ARBITRATION SUMMARY AND AWARD LOG

OCB AWARD NUMBER: 537

OCB GRIEVANCE NUMBER: 27-15-90051500098-01-03

GRIEVANT NAME: FOLLROD, TIMOTHY

UNION: OCSEA, AFSCME

DEPARTMENT: REHABILITATION & CORRECTIONS

ARBITRATOR: SMITH, ANNA D.

MANAGEMENT ADVOCATE: DURKEE, THOMAS E.

2ND CHAIR: KITCHEN, LOU

UNION ADVOCATE: MAYER, PATRICK

ARBITRATION DATE: DECEMBER 7, 1990

DECISION DATE: JANUARY 7, 1991

DECISION: GRANTED

CONTRACT SECTIONS AND/OR ISSUES: REMOVAL FOR VIOLATION OF RULES OF CONDUCT: BUYING AN OLD BOAT FOR $100 FROM AN INMATE'S WIFE

HOLDING: "LENIENCY IS FOR THE EMPLOYER AND THE ARBITRATOR OUGHT NOT TO SUBSTITUTE HER JUDGDMENT FOR THAT OF THE EMPLOYER. HOWEVER, EMPLOYER HAS EXCEEDED THE BOUNDS OF REASONABLENESS IN THIS CASE." DISCHARGE IS REDUCED TO 30 DAY SUSPENSION WITHOUT PAY. GRIEVANT REINSTATED AND OTHERWISE MADE WHOLE.

ARB COST: $972.46

In the Matter of Arbitration
Between

THE STATE OF OHIO,
DEPARTMENT OF REHABILITATION
AND CORRECTIONS

and

OHIO CIVIL SERVICE EMPLOYEES
ASSOCIATION, LOCAL 11,
A.F.S.C.M.E., AFL-CIO

OPINION and AWARD

Anna D. Smith, Arbitrator
Case No. 27-15-900515-
98-01-03

Removal of Timothy Follrod

#537

I. Appearances

For the State of Ohio:

Thomas E. Durkee, Advocate, Ohio Department of Rehabilitation and Corrections
Lou Kitchen, Second Chair, Office of Collective Bargaining
Rex Zent, Warden, Madison Correctional Institution, Witness
Lana Stanley, Major, Madison Correctional Institution, Witness
Leroy Payton, Captain, Madison Correctional Institution, Witness
Jason Berchtold, Correction Officer, Madison Correctional Institution, Witness
Phil Lomax, Labor Relations Officer, Madison Correctional Institution, Observer

For OSCEA/AFSCME Local 11:

Patrick A. Mayer, Staff Representative and Advocate
Sharon Vanmeter Bailey, Staff Representative and Observer
Timothy L. Follrod, Grievant
Frank T. Penwell, President #4910, Madison Correctional Institution

II. Hearing

Pursuant to the procedures of the Parties a hearing was held at 9:15 a.m. on December 7, 1990 at the offices of the Ohio Civil Service Employees Association Local 11 A.F.S.C.M.E., 1680 Watermark Drive, Columbus, Ohio before Anna D. Smith,

Arbitrator. The Parties were given a full opportunity to present written evidence and documentation, to examine and cross-examine witnesses, who were sworn and excluded, and to argue their respective positions. No post-hearing briefs were filed in this dispute and the record was closed at the conclusion of oral argument, 1:00 p.m., December 7, 1990. The opinion and award is based solely on the record as described herein.

III. Issue

The Parties stipulated that the issue before the Arbitrator is:

> Was the removal of Timothy Follrod, grievant, on May 1, 1990, for just cause? If not, what should the remedy be?

IV. Stipulations

The Parties stipulated to the following facts:

1) Timothy Follrod was hired March 9, 1987, as a Correction Officer 2 at Madison Correctional Institution;
2) Grievant has no prior discipline;
3) Grievant was removed from his position May 1, 1990;
4) Grievant received the Department of Rehabilitation and Correction Standards of Employee Conduct;
5) Grievant purchased a metal boat and picked it up in July or August, 1989, for $100 from the home of inmate Radclife, #201-144, 4801 Palmetto Drive, Columbus, Ohio;
6) Grievant went to inmate Radclife's home on at least two occasions and telephoned approximately four times. The second time, the employee was not in violation of the Standards of Employee Conduct;
7) Inmate Radclife was incarcerated at Madison Correctional Institution when he discussed the boat for sale with grievant;
8) Grievant was assigned to Zone "A" kitchen when they discussed the sale of the boat;
9) Grievant neither asked for permission to purchase the boat from inmate Radclife nor reported his transaction;

10) Grievant submitted a statement dated April 4, 1990, to Captain Payton reporting the boat purchase;
11) There are no procedural issues remaining;
12) The grievance is properly before the Arbitrator to decide on the merits.

In addition, the following documents were received as joint exhibits:

1) State of Ohio/OCSEA Local 11 Contract, 1989-91;
2) Discipline Trail;
3) Grievance Trail;
4) Standards of Employee Conduct.

V. Relevant Contract Clauses

Article 24 Discipline

§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.

...

§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.

...

§24.05 - Imposition of Discipline

...

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

...

VI. Background

At the time of his removal in 1990, Timothy Follrod had been a Correction Officer 2 at the Madison Correctional Institution, an 1800-bed medium and minimum security facility, for three years. He had no prior disciplinary record, had received

a Letter of Commendation (Union Exhibit 3), was judged to be a good officer by his commanding officer, Captain Payton, and thought to be dependable by at least one of his peers, Jason Berchtold.

The facts of the matter which led to Follrod's removal are largely uncontested. Very simply, during the summer of 1989, he learned through an inmate of the institution that a 13-foot metal rowboat in poor condition was for sale. This knowledge was gained during a routine shakedown of the inmate's cell. An outdoorsman, Follrod became interested in purchasing the boat to restore it for his personal use. He subsequently telephoned the inmate's wife and made arrangements to buy it. In July or August he went to the inmate's house, picked up the boat, and paid $100.00 in cash. The inmate, who was still incarcerated, was not present, but a woman Follrod identified as the inmate's wife was. Follrod testified that he paid the money not to the wife, but to a man whom he believed was the owner of the boat and had worked on it. Assisting Follrod was a fellow officer and friend, Jason Berchtold. Berchtold was unaware of the connection to the inmate. After the boat was loaded, Berchtold waited in the truck for Follrod. He did not see the third man, did not see Follrod go into the house where the man allegedly took the money, and did not see money change hands. Neither officer reported the transaction at the time.

Sometime after the inmate was released, in November or December, the same two officers and a third, Michael Seitz,

visited at the inmate's home. A weapon was present; marijuana may also have been. This visit was not in violation of the Standards of Employee Conduct.

In March of 1990, an otherwise uninvolved officer reported what he had heard about the boat transaction to Captain Payton, who initiated an investigation. This investigation included interviews with staff members, a non-employee friend of the Grievant, and an employee of the Madison County Auto Title Department. On April 4, Payton and Deputy Warden Wamsley met with Follrod, who admitted to wrongdoing and supplied a written statement (Joint Exhibit 2). On April 5, Major Stanley conducted investigatory interviews with Officers Follrod, Berchtold, Chapman, Seitz and Clay. Her findings were consistent with the facts as outlined above (Joint Exhibit 2). The result of these investigations and April 13 predisciplinary conference was that Follrod was removed from his position as Correction Officer 2 effective May 1, 1990 for the following rule infractions:

> #23 Failure to report a violation of any work rule
>
> #39 Giving preferential treatment to an inmate, receiving or giving a favor or anything of value, dealing
>
> #40 Engaging in unauthorized personal relationship with an inmate, ex-inmate's [SIC], family or friends.
>
> Joint Exhibit 2

This removal was grieved on May 1 and subsequently processed through the grievance procedure to arbitration where is presently resides free of procedural defect.

VII. Positions of the Parties

Position of the Employer

The Employer states that the only fact of this case that is unclear is who got the $100 paid for the boat. It claims that circumstances support the inference that the inmate's wife received it: the transaction was initiated by a conversation with the inmate and the boat was picked up from his residence where his wife was present. The officer who accompanied the Grievant saw no other person.

The Employer goes on to point out that this transaction was unreported and unauthorized. Moreover, both the transaction and the relationship with the inmate's family were purposefully concealed by the Grievant, aggravating the rule violation. Further aggravating the case is the inmate's record and reputation as a kingpin of illicit dealings in the institution.

Strict enforcement of the rules prohibiting dealings and personal relationships with inmates and their families is essential, the Agency contends, because of the potential security breach. Personal relationships and dealings with inmates compromise the officer's ability to perform his job enforcing institutional rules because he becomes open to manipulation and blackmail by the inmates. Once an employee begins dealing, both the employer and fellow employees lose their trust and confidence in him. Removal is thus commensurate with the actions of the Grievant. The seriousness of the offense is not

in the dollar value of the transaction, but in its threat to the security of the institution.

The Agency responds to the Union's argument of disparate treatment thusly:

1. The Jennings case (23-06-891113-0121-01-03, Arbitrator Rivera, October 5, 1990) sets forth the tests for disparate treatment, which this Arbitrator is asked to apply.
2. The Franks case (Union Exhibit 1) in which a written reprimand was issued is distinguished by facts and degree of guilt. Even so, it is but one case and does not make a pattern.
3. Other cases cited by the Union were either resolved by settlement agreements (but nevertheless removal was the original discipline imposed) or were the discipline of differently-situated exempt employees.
4. A review of all agency cases of Rule 39 and 40 violations in the 1989-90 period revealed 37 removals. Some of these might be distinguished, some may have been settled, but it is clear that termination is the common penalty across the Agency.
5. Of the nine cases going to arbitration, eight dismissals were upheld, one overturned. The activities involved ranged from receiving flowers to sex. These cases demonstrate the Agency's stand and dispell the disparate treatment argument.

In conclusion, the Employer asks that the grievance be denied in its entirety.

Position of the Union

With respect to facts, the Union stipulates that the purchase of the boat was arranged through the inmate, but argues that there is no evidence that the purchase was from the inmate. That is, it disputes the Employer's contention that the inmate or a member of his family was the recipient of the $100.

It further disputes the Agency's contention that the Grievant concealed the transaction. His actions were not furtive: they were done in daylight and in the presence of another employee who was not cautioned to hold his tongue. Moreover, the Grievant cooperated fully with the Agency's investigation and did not even initially exercise his right to Union representation.

The Union argues that the Grievant's cooperation in the investigation is not the only mitigating factor. For his three years of service prior to his dismissal he was a promising young officer. His disciplinary record was clean and he had even received a letter of commendation for his role in an incident occurring after the boat purchase but before it came to light.

The Union goes on to point out that the picture the Employer paints of the consequences of dealing with inmates is, in this case, pure speculation. The inmate in question was

released clean nine months after the transaction and there is no evidence to show that he benefitted from the deal or received favors or privilege from the Grievant. The Union concludes that the Employer had not shown the Grievant's capacity to perform his duties has been reduced, that institutional security has been compromised, or that either would be negatively affected if he were reinstated.

The Union further reminds the Arbitrator that dismissal is not corrective, and no evidence was presented to show that a less severe penalty would not have that effect.

While not wishing to minimize the importance of controlling dealing within the prisons, the Union notes that the disciplinary grid does not require removal on the first offense, permitting lesser penalties for lesser violations. What the Grievant did is not of the same degree of severity as dealing in contraband, guns or drugs on premises, which acts constitute a serious breach of security. Thus the Union argues that discharge is not commensurate with the severity of the violation.

Finally, the Union contends that similarly situated Employees have not been terminated for these rule infracitons, and cites several cases in support of disparate treatment (Keaton, O'Connor, Sampson, Cavanaugh, Seitz, Berchtold and Franks). With respect to the cases cited by Management, the Union urges the Arbitrator to read them all and note their different facts, all revolving around sex or drugs, furtive actions, and on-premises behavior.

In conclusion, the Union acknowledges the guilt of the Grievant, but asks the Arbitrator to adjust the penalty to make it more just, corrective and commensurate with the offense.

VIII. Opinion

Since the Union concedes to the guilt of the Grievant and no procedural questions are raised, the only issue for the Arbitrator to decide is the reasonableness of the penalty imposed by the Employer. Arguments put forth by the Union would have the discipline reduced for one or more of the following reasons:

1. **Nature of the offense.** Discharge is out of proportion to the Grievant's action. That is, this case represents a lesser violation for which a lesser penalty is justified.
2. **Probability of correction.** The Grievant's record prior to and after the incident make recurrence unlikely if he were to be reinstated.
3. **Discriminatory treatment.** Similarly situated employees have been differently disciplined for similar offenses.
4. **Mitigation.** The disciplinary grid provides for Employer discretion which should have been exercised in the Grievant's favor because of his length of service, absence of prior discipline, and cooperation with the investigation.

At the outset, let it be noted that the Arbitrator's authority to modify a termination is limited by the Contract only in cases of abuse, of which this is not one. Nevertheless, this Arbitrator subscribes to the theory that leniency is for the Employer and, provided just-cause requirements are met and the discipline is within the bounds of reason, the Arbitrator ought not to substitute her judgment for that of the Employer. In the instant case, however, I must agree with the Union that the Employer has exceeded the bounds of reasonableness.

First, with respect to the **nature of the offense**, I agree with Nicholas Menedis as quoted by Arbitrator Keenan that "'dealing with inmates and the introduction of contraband into the prison is so serious that the only commensurate penalty is removal'" (LeCI-87-D-003-AFSCME re Burg, November 11, 1988, p. 21). That is not the case here, though. No evidence has been offered that Follrod has been responsible for the introduction of guns, drugs, cigarettes or other contraband into the prison. Nor is it clear that Follrod dealt with the inmate in the sense of exchanging or negotiating for the exchange of benefit. The most that can be said with certainty is that the inmate provided information that led to an exchange. It is not at all clear that he owned the boat, used his influence with the owner, or acted as broker. While I agree with the Employer that an inference may be drawn from the fact of the wife's possession of the boat and Berchtold's testimony about seeing no third man, credit must also be given to Follrod's sworn testimony.

Although his statement is self-serving and he has shown a capacity to lie (with regard to a second visit to the Palmetto address), he has been consistent in this part of the story, and the Employer, itself, relies on much of the Grievant's version of events. Moreover, one wonders why he would invent a third man who could so easily be disputed by the witness. That Berchtold neither saw Follrod go into the house nor a third man is easily explained by Berchtold's location in the truck. His testimony on this matter, therefore, does not effectively rebut Follrod's. Additionally, the Union's point about the openness of the Grievant's behavior is well-taken. If he had, in fact, dealt with the inmate, it is logical that he would have been more secretive, at least to the point of admonishing Berchtold to keep silent or not using his assistance at all. Thus, while the inference that the Employer would have me draw is a reasonable one, sufficient doubt about the ownership of the boat, recipient of the money and role of the inmate leaves me unconvinced that the inmate or his wife sold the boat to the Grievant. In short, the case for dealing with an inmate is insufficiently established.

Turning now to Rule 40, engaging in an unauthorized relationship, there is no question that the Grievant had an unauthorized off-premises, off-duty interaction with the inmate's wife. That at least one additional visit to the Palmetto address followed (albeit after the inmate was released) suggests the relationship became more involved than mere participation

in an isolated economic exchange. While the relationship may not have been an extensive one, it gave the appearance of wrong-doing and therefore left the Grievant open to manipulation by inmates and distrust by co-workers who became aware of it. As the Employer points out, in the prison setting an officer's reputation influences his ability to perform his job through its impact on relationships with inmates and co-workers. Hence the rule prohibiting unauthorized off-duty relationships with a nexus to employment. Somewhere along the way in this case co-workers of the Grievant and even the Grievant himself began to question the propriety of his actions. As testified by Officer Berchtold and Warden Zent, knowledge of and suspicions about the relationship had an impact on the way co-workers and the Employer thought of the Grievant. His reputation was tarnished to the point where Berchtold would no longer socialize with him but, significantly, not to the point where Berchtold would not work with him. In fact, Berchtold testified that despite these events, he thought of Follrod as dependable and that he could count on him in times of need. Thus, while I cannot conclude that what the Grievant did so destroyed his reputation that he became or would become subject to inmate extortion or co-worker avoidance, he did take at least the first step along that path and went beyond the bounds of propriety. Even if he did not believe the inmate owned the boat, because of the association he ought not to have purchased it or gone to that particular address without the approval of his Employer. Having done so,

he should have reported it to prevent the opportunity for exploitation that exists when one has a secret. The Grievant is guilty of having violated Rule 40 and Rule 23, but the gravity of his offense is not such as to warrant termination.

Probability of Correction. Berchtold's testimony about his feelings toward the Grievant, the Grievant's good record before and after the incident, and the genuine remorse an motivation to make amends expressed at the hearing persuade me that a recurrence of this or similar violations is unlikely. I am further persuaded that his work relationships are not so eroded that his job performance is likely to be unacceptable. Neither has the Employer established that returning him to the workplace would place the security of the institution at risk. The existence and circumstances of the second visit to the Palmetto address are troublesome because they suggest a continuing association. However, very little information about it was revealed at the hearing and the parties stipulated it was not in violation of the Standards of Employee Conduct. I conclude that corrective discipline rather than termination is called for.

Discriminatory Treatment. Numerous cases of the same rule violations have been cited. All have been carefully read. Not surprisingly, not one is very much like this one. As to the Union's cases, the outcomes of the Sampson and Cavanaugh cases must be disregarded because they were the result of settlement agreements. Seitz and Berchtold were charged with

violations of Rule 23 only. The Keaton and O'Connor cases are similar in that they involve financial transactions, but are distinguished by the employees' exempt status and evidence of more extensive inmate influence in the affairs of the employees. Franks received a written reprimand for attempts to initiate personal relationships with several female visitors of inmates. The case has strong sexual overtones and the employee in question denied knowing the women and the behavior with which he was accused. Warden Zent testified the discipline may have been justified because this was a soft case based on innuendo and rumor, and no favors were actually exchanged. I agree with the Employer that the facts of the Franks case are different from the case at hand, but not entirely to the Employer's advantage. The Franks case involved multiple relationships evidently initiated by the employee who denied even knowing the women. Follrod's is a single spontaneous relationship acknowledged by him. Like the Franks case, there are soft elements: the case for dealing is circumstantial although it is clear that there was an exchange with someone. The greatest significance of the Franks case is that it provides one instance of the Employer's flexibility with regard to violations of Rule 40, even beyond the grid's provision for 5-10 day suspensions on a first offense. Warden Zent indicated further examples of flexibility as, for instance, when an employee gives an inmate a sandwich or permits an unauthorized phone call. Such flexibility is appropriate to provide for differing circumstances.

The question is, is it called for here? When the cases of sustained removals offered by the Employer are examined in light of the facts of the instant case, I think the answer must by in the affirmative.

Bastian, 1989. Fraternized with inmate's sister for 7-8 months without report. Abused office to obtain benefit of inmate's van (threat and coercion). Substantial prior discipline including major suspension.

Burg, 1988. Exchange of money and drugs for work assignment. Arbitrator held willingness alone grounds for discharge.

Dill, 1988. Sunglasses exchanged for cigarettes in an on-premises, intentional barter. Grievant unremorseful. Prior progressive discipline.

Johnson, 1990. Fraternized with inmate. Evidence of multiple and lengthy phone calls. Apparent intent to live with inmate on release. Insufficient evidence of sexual abuse. Clean 7-year record. Grievant lied until confronted with evidence.

Krafthefer, 1990. Intimate, physical relationship with inmate. Direct security threat (man-down alarm behind locked doors). Prior discipline. 1-1/2 year employee.

McNeal, 1987. Sexual activity with inmates. Gifts of alcohol and money. Arbitrator held conduct constituted physical abuse, therefore no authority to modify termination.

Morgan, 1990. Overwhelming evidence of extensive off-duty noncasual relationship with parolee initiated at institution. Manipulation of grievant by parolee. Grievant never told truth. No prior disciplines. 1-1/2 year employee.

Reed-Werling, 1990. On-duty noncasual relationship with inmate nurtured and sustained by grievant. Covert exchange of notes, letters, flowers, pictures. Grievant lied. No prior discipline. 1-year employee.

The sole case submitted by the Employer in which the discharge was overturned involved an alleged rape of an inmate for which the arbitrator found insufficient proof. Thus, all challenged-and-sustained removals were for established relationships, sex or contraband, and all but one were short-term employees and/or

had prior records. The instant case, on the other hand, involves a single financial transaction by a good-record three-year employee with a tenuous and limited connection to the inmate and his family member.

Because none of the cited cases is very like Follrod's, there is no basis for a finding of disparate treatment. Neither are the cited cases helpful in establishing a reasonable penalty for Follrod's offense. While serious, his actions are not as egregious as those previously resulting in discharge. On the other hand, the Franks case and testimony of Warden Zent establish that the Agency does not, as a rule, uniformly discharge for violation of Rule 40. Therefore, while I cannot find that Follrod has been disparately disciplined in comparison to like cases, I can and do find that a lesser penalty than discharge is called for by the facts at hand.

Appropriate Penalty. The warden testified that he took the totality of the circumstances into account when he decided to remove Follrod. Those circumstances were principally the reputation of the inmate, his record as a career criminal, and results of drug tests. Further aggravating circumstances are the second visit to the Palmetto address and the Grievant's lie about it in his first interview. These suggest a penalty harsher than the minimum 5-10 day suspension called for on the grid. Mitigating circumstances such as the Grievant's record and the seriousness and extent of the infraction have already been taken into account in the decision to overturn the dis-

charge and afford the Grievant an opportunity to correct his behavior. The Grievant will be returned to his job and suspended for thirty days.

IX. Award

The grievance is sustained. The Employer did not have just cause to remove the Grievant, Accordingly, the discharge is reduced to a thirty-day suspension without pay or benefits. The Grievant is to be reinstated to his former position as Correction Officer 2 and otherwise made whole. Back pay is to be reduced by such interim earnings as the Grievant may have had and he is to supply the Employer with such evidence of earnings as it may require.

Anna D. Smith

Anna D. Smith, Ph.D.
Arbitrator

Shaker Heights, Ohio
January 7, 1991