

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

IN THE MATTER OF THE ARBITRATION BETWEEN

THE STATE OF OHIO, THE OHIO DEPARTMENT
OF REHABILITATION AND CORRECTION,
FRANKLIN PRE-RELEASE CENTER

-and-

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

GRIEVANCE: Catherine Hoover (Discharge)

OCB Case Nos.: 27-08-(89-08-04)-016-01-03
27-08-(89-08-30)-018-01-03

ARBITRATOR'S OPINION AND AWARD
Arbitrator: David M. Pincus
Date: June 25, 1990

Heard 5/8/90

APPEARANCES

For the Employer

Christine Money	Warden
Patrick Hurley	Deputy Warden
Pauline Boyer	Personnel Officer III
Barbara Persly-Jones	EEO Officer
Felicia Bernardini	Second Chair
Nick Menedis	Advocate

For the Union

Catherine Hoover	Grievant
Nick Chibis	Labor Relations Officer
Mary Jennings	Ohio Civil Rights Commission Supervisor
Debra Dever	Witness
Arthur Gooden Jr.	Chief Steward
Carol Bowshier	Advocate

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 Rehabilitation Services, Franklin Pre-Release Center, 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, 1989 - January 1, 1991 (Joint Exhibit 1).

The arbitration hearing was held on May 8, 1990 at the office of Collective Bargaining, Columbus, Ohio. The Parties had selected Dr. 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 removal of Catherine Hoover, Grievant, on August 22, 1989, for just cause? If not, what should 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. One or more verbal reprimand(s) (with appropriate notation in employee's file);
- B. One or more written reprimand(s);
- C. One or more suspension(s);
- 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.

(Joint Exhibit 1, Pgs. 37-38)

...

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-discipline meeting. At the discretion of the Employer, the forty-five (45) day 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. The OCSEA Chapter President shall designate the Union representative who shall receive such notice who is assigned to selected work areas under the jurisdiction of the Chapter. 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.

Section 24.06 - Prior Disciplinary Actions

All records relating to oral and/or written reprimands will cease to have any force and effect and will be removed from an employee's personnel file twelve (12) months after the date of the oral and/or written reprimand if there has been no other discipline imposed during the past twelve (12) months. Records of other disciplinary action will be removed from an employee's file under the same conditions as oral/written reprimands after twenty-four (24) months if there has been no other discipline imposed during the past twenty-four (24) months. This provision shall be applied to records placed in an employee's file prior to the effective date of this Agreement.

...

(Joint Exhibit 1, Pgs. 39-40)

STIPULATED FACTS

CATHERINE HOOVER

1. Grievant was appointed as a Correction Officer 2 at Franklin Pre-Release Center on September 12, 1988.
2. Grievant has prior state service with the Rehabilitation Services Commission at a Disability Claims Adjuster from December 7, 1987 through May 20, 1988.
3. Grievant resigned from Rehabilitation Services Commission on May 20, 1988.
4. Grievant has prior state service with Ohio Department of Mental Health, Central Ohio Psychiatric Hospital as a Psychiatric Attendant from August 3, 1981 through March 6, 1982.
5. Grievant was removed from the Ohio Department of Mental Health on March 6, 1982.
6. Catherine Hoover met the minimum hiring requirements that were in effect on her date of hire.
7. Grievant signed for receipt of the Standards of Employee Conduct on September 13, 1988 at the Corrections Training Academy and again on March 23, 1989 at the Franklin Pre-Release Center.
8. The grievance is properly before the arbitrator.
9. Joint Exhibit 4 is the Standard of Conduct in effect at the time that discipline was taken and still is in effect today.
10. OAD Sections 5120-7-09 and 10 were followed by the Ohio Department of Rehabilitation and Correction in the employment process in awarding positions to prospective employees.

Nicholas G. Menedis
Chief of Labor Relations
Department of Rehabilitation
and Correction

Carol Bowshier
Staff Representative
OCSEA/AFSCME

CASE HISTORY

The Franklin Pre-Release Center, the Employer, is charged with the general mission of housing convicted felons in a safe and humane atmosphere. Patrick Hurley, the Deputy Warden, acknowledged that the Employer is formally classified as a

minimum security pre-release facility but that the existing classification is a bit misleading. Such a classification means that the inmates typically require little or no supervision and are housed within four to five weeks of release. This particular facility, however, receives inmates that enjoy higher classification ratings for longer periods of time. At the present time, the facility receives pregnant inmates with a variety of security classifications and some inmates are housed for two to three years.

Catherine Hoover, the Grievant, was hired as a Correction Officer on September 12, 1988 and removed on August 21, 1989. As such, she was employed for eleven months and two weeks prior to her removal for falsifying her employment application. The instant matter must be viewed in the context of the Grievant's prior work history. This history served as the primary ingredient leading to the Grievant's eventual removal.

The Grievant was initially employed at the Central Ohio Psychiatric Hospital (COPH) during 1981. She was employed as a Psychiatric Attendant. At the hearing, the Grievant admitted that she was removed because she walked off the job. Mitigating circumstances in the form of sexual harassment by a fellow employee were offered as rebuttal to the removal decision. Specific claims were raised by the Grievant dealing with a security officer's attempts to keep her from leaving a secured area after she refused to display an identification card; excessive surveillance by the security guard after Grievant refused a date attempt; and touching of a sexual nature which took place during an incident.

The matter was eventually appealed and reviewed by an Administrative Law Judge. This individual recommended that the Grievant's removal should be modified to a ten-day suspension. On May 21, 1982, however, the State Personnel Board of Review concluded that the mitigating circumstances were insufficient to justify modification of the order (Joint Exhibit 6). It should be noted that the Grievant filed a claim with the Ohio Civil Rights Commission. It was alleged that the Grievant's discharge was somehow related to her sexual harassment claim and disparate treatment. The Commission concluded that there was insufficient evidence that the Security Officer's conduct constituted sexual harassment. A similar conclusion was reached with respect to the disparate treatment claim. Unlawful bias was not established because both the Grievant and her male co-worker were removed; they left COPH without permission (Employer Exhibit 7).

On October 2, 1987, the Grievant applied for a position as a Disability Claims Adjudicator I with the Rehabilitative Service Commission. Her employment application (Employer Exhibit 1) clearly indicates that the Grievant omitted her prior employment with COPH. Although there appears to be some dispute concerning the actual reasons surrounding the Grievant's departure from the Commission, she alleged that she resigned as a consequence of work-related stress. The Grievant acknowledged that she was ill-prepared to adequately perform her responsibilities as an Adjudicator and that her marginal evaluations supported this concern. As a consequence, she resigned from the position on May 20, 1988.

On September 12, 1988, the Grievant was appointed as a Correction Officer 2 by the Employer. Pauline Boyer, a Personnel

Officer 3, reviewed the screening and selection process which eventually led to the Grievant's selection. Documents (Employer Exhibit 5) and Boyer's testimony indicate that the Grievant did extremely well during the structured interview portion of the selection process. The Grievant realized the maximum possible score. Boyer and Hurley, moreover, noted that prior disciplines were factored into the selection process. Any applicant attempting to transfer to the facility with a disciplinary record exceeding a written reprimand was automatically disqualified from the process.

Although the Grievant gained employment, she omitted her prior employment at COPH when she completed the Employer's application (Joint exhibit 5). The Employer, however, became aware of this omission by mere happenstance. On June 22, 1989, Chief Union Stewart Arthur Gooden Jr. arrived at Lori Smith's office to discuss the "state time" accumulated by several bargaining unit members. The Grievant's accumulated years of service was one of the items discussed by Smith and Gooden. Smith accessed the Grievant's file (Employer Exhibit 3 and Joint Exhibit 3) which disclosed that she had been removed from COPH on March 6, 1982. She then compared this data against the information provided by the Grievant on her original job application (Joint Exhibit 5). Surprisingly, the original application (Joint Exhibit 5) failed to include her prior employment at COPH or her removal from this institution.

On July 6, 1989 Smith conducted an investigatory interview. During the interview, the Grievant acknowledged that she failed to list her COPH experience because "I just wanted to forget about working at COPH." Smith purportedly asked the Grievant a

number of times why she was removed from COPH. The Grievant responded that she was removed because she filed a sexual harassment claim against a Security Officer. Smith recommended that a pre-disciplinary conference should be held for possible violation of the Standards of Employee Conduct Rule No. 21. This Rule deals with willfully falsifying, altering, or removing any official document arising out of employment with the Department of Rehabilitation and Correction (Joint Exhibit 4).

On July 14, 1989, a pre-disciplinary hearing was held to discuss the above-mentioned matter. It appears that the Grievant reiterated some of the claims she raised at the investigatory interview. The Grievant, moreover, alleged that she was told by an individual at the Rehabilitation Services Commission to omit information regarding COPH employment. She tendered a similar excuse regarding her most recent omission. The Grievant claimed that a representative of the facility during the recruitment drive advised her to omit the information.

Hurley served as the Hearing Officer at the pre-disciplinary hearing. He concluded that just cause existed for a violation of Rule No. 21.

On July 21, 1989, the Employer terminated the Grievant. The Notice of Disciplinary Action contained the following relevant particulars:

"...

You are to be Terminated for the following infractions:

As a result of researching your inquiry regarding your state service and seniority, it was discovered that you falsified your application for the position of Corrections Officer at Franklin Pre-Release Center. You did not list on your application or mention in your interview that you worked at Central Ohio Psychiatric Hospital (sic) and that you were terminated for abandoning your post. Upon further investigation is (sic) was determined that you also falsified your application to Rehabilitation

Services Commission, again by not reporting your hiring and removal from Central Ohio Psychiatric Hospital. You obtained two state of Ohio jobs under false pretenses. Also, during your investigatory hearing you were untruthful regarding details of your removal including stating that you had been reinstated and not ever admitting to abandoning your post.

..."

(Joint Exhibit 3)

On August 30, 1989, the Grievant contested the termination by filing a grievance. It contained the following Statement of Facts:

"...

On 8-22-89 I became aware that I was going to be removed from my position of CO II. I feel that this disciplinary action was taken without just cause. I feel that removal is too harsh a penalty.

..."

(Joint Exhibit 3)

The Grievant sought reinstatement with full back pay and restoration of all benefits.

A Step 3 hearing was held with Charles R. Adams serving as the Hearing Officer. He concluded that the Union's claims lacked merit and as a consequence denied the grievance (Joint Exhibit 3). The Parties were unable to resolve the grievance. Since neither Party raised any objections regarding substantive nor procedural 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 violating Rule No. 21 which deals with willfully falsifying, altering or removing any official document

arising out of employment with the Department of Rehabilitation and Correction. The Employer's assertion is based upon a series of arguments dealing with the procedural propriety of its decision; the Grievant's proven guilt; certain credibility concerns; prior work history problems; and unsubstantiated unequal treatment claims.

The Employer maintained that the Grievant was properly notified of the probable consequences associated with any falsification of a document arising out of employment. Such notice was provided through a number of independent but related sources. The Grievant's employment application (Joint Exhibit 5) contained an oath which affirms that her answers "of the questions in this application are true to the best of my knowledge and belief." As such, the Grievant should have known that a falsified response could lead to dire negative consequences. The Grievant, moreover, signed and received the Standards of Employee Conduct (Joint Exhibit 4) at the Corrections Training Academy and again at the facility. Rule No. 21 is a specific provision enumerated in the above-mentioned Standards.

The Union's Section 24.06 claim was refuted by the Employer. It was asserted that the two year bar contained in this provision dealing with non-oral and/or written reprimands is inapplicable. The Employer emphasized that it had every right to investigate the Grievant's prior disciplinary record. At the time of her application, the Grievant was an outside applicant because she did not enjoy State of Ohio employment status. As such, nothing in Section 24.06, nor other sections of the Agreement (Joint Exhibit 1), preclude an investigation of prior employment records.

It was maintained that the tendered proofs clearly exposed the willful nature of the Grievant's falsification activity. Although she proposed some justifications for her omission, Grievant admitted that she omitted her prior employment at COPH because of a bad experience. The willful element of the charge was also supported by a pattern of previous behavior engaged in by the Grievant. The Grievant not only falsified the Employer's application (Joint Exhibit 5) but failed to disclose her COPH experience when applying for her position at the Department of Rehabilitative Services. The prior application (Employer Exhibit 1) contained identical questions regarding prior employment and asked for a sworn oath regarding the contents specified therein.

Credibility concerns were offered in support of the willfulness assessment. Concerns which indicate that the Grievant has a propensity to alter the truth or deny the actual circumstances surrounding a series of incidents. First, throughout the investigation the Grievant provided varying versions concerning the circumstances surrounding her departure from COPH. Hurley testified that this conclusion was exposed during the pre-disciplinary hearing stage. The Grievant noted that she omitted information because: it was a bad experience; she was advised that this information was unimportant during a recruitment drive; and that she was removed because she filed a sexual harassment claim. At no time did she acknowledge that she was removed because she left her post without prior approval. The Grievant's justifications, moreover, did not comport with related information introduced by the Employer. The Personnel Board of Review upheld the Grievant's removal for leaving her post without authorization (Joint Exhibit 6). In a like fashion, the Ohio

Civil Rights Commission concluded that there was insufficient grounds to prove that the security officer's conduct constituted sexual harassment (Employer Exhibit 7).

Second, the Grievant's reason for leaving the Rehabilitative Service Commission seemed unclear; the Grievant's application (Joint Exhibit 5) cites her reason for leaving "to enter the field of Correction and Rehabilitation." Yet, at the hearing, the Grievant noted that the job was stressful and that she was ill-prepared to perform the tasks. The Employer's investigation disclosed an additional reason for her separation. It was alleged that the Grievant went AWOL and subsequently submitted a back-dated resignation (Employer Exhibit 6) to avoid discipline.

Based upon the previous points and the Grievant's demeanor during the hearing, the Employer contended that the Grievant's credibility was dramatically damaged. As such, the consistent testimony provided by Hurley and Boyer bolstered the credibility of the Employer's version by mere comparison.

A nexus was fashioned between the Grievant's prior activities, conduct at the hearing, and her most recent appointment. The Employer asserted that it had a legitimate concern about the Grievant's potential reinstatement. Hurley testified that the entrance post at COPH is very similar to what his institution employs in terms of security protocols. By abandoning a post and failure to be checked at an entrance, the Grievant evidenced a predisposition which could prove to be harmful to herself and others. Truthfulness was also a critical aspect which led to the conclusion that discharge was in order. The varying versions provided by the Grievant surrounding her COPH removal, and her denials, led to this concern. Hurley emphasized

that "our business is based on trust;" an essential and necessary ingredient when one attempts to supervise inmates.

The Grievant's demeanor at the hearing was used to bolster the truthfulness allegation. When testifying about matters which tended to benefit her cause, she was calm, eloquent and shared all the relevant information. The Grievant's demeanor, however, changed dramatically under cross-examination. It was alleged that the Grievant was often evasive and refused to respond to questions raised by the Employer's advocate. Such potential conduct cannot be tolerated in an institution confronted with a variety of stress-inducing conditions.

The Employer contended that the Union failed to support its disparate treatment claim. The comparables raised by the Union were not thought to be similarly situated. Debra Dever, a Correction Officer 2, was not thought to be similarly situated because she did not willfully falsify her application. Rather, her actions were viewed as careless. As such, the Employer was justified in its issuance of a written reprimand under Rule No. 35 rather than a reprimand under Rule No. 21. Rule No. 35 deals with other actions that could compromise or impair the ability of the employee to effectively carry out his/her duties as a public employee (Joint Exhibit 4). Dever's situation was additionally distinguished by Hurley. The Grievant was evasive throughout the investigation while Dever was quite open and cooperative even though they were asked similar questions. In fact, Dever attempted to help Boyer determine what her status was at the time of the separation.

The Larry Glass comparison offered by the Union was viewed as totally inappropriate. The incident took place at a different

institution with a different Appointing Authority. The Employer contended that the Standards of Employee Conduct (Joint Exhibit 4) allow a designee a great deal of discretion in the implementation of discipline. As long as the facts are distinguishable, discipline action may vary.

The Employer also maintained that Dever's discipline was not a mere pretext initiated by the Employer to subvert a potential unequal treatment allegation. The sequence of events allegedly supported this conclusion. Hurley testified that the Employer initially became aware of the Union's reliance on Dever's employment history when Lori Smith received a complaint (Employer Exhibit 3) issued by the Ohio Civil Rights Commission on or about August 21, 1989. In a sworn affidavit (Employer Exhibit 2), Smith noted that the complaint was forwarded to Barbara Persley-Jones, an EEOC Officer, on September 8, 1989. The Grievant was formally notified about her removal on August 21, 1989. As such, the removal was implemented prior to the complaint and notice of Dever's involvement. Hurley and Boyer recalled that they pulled Dever's service file from the computer between August 31, 1989 and September 8, 1989. Only then did the Employer become aware of Dever's falsification. On August 31, 1989, Smith was notified by Jones not to pursue the investigation of Dever's falsification charge. Jones testified that she in fact instructed Smith to follow this course of action.

Approximately five months later, on February 28, 1980, Boyer initiated an investigation of Dever's falsification charge. Even though the investigation commenced on or about the time the Employer became aware of the Union's request to subpoena Dever, the delay was primarily perpetuated by Jones' instructions. It

was also engendered by an awareness that an investigation and determination were necessary as rebuttal to a potential unequal treatment claim at the arbitration proceeding.

In a related fashion, the Employer argued that any unequal treatment claim required some semblance of prior knowledge. Even if the Union was able to prove this allegation, prior knowledge could not be established because the Grievant's removal took place prior to the issuance of the Ohio Civil Rights Commission's complaint.

The Position of the Union

It is the position of the Union that the Employer did not have just cause to remove the Grievant. This position was based on a number of procedural issues and other substantive matters.

The Union alleged that the Grievant was not properly forewarned about the possible consequences associated with falsification of an employment application. Although the Grievant's application (Joint Exhibit 5) contained a sworn oath concerning its contents, this form of notice was viewed as deficient. The warning was deficient because it failed to warn the Grievant that falsification could result in sufficient cause for subsequent termination or dismissal. Specific notice regarding Work Rule No. 21 was also questioned. Although the Grievant received the Standards of Employee Conduct (Joint Exhibit 4), she was not apprised of the possible consequences of this work rule until she was formally employed by the facility. As such, the Grievant was not put on clear notice of the penalty attached to any violation.

A Section 24.06 violation was offered by the Union. This provision bars the Employer from placing any force or effect on

prior disciplinary action if there has been no disciplinary action imposed during the last 24 months. As such, the Employer was barred from placing any force or effect on the Grievant's removal from COPH. This provision was thought to be applicable because the Employer in both instances is defined by the Agreement (Joint Exhibit 1) as the State of Ohio.

An award rendered by Arbitrator Dworkin¹ was introduced in support of this interpretation. He concluded that the Parties unambiguously agreed that all records pertaining to disciplinary actions will cease to have any force or effect and will be removed from an employee's file after the time specified by the contract. As such, the State of Ohio has an absolute and unqualified responsibility to update and monitor personnel files.

Sections 24.02 and 24.05 were purportedly violated by the Employer. Work Rule No. 21 indicates a range of potential discipline from five to ten days suspension to removal. By levying a removal for a first offense, the Employer failed to comply with the progressive discipline requirements specified in Section 24.02 which resulted in a punitive action in violation of Section 24.05.

Although the Grievant omitted her prior employment at COPH, the Union did not view this action as a willful omission. Rather, the omission was based on a real aversion to a painful experience at COPH. On numerous occasions at the hearing, the Grievant expressed that the harassing incident perpetuated by a Security Officer working at COPH was quite devastating.

¹The State of Ohio, Ohio Adjutant General's Department and Ohio Civil Service Employees Association, AFSCME, AFL-CIO, Local II, Grievance Number G87-2358, (Dworkin, 1988).

The propriety of the Grievant's removal was also challenged by the Union. The Grievant appealed this disciplinary action but was not afforded the same rights she presently enjoys under the provisions negotiated by the Parties. The Personnel Board of Review's decision (Joint Exhibit 6) was viewed as tainted because the Grievant was not present at the hearing to present her version of the contested events.

The Union claimed that the Grievant did not provide varying versions concerning her departure from CPH. Grievant merely provided different facets engendered by the same set of circumstances. The Union challenged the Employer's assertion that the Grievant denied her removal from CPH while being queried at the pre-disciplinary hearing. Such a denial could not have been possible since the Grievant was presented with the removal order at the hearing.

Reliance on the Grievant's employment at the Rehabilitation Service Commission was viewed as unimportant and an attempt to discredit the Grievant. The Grievant testified that she did not resign in an attempt to avoid disciplinary action. She freely admitted that stress and her inability to perform the work caused her to leave. None of the records introduced at the hearing evidence that the Commission initiated any disciplinary action against the Grievant.

Since the Employer was unable to support a pattern of falsification, the nexus proposition submitted by the Employer was viewed as unpersuasive. Rather, the Grievant's performance evaluations (Joint Exhibit 7) at the completion of her probationary period indicate satisfactory performance. This led to the

Grievant's retention and readily evidences that the Grievant can fulfill the Employer's efficiency and security interests.

For a number of reasons, the Union alleged that the Employer engaged in a practice of unequal treatment. First, the Grievant and Dever were similarly situated, and yet, received different penalties under different work rule offenses. Both individuals admitted to an omission from their employment application forms. These individuals, moreover, engaged in equally serious offenses resulting in their departures. The Grievant left her post without authorization while Dever was caught sleeping while on duty. By failing to volunteer her omission when confronted by Gooden, Dever was equally deceitful and willfully falsified her employment application. If the Employer was truly committed to a policy of not selecting employees with a disciplinary history exceeding a written reprimand, then neither individuals should have been retained.

The proposed charges and related penalties evidenced an arbitrary and capricious practice. The Employer failed to justify why Dever was reprimanded under Rule No. 35 rather than Rule No. 21. Based on the previous discussion, both individuals were equally willful and untruthful which should have resulted in an identical violation. Also, the Employer failed to support the rationale for administering the most severe penalty when removing the Grievant, and yet, only opted to assess the least severe penalty when reprimanding Dever.

Second, the Larry Glass situation was viewed as a relevant comparison even though Glass was employed at a different facility. Glass was exposed to a charge of falsification prior to the completion of his probationary period. Although the Employer was

fully aware that Glass had willfully omitted information on his application, the Employer took no disciplinary action. Glass' employment at a different facility was not viewed as a sufficient distinction because discipline was initiated under a common Departmental policy. Since the Agreement (Joint Exhibit 1) is not institution specific but applied on a state-wide basis, the Employer is required to apply its policy even-handedly.

The Union charged that the offense was not properly specified. If, in fact, the Grievant failed to admit to her omission, then she should have been charged with a Rule No. 22 violation. This Rule deals with an employee's failure to cooperate in an official investigation and carries a penalty of a written reprimand to removal.

The investigation and outcome of Dever's falsification charge were viewed as a pretext to avoid a finding of unequal treatment. The Employer initiated an investigation five months after it was advised of Dever's possible falsification. Although the Employer purportedly relied on Jones' instructions, Jones never testified that she instructed the Employer to convene an investigation. The timing of the investigation also seemed a bit suspect. Boyer questioned Dever on the day that Dever was provided with a subpoena by the Union. Shortly thereafter, a pre-disciplinary hearing was convened which resulted in a written reprimand (Union Exhibit 3).

Another pretext argument dealt with the timing of the Grievant's removal. The Grievant was a plaintiff in the McDowell vs. Richard P. Seitser lawsuit. The settlement provided the Grievant with primary hiring status and a monetary settlement. The Grievant testified that she received the settlement on the

day she was removed. The timing of these two events seemed suspiciously connected.

THE ARBITRATOR'S OPINION AND AWARD

In my judgement, the Grievant was provided with adequate and complete forewarning concerning the possible negative consequences associated with the falsification of the employment application. Even though at the time of the signing she was not provided with the Standards of Employee Conduct nor the specific requirements of Rule No. 21 (Joint Exhibit 4), the Grievant did sign an oath personally administered by a Notary (Joint Exhibit 5). The oath, itself, states that "I solemnly swear or affirm that the answers I have made to each and all of the questions in this application are complete and true to the best of my knowledge and belief." The directions on the application, moreover, are explicit and unambiguous. They state "If you have answered 'yes' to question 3 or 4 . . . please explain fully below." When an employee swears or affirms to answers in response to a series of questions in a job application, it is reasonable to conclude that any omission or falsification may lead to undesirable consequences up to and including removal; if such falsifications are later surfaced or disclosed. As such, the oath administered under the supervision of a Notary, the specific questions and directions act as purposeful and complete notice conditions. This conclusion is especially true and important when an applicant, such as the Grievant, applies for work in a corrections institution. An institution which houses felons requires a higher level of trust, honesty and confidence than is normally

necessary in other work settings. Within this context, the Employer rightfully expects truthful and accurate information from any prospective employee. Otherwise, the entire selection and appointment process can prove to be futile and inefficient.

This Arbitrator cannot concur with the Union's Section 24.06 argument. Arbitrator Dworkin's analysis seems proper but does not anticipate the circumstances surrounding the present matter. In his decision, Arbitrator Dworkin had to determine whether a past reprimand issued by the Employer in 1985 could be properly submitted. He concluded that Section 24.06 requires that the reprimand "will be accorded no weight in the decisional process that follows." Here, however, we are not dealing with a reprimand issued by an Employer after it should have been expunged in accordance with the particulars contained in Section 24.06. This Arbitrator is unwilling to equate the two scenarios without additional evidence and testimony dealing with the Parties' intent regarding Section 24.06.

The Union would have the Arbitrator equate a department's actions with those of the State of Ohio. Such an interpretation, without additional documentation, could lead to a ruling which modifies the express language negotiated by the Parties. It appears that this provision considers prior disciplinary actions initiated during an employee's tenure with a particular employer. Nothing in the record nor the Agreement (Joint Exhibit 1) indicates that prior reprimands including removals, issued by another department and surfaced as a result of application falsification, cannot be used to substantiate a removal decision initiated by a present employer. To preclude such an investigation would frustrate the selection and appointment process.

In my view, the Grievant was charged with the appropriate work rule violation. That is, the circumstances surrounding the present matter accurately contemplate a Rule No. 21 violation rather than violations of Rule Nos. 22 or 35 (Joint Exhibit 4). The focal point of the Grievant's activities or non-compliance with the Employer's policies specifically deal with falsifications or omissions arising out of employment.

Based upon the evidence and testimony introduced at the hearing, it is my judgement that the Grievant willfully falsified her application. As such, based on the matters discussed below, the Grievant's removal was for just cause. This conclusion is supported by a pattern of falsification engaged in by the Grievant, her denials prior to and at the arbitration hearing and credibility concerns.

The Grievant failed to include her COPH employment on both the Department of Rehabilitative Services (Employer Exhibit 1) and the application (Joint Exhibit 5) presently under review. Testimony provided by the Grievant documents the willful and intentional nature of her omission. When she was asked why she omitted the COPH experience she exclaimed that she wanted to get the experience out of her mind. The Grievant, moreover, noted that she did not specify the information "because you have to talk about it" and "I really didn't think it would come to this and if I had it to (do) over again, I'd do it differently." Such admissions clearly evidence that the Grievant willfully omitted the information knowing that full disclosure would have led to her non-selection. The very fact that the same omission took place in two different applications underscores the purposefulness of the Grievant's falsification attempts. These omissions

cannot be characterized as oversights nor the result of memory lapses.

The Grievant's denials are also clothed with a semblance of deceit and an unwillingness to acknowledge the real reason for her removal from Copenhague. On two separate occasions during the hearing the Grievant admitted that she omitted her Copenhague experience but that she did not falsify the Commission's application (Employer Exhibit 1) nor the Employer's application (Joint Exhibit 5). This Arbitrator equates omissions of this type as blatant examples of falsification and any attempt to disassociate or distinguish these activities strains the Grievant's credibility.

Other veiled denials and other half-truths are readily evidenced when one reviews the record. At the hearing, the Grievant eventually admitted that she was removed from Copenhague for leaving her place of duty and not returning without prior permission (Joint Exhibit 6). She was not, however, as cooperative during the other stages of the grievance procedure. At the Investigatory Interview and the Pre-disciplinary Hearing (Joint Exhibit 3), the Grievant primarily focused on her bad experience and her sexual harassment allegation. She never fully acknowledged that her sexual harassment claim and removal were denied by separate administrative bodies. The Grievant admitted that she was removed but failed to emphasize that her removal was based on failure of good behavior or neglect of duty. Under direct examination the following exchange took place between the Grievant and her advocate:

U When you were asked during your pre-disciplinary hearing the reasons for leaving this information off of your application, what did you give as the reason to Mr. Hurley?

W Mr. Hurley?

U Yes, the reasons.

W I told Mr. Hurley the same thing I told Laurie Smith. I told him that I walked off my job because I was sexually harassed. I told him that I was removed because I filed sexual harassment charges against an officer. I told him that when they questioned me about my application that I did put my jobs in chronological order. I told him all three of these things in all of my hearings that I had. How they recorded them I don't know.

It is almost as if the Grievant felt that her removal would be held up to greater scrutiny, or be minimized, if it dealt with sexual harassment rather than leaving her post.

Another line of questioning further suggests that the Grievant failed to be totally truthful regarding the outcome of the Personnel Board of Review process. The following exchange took place during direct examination and deals with the Grievant's Investigatory Interview with Laurie Smith:

U Did you attend your investigatory interview with Laurie Smith?

W Yes I did.

U Did you tell Laurie Smith, who conducted the interview, that you had been reinstated by the Personnel Board of Review?

W I told her that what I thought was reinstatement was coming back into the state's system when I got a job with Rehab Services Commission. That is what I thought was reinstatement. She thought it to be something else.

U Did you intend to make her believe that you were saying that you got your job back from COPH?

W No.

Again, the Grievant's rationale seems to dampen her credibility and supports the Employer's claims that she was uncooperative during the pre-arbitration process. An intelligent and articulate person such as the Grievant should have understood the nature of the question raised by Laurie Smith. To equate reinstatement by the Personnel Board of Review with reinstatement

into the State's system seems highly disingenuous and veiled with explicit deceit.

The Grievant's testimony regarding information permitted during the recruitment drive also raises credibility concerns. The Grievant indicated that she was told to focus on her good points when filling out her application. At the hearing, however, the Grievant acknowledged that she never fully expressed the nature of her "bad experience" at COPH. She admitted that she did not tell the individual about her removal and that he never specifically advised her to omit information. As such, the Grievant specifically misled the Employer during the investigatory process when she tendered this half-truth.

The unequal treatment claim raised by the Union was not properly supported. The primary focus of this claim requires one to establish that an aggrieved employee is similarly situated to a comparison cohort group of employees. This requires evidence and testimony concerning the circumstances surrounding the selected comparables and is not merely limited to an expression of outcome differences resulting from identical violations. As such, the circumstances surrounding Green's situation were not fully articulated to clarify the record. No questions were asked concerning the willful nature of Green's omission, whether a prior pattern had been established, nor whether the facility in question considered certain mitigating factors which caused it not to discipline Green.

In a like fashion, Dever proved to be an improper comparison. I am convinced that Dever did not intentionally nor willfully falsify her application. Rather, her omission was a mere oversight. Other considerations also evidence that Dever

was not similarly situated. At the hearing, there was much conjecture concerning Dever's removal from the County facility. Dever admitted that she was told to leave after she was found sleeping on the job, and yet, the facility never told her not to come back. As such, her actual status is a bit muddied and could easily be viewed as a resignation rather than a removal. This conclusion is especially possible since the Union failed to introduce any documentation evidencing Dever's removal. The record also indicates that Dever was concerned about the consequences associated with her omission. This concern, however, did not dampen her willingness to cooperate and participate in the Employer's investigatory attempts. Dever's outlook regarding the matter differed from the Grievant's evasive and uncooperative demeanor.

The various pretext arguments proposed by the Union were equally unsupported. Nothing in the record indicates that the removal decision was implemented as a consequence of the McDowell settlement. The entire matter was initially triggered by an information request tendered by the Chief Steward. Without this request, it is highly likely that the falsification would have never surfaced regardless of the settlement decree. As such, the investigation that followed and the associated removal decision were never obviously linked with the monetary settlement. The removal, in fact, took place prior to the date that the Grievant received her settlement. There is no cogent evidence suggesting any animus motivated by the settlement payment to the Grievant. I am also convinced that the Employer failed to promptly initiate an investigation concerning Dever's circumstance because it relied on Jones' advice. When confronted with the present

arbitration hearing, it decided to move forward with the investigation. Otherwise, the Union could have benefitted in terms of an unequal treatment comparison. These circumstances adequately rebut the Union's pretext claim.

The Union's reliance on the Grievant's job performance does not serve as a sufficient mitigating circumstance. A review of her Employee Performance Reviews (Joint Exhibit 7) indicates that for the most part the Grievant met expected rating levels. Only one of the ratings, however, expresses an "above" expectation rating. As such, the Grievant's performance seems acceptable but far from superior.

The Union placed some emphasis on the time between falsification and disclosure. Any time lag which took place, however, was solely the result of the Grievant's willful falsification. Once it learned of the false statement, the Employer promptly initiated an investigation which resulted in removal. It also appears abundantly clear that proper timely disclosure during the selection process would have precluded the hiring of the Grievant.

Finally, such a pattern of falsification and deceit cannot be condoned by this Arbitrator. Correction facilities are clothed with numerous security considerations requiring honesty and forthrightness. Even though the Grievant has not engaged in similar activities since she became employed, her inability to truthfully confront her prior shortcomings raises certain unavoidable concerns and questions. In my judgement, the Employer should not have to assume these obvious risks especially when an honest disclosure would have precluded hiring.

AWARD

Based upon a careful consideration of all the evidence and argument on the issue, it is the decision of the Arbitrator that:

1. The Grievant was discharged for just cause; and
2. The grievance is denied.



Dr. David M. Pincus
Arbitrator

June 25, 1990

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