections 24.01 and 24.02 plus any other pertinent Articles and Sections of the Contract. AFSCME/OCSEA and Virginia Reed makes (sic) such claim when on February 17, 1989, Virginia Reed was removed for having personal relationship with an inmate,

received flowers from an inmate and giving the inmate personal pictures and notes.

..."

(Joint Exhibit 2)

A Step III grievance hearing was held on March 30, 1989. The grievance was denied based upon a series of findings. It was determined that the Grievant admitted that she had a relationship with Oyler; and that this relationship was nurtured in conflict with existing departmental policy. Reliance was also placed on the Grievant's failure to notify the administration of the relationship and the Grievant's misleading assertions during the course of the investigation (Joint Exhibit 2).

At the Step IV grievance stage, the Employer, once again, denied the grievance by referencing many of the same particulars specified in the Step III response. The Employer, moreover, concluded that the discipline was for just cause and commensurate with the offense.

The Parties were unable to settle the above-mentioned matter. Since neither Party raised any objections regarding procedural nor substantive arbitrability, this grievance is properly before the Arbitrator.

THE MERITS OF THE CASE

The Position of the Employer

It is the position of the Employer that it had just cause to remove the Grievant for the following work rule violations: Rule

39 - Giving preferential treatment to an inmate, the offering, receiving or giving of a favor or anything of value to an inmate without expressed authorization; Rule 22 - Interfering with or failing to permit an official search of a person or property or failing to cooperate in any official inquiry or investigation; Rule 40 - Engaging in an unauthorized personal relationship with an inmate (Joint Exhibit 5). Just cause principles were referred to as well as other evidence and testimony in the support of the removal decision.

The Employer argued that the Grievant was placed on notice concerning the possible or probable consequences of her disciplinary misconduct. The Employer maintained that notice was provided via a number of different sources. A document (Joint Exhibit 6) jointly submitted indicates that the Grievant received a copy of the Standards of Employer Conduct (Joint Exhibit 5), acknowledged that training was received, and that she understood the possible consequences of non-compliance. It was emphasized that the security and non-security personnel received identical training at the Academy. Additional training was provided on an in-service basis once an employee was assigned to a particular facility.

The Employer contested the Union's Section 24.04 and Section 25.08 arguments dealing with the need to provide relevant documents. In dispute, were a series of exhibits (Employer Exhibits 1-6) introduced at the hearing but not made available to the Union at the other stages of the grievance procedure. The

Employer maintained that the availability of some of these documents, and the lapse of time since the initial action, provided some rationale for the delay in revealing these items to the Union. Also, Warden Russell, the Hearing Officer at the two pre-disciplinary conferences, did not rely on these documents when rendering his assessments. These documents, moreover, were not at his disposal as evidenced by two Pre-disciplinary Conference Management Witness/Document Lists (Joint Exhibits (B) and (F)). The Employer, moreover, maintained that the items testified to by Bivona, and contained in his Incident Report (Employer Exhibit 1), were disclosed in documents (Joint Exhibit 3(H), (I), (J) and (K)) presented to the Union during the second pre-disciplinary conference. As such, the informational requirements contained in the previously described provisions were complied with by the Employer.

The rules violated were viewed as reasonable and necessary to the efficient operation of the facility. A number of considerations were raised by Russell. First, the relationship in question would tarnish the image of the facility and erode the public's confidence in the facility's primary function; the incarceration of convicted felons. Second, the Grievant's involvement would reduce her credibility with her fellow workers, which would in turn deteriorate the trust level necessary for the type of work performed by the Grievant. Third, the Grievant's relationship jeopardized the institution's security responsibilities. If the relationship had continued, contraband might

have been introduced and various extortion attempts by inmates might have been attempted.

The Employer asserted that each of the charges were supported by evidence and testimony presented at the hearing. Russell, moreover, maintained that he considered each charge individually and in the aggregate.

It was contended that an unauthorized personal relationship in violation of Rule No. 40 was unequivocally established. The relationship, more specifically, was evidenced by the exchange of notes, letters, pictures, and the development of covert procedures and schemes to avoid the detection of this illicit relationship. Contents of the Grievant's Incident Report (Joint Exhibit 3(H)) further bolstered this premise. The Grievant admitted to having feelings for Oyler, giving Oyler pictures of herself and her children, and covertly removing notes from the institution which were passed to her by Oyler.

Rule No. 39 was thought to be violated in a number of ways. The Grievant admitted receiving flowers from Oyler. Oyler, moreover, obtained her picture so that he could draw the Grievant's portrait.

Several incidents supported the notion that Rule No. 22 was violated. When originally confronted by the Employer, the Grievant adamantly rejected the notion that a reciprocal relationship was fashioned between the Grievant and Oyler. The Employer viewed her eventual recantation as a clear admission

that she lied. As such, she failed to cooperate and interfered with an ongoing investigation.

Unequal treatment claims were also rebutted by the Employer. The Employer asserted that the Grievant's testimony regarding other employees receiving picture frames failed to establish this theory. Her observations, more specifically, did not establish the degree of proof necessary to support this premise.

The Position of the Union

It is the position of the Union that the Employer did not have just cause to remove the Grievant for violating Rule Nos. 40, 39 and 22. In addition, a number of procedural defects were offered as evidence of due process violations which, at a minimum, should result in a modification of the penalty. The procedural defects will initially be reviewed, followed by the substantive assertions raised by the Union.

The Union opined that representational rights afforded by Section 24.04 were violated by the Employer. The Union asserted that on several occasions meetings were held without the presence of a Union Steward.

It was maintained by the Union that it did not have an opportunity to properly conduct its own investigation. Inmate Oyler was viewed as a principle participant to the entire altercation. The Union, however, was not given an opportunity to interview the inmate, even though the inmate was under the control of the Employer.

A portion of Section 24.02 was referenced as a potential contractual violation. This provision requires that a disciplinary action shall be initiated as soon as reasonably possible. It was alleged that the Employer knew about the flower exchange as early as October 21, 1989, and yet, two pre-disciplinary conferences were conducted prior to the removal decision. The Grievant's Incident Report (Joint Exhibit 3(G)) was viewed as the triggering event which surfaced most of the damaging evidence in support of the Employer's claims. As such, these items were given to her prior to the first pre-disciplinary hearing, which should have precluded the second pre-disciplinary hearing.

Although the Union agreed that the Grievant received and signed (Joint Exhibit 6) for the Standards of Employee Conduct (Joint Exhibit 5), and attended Training Academy (Joint Exhibit 7) courses dealing with this subject matter, it still contended that certain notice defects biased the removal decision. It was alleged that Food Service Workers, as members of the non-security force, are not as well schooled in proper inmate relations as their counterpart security officers. The Grievant emphasized that she was never aware that some of her infractions could result in administered disciplinary outcomes.

The Union asserted that the Employer violated Sections 24.04 and 25.08 by failing to provide requested information in a timely fashion. Employer Exhibit 1 was authored on October 14, 1988 and contained particulars which were employed in the second pre-disciplinary hearing rather than the first pre-disciplinary hearing

held on November 7, 1988. As such, Employer Exhibit 1 and other relevant documents should have been presented prior to or at the time of the first pre-disciplinary hearing. By failing to do so, the Employer purportedly violated Section 24.04.

Similarly, the Union argued that the Employer failed to provide relevant documents in accordance with requirements contained in Section 25.08. The Union maintained that it requested relevant documents (Employer Exhibits 1-6) that were reasonably available from the Employer. These requests took place during prior meetings, at the Step III hearing, and at various times leading to the arbitration hearing. The Employer's failure to provide this information was viewed as an extreme due process violation. This violation allegedly prejudiced the Union's case by preventing a full-fledged defense. As such, if the Arbitrator determined that the Grievant did in fact engage in the alleged infractions, then the noted informational defects required a modification of the administered penalty.

The Union alleged that the Grievant did not engage in an unauthorized personal relationship in violation of Rule No. 40. The Grievant testified that her contacts with the Grievant during normal working hours was not extreme, and did not establish a personal relationship. These periodic exchanges were not excessive in duration nor peculiar in terms of content. The Grievant emphasized that her involvement was merely a friendship; and if Oyler had other objectives they were not reciprocal. The various comments contained in the notes and documents were viewed as

attempts to deter the Grievant; she hoped that they would eventually frustrate his amorous motives.

The Grievant denied that she violated Rule No. 39. She contended that the flowers were sent without her knowledge. With respect to the pictures and picture frame, the Grievant asserted that she never showed Oyler the pictures with the initial intent of giving him these items; she always carried the photographs while she was working. The Grievant admitted that she gave Oyler the photographs after he offered to draw a portrait. She did not deem this as inappropriate because he provided similar favors for his supervisors. Also, the Union asserted that other employees and supervisors had "mush faked" items made for them by inmates. They did not receive any discipline which led the Grievant to some erroneous assumptions.

The Rule No. 22 allegation was also refuted by the Union. The Union, more specifically, alleged that she did not obstruct the investigation. Her initial failure to admit the degree of her involvement was engendered by a deep-seated fear that she would lose her job. The Grievant's failure to report the flower incident was not viewed as her fault. She did not know that an Incident Report was in order, and was never instructed to fill one out by Supervisor Hull.

For a number of reasons, the Union felt that the administered penalty was inappropriate. The penalty was thought to be in violation of Section 24.05 because it was not commensurate with the offense and used solely for punishment. A review

of the relevant charges contained in the Standards of Employee Conduct (Joint Exhibit 5) indicated a range of potential penalties. Since this was the Grievant's initial offense, a lesser penalty should have been administered. It was also asserted that the penalty was escalated after the initial pre-disciplinary conference as a form of punishment. The newly surfaced information indicated a greater degree of involvement which resulted in the issuance of the harshest available penalty. A lesser penalty might have been in order in light of the progressive discipline language contained in Section 24.02.

The Union argued that the penalty should be reduced or eliminated as a consequence of mitigating circumstances. The Grievant received very good performance evaluations (Joint Exhibit 4) throughout her employment history; even after the initial pre-disciplinary hearing held on November 7, 1988. Greg Evans, a Food Service Manager I, also provided the Grievant with a glowing recommendation (Employer Exhibit 11).

THE ARBITRATOR'S OPINION AND AWARD

The Arbitrator must totally discount several of the procedural defects raised by the Union. Merely arguing or asserting certain matters at the opening and closing portions of the hearing does not elevate them to the level of purposeful evidence and testimony. When certain arguments are raised, the Party which asserts their relevance has an affirmative obligation to

provide evidence and testimony in support of the truth of the matter. In my judgement, this requirement was not satisfied with respect to three specific procedural defect arguments.

First, the Union contended that certain representational requirements contained in Section 24.04 were violated. Yet, it did not sufficiently establish this point through evidence and testimony. The factors which required further elaboration dealt with the meetings which were unattended, whether the Grievant requested the presence of a Union Steward, and whether she had reasonable grounds to believe that the interview would be used to support a disciplinary action. These particulars were negotiated by the Parties and require support before one can establish that a procedural defect has indeed occurred. The Union had every opportunity to pursue this argument at the arbitration hearing. The Union Steward, Grievant, and a number of Management representatives should have been queried in greater detail regarding this matter. Hawks' testimony provided some indication that this provision was not violated by the Employer. He noted that he raised the issue at some point during the process but failed to pursue it because he concluded that the Grievant did not originally request representation.

Second, the Union's Section 24.02 argument is equally unsupported. It is my conclusion that the disciplinary action was initiated as soon as reasonably possible. Even though some of the articles and circumstances surrounding the incident dealt with matters which took place prior to the first pre-disciplinary

hearing, these matters were not reasonably apparent until the Grievant filed her Incident Report (Joint Exhibit 3(G)) on November 19, 1988. Also, Russell was ready to administer a minor suspension based on the information he, as Hearings Officer, had available on November 7, 1988. Shortly after the hearing, he became aware that the degree of potential involvement was more severe than originally thought. As a consequence, he decided to expand the Employer's investigation. Within the previously described context, the disciplinary action was initiated as soon as reasonably possible. Once again, the Union failed to provide any clearly articulated evidence and testimony in support of its argument.

Third, nothing in the record supports the notion that the Grievant was not properly notified of the Standards of Employee Conduct (Joint Exhibit 5). Upon achieving gainful employment, the Grievant received and acknowledged that she was trained and understood the Standards (Joint Exhibit 6). Training, moreover, was provided at the Training Academy (Joint Exhibit 7) and in a number of in-service training sessions at the facility. Unequal training opportunities were alleged but were never established; even though the Union had every opportunity to call witnesses and to cross-examine Russell regarding the matter. The Grievant's testimony regarding this item also lacks veracity. She alleged that she was unaware of certain potential violations regarding unauthorized personal relationships. And yet, the Grievant admitted that she initially lied to save her job and smuggled

certain notes in her socks to avoid disclosure. These admissions clearly evidence that this employee knew that certain activities could result in an administered penalty. As such, her naivete seems suspect in light of her misleading assertions and covert activities.

The Employer did not violate Section 24.04. The Parties negotiated specific language dealing with informational requirements at the pre-disciplinary meeting to provide the Union with a list of witnesses and documents known of at the time used to support the possible disciplinary action. The Employer fulfilled each of these requirements. It provided a list of witnesses and documents (Joint Exhibit 3(A)) a number of days prior to the actual hearing date. Russell's credible testimony indicates that he solely relied on these documents; and that these documents were the only ones known of at the time used to support the possible disciplinary action. Circumstantial evidence adequately supports this conclusion. In other words, this Arbitrator is firmly convinced that Russell was not aware of Employer Exhibits 1-6 during this stage of the process. His analysis was solely based upon the flower incident. If these other items had been in his possession, it is highly probable that he would have never considered a three-day suspension. Jerry Dunnigan, a Labor Relations Officer, testified that Hawk did ask whether the Employer had any other relevant documents which the Employer intended on using to justify the possible disciplinary action.

Russell responded that the documents specified in the listing (Joint Exhibit 3(A)) were the only available items.

The previous analysis dealing with the November 7, 1988 pre-disciplinary conference similarly applies to the pre-disciplinary conference held on January 4, 1989. Once again, the Employer provided the Union with a listing (Joint Exhibit 3(F)) of witnesses and documents known of at the time used to support the possible disciplinary action. As such, the Employer complied with the requirements contained in Section 24.04.

Section 25.08, however, places more specific requirements on the Employer beyond the pre-discipline stage of the process. Here, the Employer must comply with the Union's request for specific documents, books, papers or witnesses that are reasonably available and are relevant to the grievance. The Union's request to interview Oyler prior to the hearing was not substantiated. Once again, the Union only alluded to this matter in the closing argument; no other evidence and testimony were provided in support of this premise. Also, there is no evidence that the Union was denied the presence of Oyler or any other witness for this particular arbitration proceeding.

In a similar fashion, there is no basis for concluding that the Employer failed to comply with the Union's request for specific documents. The record does not adequately support the notion that such a specific request was ever proposed by the Union. Hawk never asserted that such a request was offered at Step III or Step IV. Also, the Step III and Step IV answers

(Joint Exhibit 2(A) and (B)) fail to reference any specific objection regarding the Employer's refusal to comply with a specific Union request. The Union had ample opportunity to proffer a specific request. The Union had in its possession a substantial series of exhibits which articulated in significant detail the evidence and documents exposed by the Employer during its investigation.

It appears, moreover, that the particular documents (Employer Exhibits 1-6) in dispute might not have been reasonably available. The majority of these documents were exposed during a shake-down and were found in an inmate's possession. They were then placed in security control after being confiscated from the inmate. As such, these documents might not have been readily available to anyone prior to the arbitration hearing. The Parties' Joint Stipulations allude to this problem and acknowledge that the Union was placed on notice prior to the hearing but failed to raise any objection regarding discovery.

The relevance of these documents (Employer Exhibits 1-6) is also at issue. The Grievant recanted the majority of her original statements when she independently submitted two Incident Reports (Joint Exhibits (G) and (H)). As a consequence, she directly affirmed the evidence contained in the other exhibits used by the Employer in support of the removal order. Within this context, the surprise and related prejudice arguments asserted by the Union are significantly mitigated.

Since the various procedural arguments proposed by the Union are found to be deficient, what remains is an analysis of the various substantive charges asserted by the Employer. In this Arbitrator's opinion, all of the charges were sufficiently substantiated and the penalty imposed is commensurate with the proven offenses. Each of the charges will be analyzed in the discussion that follows.

From the evidence and testimony presented at the hearing, it is my judgement that the Grievant violated Rule No. 40 because she engaged in an unauthorized personal relationship with an inmate. The Grievant dramatically characterized her relationship in an Incident Report (Joint Exhibit 3 (H)) submitted on November 22, 1988. The following excerpts clearly indicate that a relationship existed which exceeded the traditional employee-employer relationship:

"...

- I started to get feeling (sic) for this inmate because he showed me concern.
- I then brought in pictures of my children to share a little of my life with him.
- I told him once he got out, then we could start a relationship.
- I also told him he had to be divorced.
- I did get a couple of notes which (sic) he stated his love for me.
- I also have written him a note saying that if I were to get serious with him he would have to be a Christian and change his ways. And that we would have to wait on sex till we were married. But that I did have feelings for him, that he made me feel good about myself.

..."

(Joint Exhibit 3(H), Pg.s 1-2)

It should be noted that the Grievant did not dispute the authenticity of these various statements. She did, however, attempt to place a different slant on these items. She alleged that she made these various statements in an attempt to diffuse Oyler's interest. This assertion seems extremely naive and highly suspect. The Grievant obviously engaged in a series of contacts over a period of time; such conditions portray a "non-casual" relationship which was nurtured and sustained by the Grievant. The statements, moreover, suggest a high degree of emotional involvement which support the relationship hypothesis. A mere acquaintance would not be discussing subjects such as feelings, divorce, religion, sex and life after release from prison. The relationship also appears to be reciprocal. That is, notes were mutually exchanged by both individuals. Also, the Grievant successfully carried several letters outside the compound by hiding them in her socks and pockets (Joint Exhibit 3(I)). Again, these actions do not appear to be behaviors typically engaged in by casual acquaintances, especially when she attempted to deter Oyler for over a month. The Grievant could have used other available means to deter Inmate Oyler; notifying her supervisors about Oyler's advances would have been extremely helpful.

The Grievant also violated Rule No. 39 which deals with the offering or receiving anything of value from an inmate. Clearly, the Grievant received flowers from the inmate which she failed to report. She, moreover, gave the inmate her pictures with the

understanding that he would draw a portrait. Although she alleged that Oyler had provided this service for other employees and Management representatives, the Union did not establish that these individuals were similarly situated. That is, some of these individuals might have legitimately received these items as a consequence of the existing craft procedure.

Rule No. 22 was also violated by the Grievant; she failed to cooperate in any official inquiry or investigation. The Grievant admitted lying because she was afraid she could lose her job. Unfortunately, this Arbitrator does not view this proposition as a plausible defense.

Even though the disciplinary grid specifies a range of penalties for any given offense, the penalty administered was indeed within the realm of reasonableness. The Grievant's conduct justifies the penalty implemented by the Employer.

A number of mitigating circumstances were proposed by the Union. They, however, cannot overcome the overwhelming evidence amassed by the Employer in support of its decision. The proven charges, moreover, are of such a consequence that one proposing a mitigation defense has to submit convincing and extensive support of the argument. Performance evaluations (Joint Exhibit 4) and a recommendation (Employer Exhibit 1) from a supervisor do not establish a need for mitigation.

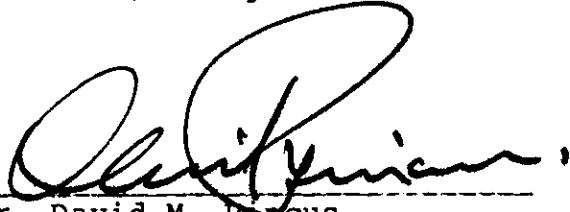
This tragic incident powerfully supports the reasonableness of the administered penalty. Before the entire story was exposed, the Grievant was beginning to feel extreme pressure.

She sensed that Oyler had begun to establish the foundation for future extortion attempts. In fact, it appears that he began circulating her telephone number and address. Such a situation, if allowed to persist, could have led to dire consequences for the Grievant and the institution.

AWARD

For the reasons more fully noted above, the grievance is denied.

May 7, 1990



Dr. David M. Pincus
Arbitrator