

OCB-OCSEA VOLUNTARY GRIEVANCE PROCEEDING  
ARBITRATION OPINION AND AWARD

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In The Matter of Arbitration  
Between:

THE STATE OF OHIO  
Department of Rehabilitation  
and Corrections

-and-

OHIO CIVIL SERVICE EMPLOYEES  
ASSOCIATION; OSCEA/AFSCME  
Local Union 11, State Unit 9

Case No 27-17(90-04-11)0086-01-09  
Marcum Suspension

Decision Issued:  
February 10, 1991

REPRESENTING THE EMPLOYER

Robert Thornton  
Tim D. Wagner

Labor Relations Specialist  
OCB Representative

REPRESENTING THE GRIEVANT

Steven W. Lieber  
Virginia M. Marcum

OCSEA Staff Representative  
Grievant

ISSUE:

Article 24: Whether or not just cause existed for the four-day Suspension of an Employee charged with gross carelessness in her work performance.

Jonathan Dworkin, Arbitrator  
9461 Vermillion Road  
Amherst, Ohio 44001

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Jonathan Dworkin, Arbitrator  
9461 Vermillion Road  
Amherst, Ohio 44001

## SUMMARY OF DISPUTE

The grievance protests a four-day disciplinary suspension imposed on an employee for negligent work performance. Grievant, an Account Clerk 2, was hired by the Ohio Department of Rehabilitation and Correction on October 24, 1988. She was assigned to the business office of the Northeast Pre-Release Center (NEPRC) in Cleveland. Her classification description called for, "working knowledge of accounting support systems." Her job was to work "under general supervision . . . to prepare vouchers, invoices, remittances for receipt & disbursement of funds & other related materials." Although the Account Clerk Classification Series contains a lower position title (Account Clerk 1), the Clerk 2 job was an entry-level position in Grievant's case.

During her first six months on the job, Grievant was judged a very satisfactory employee by her supervisors. She was given glowing job evaluations. On March 6, 1990, however, she received a four-day disciplinary suspension on charges that her carelessness and failure to follow administrative procedures caused NEPRC to double-pay invoices amounting to \$39,000. While some of the overpayments were recovered, the Institution suffered permanent loss of approximately \$6,000. These and other problems in the business office were both costly and embarrassing to the Agency; Supervision determined that Grievant's negligent misconduct was largely to blame. The Suspension Notice, sent to the Employee on March 6, 1990, aptly summarizes the Employer's allegations:

You are to be Suspended for the following infractions:

Rule #4: Carelessness resulting in loss, damage, unsafe act or delay in work production.

Rule #6c: Failure to follow post orders, administrative rules and/or written policies and procedures.

During your tenure in the Business Office, your carelessness in work resulted in duplicate payments to OPI [Ohio Penal Industries] and Central Office Supply in the amount of \$39,000.00, \$6,000.00 [of] which was lost to NEPRC permanently. In addition, your carelessness resulted in the payment of medical bills for released inmates, and vouchers being sent to wrong vendors and wrong vendor addresses, resulting in delay of work. Your lack of organized records resulted in overpayments to some vendors and no payments to others, creating chaos in the Business Office.

The Union denounces the discipline as a smoke screen to cover up Management's careless supervision and incompetent record keeping. It contends that Grievant worked under a Supervisor and simply followed his directives; that the erroneous invoices, vendor records, etc. were approved in writing by the Supervisor and the NEPRC Warden. Grievant aptly summarized the Union's perceptions in a written statement submitted on her behalf:

[I]t was not my violation of . . . rules, but rather the incompetence and mismanagement of my superiors that subsequently led to the inconsistent, inaccurate record keeping which resulted in the overpayments and double payments to vendors. My only violation was that I followed their orders.

Grievant's suspension was compounded by an involuntary transfer from the business office to the commissary. The work in the commissary was more routine, less skilled, and the Employee apparently thought it demeaning. The remedies demanded by the grievance include reinstatement to the business office in addition to pay restoration and expunction of the discipline from Agency records.

The grievance was presented to arbitration in writing, without a formal hearing. The Representatives furnished the Arbitrator with briefs, affidavits, and documentary evidence. Their stipulated issues are whether or not the suspension was for just cause and, if not, "what shall be the remedy?" The reference to just cause focuses on Article 24, §§24.01 and 24.02 of the Agreement which define and limit the State's authority to discipline Bargaining Unit employees. Section 24.01 makes just cause the touchstone of every disciplinary occurrence and places a strict burden of proof on the Employer:

#### 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.

Section 24.02 adds substance to the nebulous term, "just cause," by establishing a progressive-discipline requirement. It provides in part:

#### §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

The Agreement gives significant additional definition to "just cause" in the following excerpt from §24.05:

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

The parties stipulated that the grievance was timely and met all procedural prerequisites. They agreed that the Arbitrator was authorized to issue a conclusive award on the merits subject, however, to the following restrictions on arbitral jurisdiction in Article 25, §25.03 of the Agreement:

Only disputes involving the interpretation, application or alleged violation of a provision of the Agreement shall be subject to arbitration. The arbitrator shall have no power to add to, subtract from or modify any of the terms of this Agreement, nor shall he/she impose on either party a limitation or obligation not specifically required by the expressed language of this Agreement.

### ADDITIONAL FACTS AND CONTENTIONS

The business-office discrepancies were discovered in June, 1989, nearly a year before Grievant was suspended. The findings were not made by the Institution, they came to light in an audit by the Department's Bureau of Fiscal Audits. On August 15, 1989, the Bureau Auditor sent a memorandum to the NEPRC Warden outlining the shambles she had uncovered in the Institution's financial records. The memo mentioned a previous letter written two months earlier. That document was not offered into evidence. It might have been helpful because it seems that some of the deficiencies were corrected between June and August. It is frankly inconceivable that things could have been any worse than what the August 15 memo outlined. Its opening paragraph is astonishing:

In reference to our letter of June 28, 1989 concerning the Business Office, our preliminary findings of gross mismanagement were upheld by the total disorder found in the record keeping of this office. Although this condition has been improved by the change in personnel[i.e., Grievant's transfer to the commissary], much confusion still remains concerning which invoices are outstanding.

The memorandum continued with three pages of criticisms and recommendations in single-space typed format. It noted that there were no files of closed or open purchase orders for the current fiscal year. It charged that when the double payments for which Grievant was disciplined were brought to her Supervisor's attention, before the audit, the Supervisor did not take proper action to correct the situation and recover the overpayment. Vendor records were incomplete and some

contained thoughtless mistakes (such as address and zip-code errors). The Auditor found that, "[t]he internal controls of this office were non-existent." The Institution had been violating express procedures by purchasing food locally instead of through State contracts and Central Office Supply; as a result, according to the Auditor's memorandum, "Each time eggs were ordered from a local vendor an average of \$16.00 . . . was lost."

The Agency investigated the matter. It could not help but observe that Grievant's responsibilities comprehended issuing purchase orders, handling accounts payable, maintaining records, and dealing with vendors. While Supervision did sign the checks and purchase orders, she was the one who initiated the documents. She had been trained, supposedly knew her job, and it was apparent to the Employer that her carelessness was a major contributing factor in creating the difficulties. The Predisciplinary Hearing Officer agreed. He issued a report in which he concluded, "There is just cause for discipline."

A critical question which the Employer was compelled to answer was why the discipline took the form of a four-day suspension. Grievant's employment record was unblemished. The extent of discipline clearly fell outside the progressions required by Article 24, §24.02. Moreover, the Standards of Employee Conduct, issued by the Department of Rehabilitation and Correction, prescribe discipline ranging from a written reprimand to a one-day suspension for "Carelessness resulting in loss . . . or delay in work production . . ." On the face of the record, it seems that Grievant's suspension was harsh and not commensurate with the alleged infraction. But the Employer argues that it was entirely reasonable in view of the disastrous results of the Employee's neglect:



The employer contends that the discipline imposed was for just cause and commensurate with the offense, especially in light of the significant sums of money lost to the institution budget as a result of the carelessness of the grievant.<sup>1</sup>

As stated, Grievant contends she was guiltless -- that her only "crime" was following her "boss'" instructions. The Agency does not entirely disagree. It tacitly concedes that Supervision cannot escape some of the blame. It urges, however, that the problems started at Grievant's desk and she is answerable for her own blatant errors:

The Union would have you believe that all of these mistakes are the responsibility of the grievant's immediate supervisor, simply because he or the institution warden signed the majority of the incorrectly completed forms. While the Employer recognizes the culpability of its managers in situations such as this, we do not believe that fact relieves the grievant of her responsibilities to carry out the duties of her position.<sup>2</sup>

The issue of culpability is central to this dispute. Grievant introduced supporting evidence to prove her charge that the fault was entirely Management's. Most impressive was the established fact that, before the audit, she brought invoice improprieties to her Supervisor's attention at least twice and was instructed to handle them in a manner which obscured rather than corrected the flaws. Furthermore, she testified without refutation that the double payments

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<sup>1</sup> Employer brief, 3; emphasis added.

<sup>2</sup> Employer brief, 2.

of invoices were authorized and executed by her Supervisor and the NEPRC Superintendent (Warden).

In addition to alleging that Grievant was wrongfully accused, the Union answered the discipline with a potpourri of charges, all designed to achieve an arbitral finding that Grievant's suspension was contrary to contractual prohibitions against unjust and/or unduly punitive discipline. It contended that the Agency overreacted, ignoring the progressive-discipline mandate it accepted when it acquiesced to §24.02. The four-day suspension was not, in the Union's judgment, commensurate with the alleged offense. In fact, it violated the Department's own unilateral regulations.

The Union also made unconfirmed assertions that Grievant's training was inadequate and that the Supervisor threatened and intimidated her. It accused the Employer of violating Grievant's procedural due-process rights as well, by denying Union access to witnesses in the predisciplinary hearing and obtaining a "rubber-stamp" authorization for discipline from the Hearing Officer. In the Union's view, the Officer's findings lacked truly reflective, objective, judicious examination of the evidence.

A most influential aspect of the Union's case is the contention that the Employer inexcusably breached its contractual responsibility for timely discipline. Article 24, §24.02 imposes an unmistakable obligation in this regard:

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.<sup>3</sup>

The audit leading to the suspension began in June, 1989 and ended in August. The Institution apparently investigated Grievant's contribution to the difficulties as early as September, 1989; yet it was not until February, 1990 that the disciplinary process commenced, and late March when the Employee finally served the penalty. Indeed, the Predisciplinary Hearing Officer commented on the delay in his findings:

Mitigating Circumstances:

Timeliness of any discipline must be examined. The latest investigation into [Grievant's] actions was completed, according to statements made, about September to October of 1989.

The Union insists that for all or any of these reasons, the grievance should be sustained in its entirety.

OPINION

Management's unexplained delay is one of the puzzling aspects of this dispute. Another is the fact that the Employee received the most flattering job appraisals from her Supervisor; during the very period that she was supposedly performing so carelessly. It is to be recalled that she was a short-term employee when the audits took

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<sup>3</sup> Emphasis added.

place; she had been hired only eight months before. She received two formal evaluations, one in January, 1989 and the other in March. In the January performance report, the Supervisor wrote:

[Grievant] does more than the expected amount of work. She goes beyond her daily assigned task and does work to improve on her overall mission.

[Grievant] takes the time to do a neat and through [sic] job on all of her assigned duties. She keeps a neat, clean work area and an orderly file system. [Emphasis added.]

Since [Grievant] was hired she has been a model employee.

[Grievant] keeps neat and accurate records. She has no problem maintaining, preparing documents or retrieving information that is required.\*

Both appraisals rated the Employee as meeting or exceeding every expectation. The appraiser was the same Supervisor whom Grievant maintains was responsible for the record-keeping disasters. The March evaluation was fully as complimentary as the January one:

[Grievant] goes beyond expectations in the amount of work. She does much to improve on her daily task.

[Grievant] completes all work assigned to her in a neat and accurate manner.

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\* Emphasis added.

[Grievant] maintains, transcribes, and prepares all her work in a neat and accurate record keeping system.<sup>5</sup>

Frankly, inconsistencies are confusing to the Arbitrator. Was Grievant a "model employee" or an indifferent one whose carelessness placed NEPRC's financial records in wretched shambles? Was she hired into a situation which was already poorly administered and instructed by Supervision to continue following improper procedures? Was she a good employee who unfortunately happened to be in position to catch the flack from a disparaging audit of the facility? Was she, as the Union suggests, a convenient victim whose discipline was calculated to draw Departmental attention away from Supervision's inadequacies?

The evidence is insufficient to provide the Arbitrator with a firm basis for answering these questions. In fact, it supports affirmative answers to all of them. Because the conflict cannot be resolved with any degree of certainty, it follows that the Employer failed to meet a critical Article 24, §24.01 obligation -- "the burden of proof to establish just cause for any disciplinary action." Accordingly, the Arbitrator is compelled to sustain the grievance.

#### AWARD

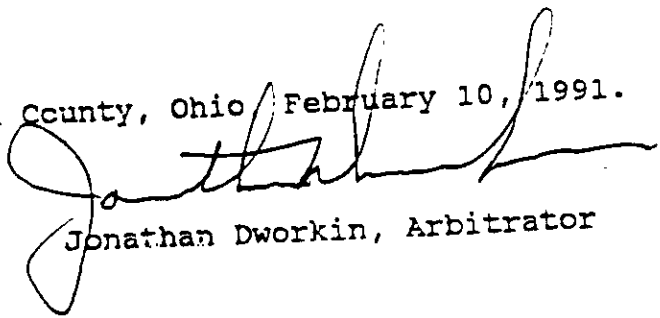
The grievance is sustained. The Employer is directed to purge its records entirely of references to this discipline and compensate Grievant for whatever wages and benefits she lost on account of the four-day suspension.

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<sup>5</sup> Emphasis added.

In view of the decision in a companion case, conditionally sustaining Grievant's subsequent removal, the Union's demand that she be reinstated to the business office is moot.

Decision issued at Lorain County, Ohio February 10, 1991.

A handwritten signature in black ink, appearing to read 'Jonathan Dworkin', written over the printed name.

Jonathan Dworkin, Arbitrator

OCB-OCSEA VOLUNTARY GRIEVANCE PROCEEDING  
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OHIO CIVIL SERVICE EMPLOYEES  
ASSOCIATION, OSCEA/AFSCME  
Local Union 11, State Unit 9

Case No 27-17(90-05-29)0094-01-09  
Marcum Removal

Decision Issued:  
February 11, 1991

REPRESENTING THE EMPLOYER

Robert Thornton  
Tim D. Wagner  
Thomas R. Israel

Labor Relations Specialist  
OCB Representative  
Deputy Warden

REPRESENTING THE GRIEVANT

Steven W. Lieber  
Virginia M. Marcum

OCSEA Staff Representative  
Grievant

ISSUE: Article 24: Whether or not just cause existed for removing  
prison employee charged with violating regulations prohibiting  
personal relationships with inmates.

Jonathan Dworkin, Arbitrator  
P.O. Box 236  
9461 Vermilion Road  
Amherst, Ohio 44001

## SUMMARY OF DISPUTE

This controversy stems from the removal of an eighteen-month employee of the Ohio Department of Rehabilitation and Corrections. Grievant was hired on October 24, 1988. She was assigned initially to the business office of the Northeast Pre-Release Center (NEPRC), a male prison in Cleveland. Several months later, she was transferred to the commissary under a cloud. She had been accused of extreme carelessness in the performance of duty and had received a four-day disciplinary suspension.<sup>1</sup>

The commissary is a kind of cage. Grievant worked inside, helping inmates outside purchase merchandise. There were also inmates assigned to work in the commissary whom she supervised. This brought her into closer contact with prisoners than was possible in the business office. One of the inmates she supervised was a neighborhood acquaintance with whom she eventually formed a close personal relationship. On March 21, 1990, the inmate was interviewed by the NEPRC Warden about his contacts with Grievant. The interview was taped and later transcribed. The seventeen typewritten pages accuse the Employee of a variety of improprieties. It is a sordid account, charging Grievant with making unsolicited professions of love, giving gifts of money, cigarettes, miscellaneous commissary items, drugs and whiskey. The inmate's sworn statement told of Grievant kissing and fondling him, expressing (unconsummated) promises of sexual inter-

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<sup>1</sup> See this Arbitrator's decision in companion case no. 27-17(90-04-11)0086-01-08 (issued February 10, 1991), in which the grievance resulting from the discipline was sustained. The ruling was based on the Employer's failure to prove just cause.



course, demanding that he telephone her regularly at night, and making several clandestine visits to him in his dormitory. He further alleged that Grievant permitted him to steal from the commissary.

The accusations were not entirely uncorroborated. The inmate produced a Valentine card (with the envelope) he claimed to have received from Grievant. It was signed, "Love Me." Enclosed was an undeniably incriminating note which stated:

Dear Pat, (Big Honkie)

Just a few lines to say hello and ask how things are going? I pray every night that you learn to curb that temper of yours (HA HA) well I hope you have a good Valentines and will see you soon.

Love Me

Beneath the message was a lipstick imprint inside a hand-drawn heart and the words, "P.S. Here's my Part the rest is up to you!" A handwriting expert was called upon to analyze the note and envelope. In his opinion, they were the "known writing of [Grievant]."

Next, Management subpoenaed Grievant's telephone records from Ohio Bell. They, too, were incriminating. In January and February, 1990, the Employee accepted thirty collect calls from the prison. With one or two exceptions, all were long -- most exceeded an hour, one lasted ninety-nine minutes.

On April 11, 1990, Grievant was subjected to a thorough investigatory interview by the Deputy Warden. She attended it, accompanied by a Union Representative. The session was taped and transcribed; it consisted of seventy-three typed pages. The interview was most

revealing. While the Employee vigorously denied carrying on a love affair with the inmate and most of the other accusations, she did admit that she had formed a special friendship with him on a purely platonic basis. She said that they fell into the friendship naturally; they had many mutual acquaintances, and it happened "just because we were together in the Commissary and we would sit and talk about everything."<sup>2</sup> Although the Deputy Warden subjected her to energetic cross-examination, she stuck to her denials and tried to explain her admissions. The following excerpt is characteristic of the dialogue:

Q. [by the Deputy Warden] Why did you send the inmate a Valentine's card?

A. [Grievant] We were close friends and he knows everyone I know, I know everyone he knows, and when he started working for me we talked, and we just knew everybody and became close friends.

Q. What is your definition, when you say we became close friends, what does that mean to you?

A. I was like, I listened to him talk, I was like a sister kind of thing or you know, would talk to him about his family and how he was going to get out and get a job, just you know, how he was going to straighten his life up and wasn't coming back to prison and things like that. A friendship.

Q. Why did you develop this friendship with an inmate?

A. Probably because we all, he knew everyone I knew and I knew everyone he knew, we would sit and talk about everybody, like he knows all my nephews, my nephews all know him, and he knew one of the guys that I was going with on the west side, I didn't care for him, you know just back and forth talking like you do with

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<sup>2</sup> Grievant's testimony

a friend. We became close like, you know, I always talked with him about all his problems and how he was going to straighten himself out and things like that.

The Deputy Warden closely interrogated Grievant about the peculiar Valentine card with the lipstick imprint. It appeared sexually suggestive; if it wasn't, what was its purpose? The Employee stated that the lip print was a joke. She said that inmates frequently teased her about her mouth, telling her she had "perfect lips." They made other provocative remarks as well, but she never reported them (contrary to specific Departmental Rules). She felt that reporting such occurrences might cause unnecessary tension between her and the inmates -- perhaps placing her in danger of retaliation. Besides, she felt well able to keep those making the remarks in line with her own brand of snappy retorts. For example, if an inmate made a sexually loaded comment to her, she might respond, "Yeah, in your wildest dreams."

Grievant admitted accepting the collect telephone calls. But stated that they were neither for her or from the inmate in question. She had befriended another inmate and, at his request, had arranged a long-distance (telephone) liaison with one of her "girlfriends." The calls were between the "girlfriend" and the other inmate. Grievant insisted that the inmate who had been her friend and became her accuser never telephoned her at home.

Of all Grievant's admissions, the most damaging was that she understood at the time she was carrying on these relationships that her actions violated fundamental rules governing her employment. The inmate reported that the Employee cautioned him not to reveal

their friendship because her job could hang in the balance. Grievant candidly conceded making the statement.

After reviewing the evidence, NEPRC Management concluded that even if all Grievant's denials were authentic, her admissions were enough to support charges that she had violated critical employee-conduct regulations. The Department of Rehabilitation and Correction has compiled a cogent, comprehensive document entitled, "Standards of Employee Conduct." Each employee receives a copy and training on conduct that is permitted and prohibited. Grievant's violations fell under the following provisions of the Standards:

#### Personal Conduct

- . . . . .
2. Employees shall not, without authorization from the Appointing Authority, allow themselves to show partiality toward or become emotionally, physically, or financially involved with inmates . . . or establish a pattern of social fraternization with same.  
  
b. An employee shall not visit an inmate . . . while such an individual is under the custody and control of the Department, unless such a visit is given prior authorization by the employee's Appointing Authority, or the visit is part of the employee's job duties.  
  
c. An employee who becomes involved in a set of circumstances as described above must advise his supervisor, who is responsible for informing the Appointing Authority or personnel officer.
3. No employee shall show favoritism or give preferential treatment to one or more inmates . . . . .

Accompanying the Rules is a section entitled , "Schedule of Rule Violations and Penalties." It is a list of misconduct categories with potential penalties. In a preface, the Department clarifies that the penalties are intended as guidelines, not dictates; that consistent with the Agreement and sound managerial philosophy, careful investigation, full consideration of mitigating and intensifying factors, and recognition of the individual nature of each offense should be used to decide what constitutes commensurate discipline.

The principal charges against Grievant are "Giving preferential treatment to an inmate" and "Engaging in unauthorized personal relationship(s) with inmates." Each carries the suggested penalty range of a five-day suspension to removal for a first offense. The evidence confirms that, except in compelling circumstances, the Department imposes removal in these cases.

Article 24, §24.04 grants every employee facing suspension or discharge the right to a preliminary hearing. Grievant's hearing took place on April 16, 1990. The Hearing Officer issued findings authorizing discipline the following day and, the day after that (April 18), the Removal Notice was drafted by the Institution Warden. It was signed on behalf of the Department on May 5. As of May 15, 1990, Grievant's employment was terminated.

A timely grievance challenging the removal was initiated and processed to arbitration. It was heard in Columbus, Ohio on November 15, 1990. The parties' Advocates stipulated that the grievance was arbitrable and the Arbitrator was authorized to issue a conclusive award on its merits. It should be observed that the scope of arbitral

authority is carefully circumscribed by the following language in Article 25, §25.03 of the Agreement:

Only disputes involving the interpretation, application or alleged violation of a provision of the Agreement shall be subject to arbitration. The arbitrator shall have no power to add to, subtract from or modify any of the terms of this Agreement, nor shall he/she impose on either party a limitation or obligation not specifically required by the expressed language of this Agreement.

### THE ISSUES

The Representatives stipulated the broad issues to be decided: "Is the removal of grievant . . . for just cause? If not, what shall be the remedy?"

The principles of just cause are firmly implanted in the Agreement between these parties as exacting limitations on the State's disciplinary authority and Management Rights. Article 24 sets forth the just-cause mandate in both general and specific terms. Sections 24.01, 24.02, and 24.05 are pertinent to this dispute. They state in relevant part:

### 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.

#### ADDITIONAL FACTS AND CONTENTIONS

The penalty was most severe. Grievant was only an eighteen-month employee with a good record. Her actions, while admittedly in violation of Departmental Rules, seem innocuous. They caused no breach of security, jeopardized no one, and did not compromise Grievant's effectiveness as an employee. The Union points out that every inmate who was housed at NEPRC has since been released or transferred. The facility is now a women's prison. Thus, reinstating this Employee to her job as an Account Clerk could have no adverse effect.

The Union finds it hard to believe that there was not some undisclosed, discriminatory purpose behind what it views as the

Employer's knee-jerk dismissal of this Employee. It sees a link between this removal and a previous disciplinary action. In March, 1990, Grievant was suspended for allegedly mishandling accounts and causing overpayments to vendors. While that discipline was being processed, she was transferred from the business office to the commissary. As stated, if the transfer had not occurred, she would not have come into contact with the inmate and would still have a job today. Moreover, the former discipline was unjustified, and a grievance protesting it was pending when the removal was processed. The Union strongly suspects that the decision to remove Grievant rather than impose one of the more moderate penalties authorized by the Employer's own rules was retaliatory.

The Union can conceive of only one other explanation for the relentlessness of the Agency's response to the infraction -- that it actually believed the inmate's slanderous, unauthenticated attack on Grievant's reputation. If Supervision placed credence in the inmate's statement, the Union contends it acted with irresponsible gullibility. Convicts are characteristically manipulative and untrustworthy; they lie whenever it suits their purposes, and no one knows this fact of prison life better than managers and supervisors of the State's penal Institutions. The Union charges that NEPRC Supervision gave the inmate a valuable reason to make defamatory, outrageous accusations against Grievant (who had innocently befriended him). It promised him early release in exchange.<sup>3</sup>

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<sup>3</sup> This is a serious allegation, but a naked one. It stands unsupported by any evidence. It was raised only in argument, and no witness attested to or even mentioned the alleged bribe.



In its closing remarks, the Union raised the possibility that Grievant was the victim of disparate treatment. It introduced a document, dated November 13, 1990 (several months after Grievant's removal), which confirmed that a female Corrections Officer formed an unsanctioned relationship with an inmate's husband and made repeated telephone calls to the inmate's home. The penalty was a verbal reprimand.

The Employer's Advocate did not try to explain or justify the difference between Grievant's removal and the Correction Officer's verbal reprimand. He did not know the circumstances of the other incident and was not prepared to respond to it. The Union's submission was a surprise. He did, however, call attention to the fact that Grievant was a short-term employee without the length and quality of service which customarily plays a part in disciplinary mitigation. He also produced significant proof that removal was the penalty normally imposed for illicit interactions between employees and inmates. His evidence consisted of six recent examples of misconduct similar to what is at issue in this dispute.<sup>4</sup> All the employees were removed, even though some had service records five times longer than Grievant's. The discharges were uniformly affirmed in arbitration.

The Employer made many of the same arguments in this dispute as in those that went before. Personal relationships between prisoners and employees are always regarded by the Department as intolerable.

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<sup>4</sup> The evidence was in the form of arbitral decisions. Actually the Employer introduced seven, not six, but one was premised on attendance violations. The Arbitrator judged it to be irrelevant and dismissed it from consideration.

They can easily jeopardize the principal mission of a penal institution -- security. In his opening statement, the Employer's Representative explained why the Department is so forceful in its disciplinary responses to misconduct such as Grievant's:

This issue of an unauthorized relationship with an inmate is not new. Ever since there were inmates confined to prisons and ever since there were prison employees, this problem has existed. The relationship may seem, at first, innocuous. However, in all cases it becomes motivated by desire to manipulate [the employee] by the inmate for special treatment; whether it be sex, food, cigarettes, or any other difficult-to-secure items and conveniences; alcohol, drugs, or even perfume and sunglasses.

The Representative concluded by pointing out that these relationships are always designed to gain an advantage for the inmate at the expense of the employee. He stated: "Most start in tiny beginnings -- break just a little rule -- testing the water. Almost without exception, there is a hook at the end of the line."

The Employer tacitly agrees that Grievant was a victim; but the inmate, not the Institution was the oppressor. Somehow she was drawn into forming a relationship in violation of explicit, well known prohibitions. She voluntarily compromised her position as an employee, risking her safety as well as her co-workers'. In the Agency's view, she was the one who made herself unacceptable for continued employment. She forfeited her job long before she was removed from it.

When the Employer ended its presentation, it was the Union's turn to provide the Arbitrator with a rational foundation for second-guessing the Department and ordering the Employee's reinstatement.

Attempting to meet this burden, the Union called upon Grievant who gave sensitive, genuinely remorseful testimony in her own behalf. She straightforwardly acknowledged forming an impermissible friendship with an inmate, sending him a humorous Valentine card, and giving her telephone number to another inmate. She knew at the time that her conduct was wrong; she also knew it placed her job in jeopardy. She is at a loss to give a concrete explanation for her actions. She believes it would not have happened if she had not been humiliated by the forced transfer from the business office to the commissary. She became depressed and suffered a low self-image as a result. As she explained at the end of her testimony, "I made a mistake; I know it was wrong. But at the time I was down and didn't care what happened to me."

The Union pleads for understanding and forgiveness of Grievant's plight. It notes that the employment relationship is composed of human beings, and an institution cannot be human without compassion. Arbitrators have denied grievances such as this because the employee was unremorseful -- Grievant is obviously filled with remorse. They have denied similar grievances because the employee's action was willful -- Grievant was not willful, she was depressed. The Agency would not be harmed if this Employee were reinstated, and the Union urges that she be given a second chance.

#### OPINION

One matter should be disposed of at the outset. Part of the Employer's case consisted of the inmate's written statement implicating

Grievant in transporting contraband into the prison, sanctioning thefts from the commissary, and carrying on an intimate physical relationship with him. The Union does not believe it; the Arbitrator does not believe it; nor, for that matter, does the Employer actually believe it. The Agency tacitly concedes that the statement is unreliable even though the inmate allegedly passed a polygraph test. As Management knows all too well, prisoners are as likely to lie as tell the truth. Their exclusive motivations are their self-interests, and their unsupported statements, whether or not they are given under oath, cannot be considered valid. If there is one common strain among prison inmates, it is their contempt for truth.

Nevertheless, the Employer maintains that the misconduct admitted by Grievant, without the other accusations, was sufficient just cause for her removal. In its Step 3 Answer to the grievance, the Agency wrote:

While there is nothing but the inmate's word in a polygraph that the grievant fondled him in his room, kissed him at other places in the institution, brought and gave him Valium and reefer, and bought and gave him alcohol, that which has been undisputably proven and admitted, is sufficient to find that just cause existed for discipline. Removal from her position is commensurate with the offense. There can be little speculation to how far this employee might go for this inmate that would seriously jeopardize the security of the institution.

Obviously, the Department's opinion is that if Grievant's admissions were the only evidence in this case, it would be sufficient for the removal to meet just-cause requirements. This concept finds support

in the arbitral decisions submitted by the Employer. Several of them merit special comment.

In one of the cases, a Corrections Officer was charged with accepting money (and expressing willingness to accept marijuana) in exchange for granting an inmate choice work assignments. The Officer was discharged, and the resulting grievance was appealed to arbitration. Arbitrator Frank Keenan denied the grievance, noting:

[I]t is simply self-evident that such dealings with inmates . . . jeopardizes not only the officer himself but others working with him as well, and in this manner adversely affects the safety and security of the entire staff.<sup>5</sup>

More recently, a Food Service Coordinator at Lima Correctional Institution was discharged for engaging in an intense relationship with an inmate which continued after the inmate's parole. The State's contention that such relationships are always manipulative was confirmed when the parolee burglarized the employee's home. One of the Union's contentions in arbitration was that the State's action against the Employee was without just cause because it contemplated off-duty behavior. Arbitrator David Pincus disagreed. He held:

Although the activities engaged in did not directly impact the employment relationship, the cast potentially negative implications on the grievant's ability and suitability in performing job functions properly. One can only surmise the devastating impact on the facility if the parolee had continued to manipulate the grievant for other

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<sup>5</sup> Case No. G87-2438, page 20. Decision issued, November 11, 1990.

purposes. All employees working in a corrections environment are responsible for security. The series of circumstances described above indicate that the grievant represents a potential security risk. Within this particular job setting, the employer should not be required to accept such a risk because any negative outcome can devastate the mission of the institution and the safety of inmates and other personnel.<sup>6</sup>

A Corrections Officer in a women's pre-release center was charged with carrying on a torrid sexual affair with an inmate, and asking her to move in with him when she was released. His discharge was grieved and presented to arbitration before Rhonda R. Rivera. The grievant denied the sexual allegations, testifying that the evidence against him, including a telephone record of collect calls from the institution to his home, did not detract from his denials. He said that his relationship with the inmate was altruistic and his only interest in her was to aid her rehabilitation. Arbitrator Rivera accepted the grievant's statements as true, but still upheld the removal. She noted that helping inmates individually and personally was not in the employee's job description, and that his violations were deliberate.<sup>7</sup>

Willful misconduct caused Arbitrator Rivera to deny a similar grievance involving a seven-year workshop supervisor who was discharged for conspiring with an inmate to barter a pair of sunglasses for a carton of cigarettes. The penalty was demonstrably harsh, yet

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<sup>6</sup> Case No. 27-12-89-02-0030-01-03, page 21; emphasis added. Decision issued, February 20, 1990.

<sup>7</sup> Case No. 27-08(06-14-89)-014-01-03. Decision issued, January 16, 1990.

Arbitrator Rivera declined to rule that it was not commensurate with the misconduct. She held:

However, the question of commensurate punishment remains. The job of the Arbitrator is not to substitute her judgment for management's. The Grievant violated a clearly stated and reasonable work rule which he admitted under oath to understand. The stated possible discipline was dismissal. The Superintendent had the duty to determine whether any circumstances mitigated the violation. Reading the transcript and hearing from the Grievant himself, the Arbitrator cannot say that the Superintendent's judgment was unreasonable, capricious, or arbitrary. Reading and hearing the Grievant's words, the Superintendent could reasonably have found an intentional, unremorseful, willful action on the part of the Grievant justifying dismissal.\*

The Arbitrator has little argument with the prior cases, but finds only tangential connections to Grievant's circumstances. This Employee does not appear to be willful or resistant to supervisory authority. Her job evaluations confirm that she is a dedicated individual, willing to work hard. She would be a valuable asset to most employers. But she has a personality which is inconsistent with employment in a prison -- especially in the prison located in her neighborhood (NEPRC). She is a social person who apparently knew several of the inmates at the Center. As she testified, "It seemed everyone we knew was either in jail or had been in jail."

Her friendliness and native compassion for fellow human beings, including inmates, puts her out of place as an employee of a prison. She seems to lack the gloss of coolness and detachment that permits

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\* Case No. G87-2389, pages 13-14. Decision issued, November 3, 1988.

Corrections employees to distance themselves from their charges. Her own statement in the interview with the Deputy Warden was a profound admission of this characteristic. She was asked whether she communicated liking inmates, or how they would know that she liked them (as friends). Her response: "The way I am, I treat everybody nice."

The Arbitrator is compelled to agree with the Agency that Grievant's rule violations -- just the ones she admitted -- rendered her ineligible for reinstatement. In arriving at this conclusion, he takes special note of the Union's evidence that NEPRC has been converted to a women's prison, but finds curious the argument that reinstating Grievant would not pose the same problems. The contention is inconsistent with Grievant's testimony. She absolutely denied the inmate's sworn statement that he and she had a sexual relationship. The Union's argument seems to assume that the inmate's allegations were accurate -- that Grievant's violation was a response to heterosexual temptation which no longer can exist at this facility. But Grievant testified, under oath, that the relationship was social, not sexual, and the Arbitrator believes her. Grievant is a social being with demonstrated warmth and a marked capacity for forming friendships. In choosing friends, she does not discriminate against the lowest echelon of society -- prison convicts -- and there is no reason to suspect that she would not be capable of as close a friendship with a woman inmate as with a man.

The Arbitrator agrees that Grievant is entitled to compassion, but finds that the removal was for just cause. For that reason, he is powerless to overturn the discipline. Once just cause is estab-



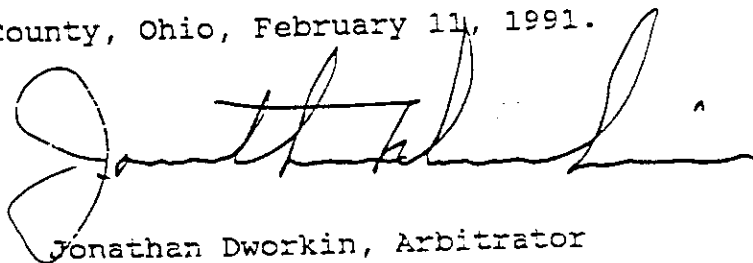
lished, an arbitrator has no authority to embellish job security by interposing his personal sympathies. The most this Arbitrator can do for Grievant is give her an opportunity to leave the Institution with a clean record. The Award will permit her to resign voluntarily and, if she does, the Employer will be required to expunge her record of the discipline and give no less than a neutral recommendation to potential future employers.

#### AWARD

The grievance is substantively denied. However, Grievant shall be permitted to write a backdated note to the Agency voluntarily resigning from her job as of May 15, 1990. If she chooses to do so, the State shall accept her resignation in lieu of the removal, and shall thereupon expunge her records of all indications of this discipline. Thereafter, the Employer shall give no less than a neutral recommendation should one be requested by potential future employers concerning Grievant.

If Grievant elects not to resign within ten days of the Union's receipt of this Award, the grievance shall stand denied.

Decision Issued at Lorain County, Ohio, February 14, 1991.



Jonathan Dworkin, Arbitrator