ARBITRATION SUMMARY AND AWARD LOG

OCB AWARD NUMBER: 631

OCB GRIEVANCE NUMBER: 27-26-900227-0076-02-12

GRIEVANT NAME: GORDON, CAROL A.

UNION: 1199

DEPARTMENT: REHAB & CORRECTIONS

ARBITRATOR: FULLMER, JERRY

MANAGEMENT ADVOCATE: COE, ROGER

2ND CHAIR: SAMPSON, RODNEY

UNION ADVOCATE: FOGT, JEFF

ARBITRATION DATE: JUNE 18, 1991

DECISION DATE: JULY 8, 1991

DECISION: DENIED

CONTRACT SECTIONS AND/OR ISSUES: REMOVAL FOR UNAUTHORIZED RELATIONSHIP WITH AN INMATE; ALSO UNION ALLEGES DISPARATE TREATMENT

HOLDING: NO DISPARATE TREATMENT PROVED BY UNION. "GRIEVANT WAS ON NOTICE BY VIRTUE OF THE EXPRESS TERMS OF RULE 46 A THAT REMOVAL WAS ONE OF THE PENALTIES WHICH COULD RESULT FROM AN EXCHANGE OF PERSONAL LETTERS WITH AN INMATE. SHE KNOWINGLY UNDERTOOK THE EXCHANGE AND TOOK SEVERAL STEPS TO CONCEAL THE EXCHANGE FROM DR&C."

COST: $846.37

IN THE MATTER OF ARBITRATION	)	
	)	
Between	)	
	)	
STATE OF OHIO,	)	
DEPARTMENT OF REHABILITATION AND CORRECTION	)	OPINION AND AWARD
	)	
The Employer	)	Carol A. Gordon
	)	
-and-	)	Removal Grievance
	)	
OHIO HEALTH CARE EMPLOYEES UNION DISTRICT 1199, WV/KY/OH NATIONAL UNION OF HOSPITAL AND HEALTH CARE EMPLOYEES, SEIU, AFL-CIO	)	27-26-(2/27/90)-076-02-12
	)	
The Union	)	

#631

APPEARANCES

For the Employer:

Roger A. Coe, Labor Relations Officer
Advocate

Rodney Sampson, 2d Chair
John K. Arbogast, DW/Programs, LICI
Bobby D. Couch, Unit mManager, LICI

For the Union:

Jeff Fogt, Organizer
Advocate

Robert P. Luken, Delegate
Carol A. Gordon, Grievant

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This case[1] concerns a claim by the Grievant, Carol A. Gordon, that her removal on February 5, 1990 for being involved in an unauthorized relationship with an inmate violated the terms of the parties' agreement.

I. FACTS

A. Background Facts

The Grievant prior to March of 1988 was employed by the State of Ohio in connection with parole work. In March of 1988 she transferred to the Lebanon Correctional Institution ("LeCI") as a Case Manager. In this capacity she acted as a social worker in connection with the inmates' problems. Because of the frequency of her contact with the inmates she had an office which was actually inside Unit 4. She worked under the direct supervision of Unit Manager Bobby D. Couch. In October, 1989 she was promoted to

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[1] The State of Ohio (hereafter referred to as "the Employer" and Ohio Health Care Employees Union, District 1199, WV/KY/OH National Union of Hospital and Health Care Employees, SEIU, AFL-CIO (hereafter referred to as "the Union"), are parties to a collective bargaining agreement (Jt. Ex. 1) providing in Article 7 for settlement of disputes through a grievance and arbitration procedure. A dispute has arisen between the parties concerning concerns a claim by the Grievant, Carol A. Gordon, that her removal on February 5, 1990 for being involved in an unauthorized relationship with an inmate violated the terms of the parties' agreement.

The grievance (Jt. Ex. 3), (27-26-(2/27/90)-076-02-12) concerning this matter was dated February 27, 1990. It was submitted to arbitration before this arbitrator who serves on the parties' permanent arbitration panel. A hearing was held on the merits of the case on June 18, 1991 in the Office of Collective Bargaining in Columbus, Ohio. Both advocates made opening and closing statements and presented and cross-examined witnesses.

a position as Substance Abuse Coordinator in the nearby Warren Correctional Institution ("WCI"). Her disciplinary record in these positions had apparently been good. She received only one warning and that for being a few minutes late on one occasion.

B. The Events Leading to the Removal

While the Grievant was working at LeCI she developed a personal relationship with one of the inmates, Steve Whitaker, who was incarcerated in Unit 4. The characterization of the relationship as "personal" is not in dispute. The Grievant admitted that it was "personal" in her testimony at the arbitration hearing.

In late 1989 an inmate reported that he had given a gold necklace to the Grievant. An investigation was started. It eventually resulted in the search of the cell shared by Inmate Whitaker and his cellmate. A packet (Employers Ex. 1) of some six letters was found hidden in the cell. The letters were handwritten ones of two-three pages, bearing dates of 12/23/90, 12/24/90, 12/25/90, 12/25/90, 12/26/90, and "Fri.". The letters were addressed to Inmate Whitaker's cellmate, Charles S. Steinmetz. They were unsigned. The letters bore return addresses of:

C. Stockton
1401 E. Main St.
Cnti, Ohio

The letters will not be quoted from since there is no need to further invade the privacy of the correspondents or cause any further embarrassment to those involved. A fair summary of the letters would indicate:

1. The writer was in love with Inmate Whitaker.

2. The writer expressed the desire to be able to engage in physical contact such as kissing and being unclothed with Inmate Whitaker at the first opportunity upon his release.

3. The writer wished to marry Inmate Whitaker upon his release.

4. There was some <u>past</u> romantic physical contact between the writer and Inmate Whitaker. "I want to kiss & touch you so bad it drives me crazy. I can only close my eyes & hunger for it to happen <u>again</u>." (emphasis added)

5. The writer and Inmate Whitaker were involved in planning their life together after his release, such as where they were going to live together and other aspects.

Following the discovery of the packet an investigation was undertaken which included the use of a forensic handwriting analyst and a tracing of the return addresses on the letters. The handwriting was indicated to be that of the Grievant and the return addresses to be either that of the Grievant's mother or a Post Office Box rented by the Grievant. In any event, the ultimate authorship of the letters is not in doubt for the purposes of this arbitration because the Union admitted on the record that the Grievant wrote the letters involved.

At the conclusion of the investigation and disciplinary process the Grievant was removed on February 5, 1990. The infractions were described as:

"On December 28, 1989, during the course of another investigation, evidence surfaced, in the form of several letters, indicating that you had become involved in as unauthorized personal relationship with an inmate Steve Whitaker #A163-670. Inmate Whitaker is incarcerated at Lebanon Correctional Institution and celled in Unit 4 (H-Block), while you were a Case Manager in that Unit. This relationship continued in the form of letters and telephone calls, after you transferred to Warren Correctional Institution. These letters made reference

to a romantic involvement (including physical contact). You were aware that you were violating Departmental rules by the various means of deception you used to avoid a detection (i.e. using aliases and a P.O. Box number). A handwriting expert identified a sample of your handwriting and the handwriting contained in the letters, found in Whitaker's cell as being one and the same. This is a violation of Standards of Employee Conduct Rules 35, 36, and 40."

In due course a grievance was filed on February 27, 1990. (Jt. Ex. 2). It stated "The grievant was unfairly and improperly discharged from her position at Warren Correctional Institution." The grievance made its way through the contractual steps to arbitration.

II. APPLICABLE CONTRACT PROVISIONS

ARTICLE 8 - DISCIPLINE

Section 8.01 Standard

Disciplinary action may be imposed upon an employee only for just cause.

Section 8.,02 Progressive Discipline

The principles of progressive discipline shall be followed. These principles usually include:

A. Verbal Reprimand
B. Written Reprimand
C. Suspension
D. Demotion or Removal

The application of these steps is contingent upon the type and occurrence of various disciplinary offenses.

III. ISSUE

Was the removal of the Grievant, Carol A. Gordon, on February 5, 1990 for just cause? If not, what shall be the remedy?

IV. POSITIONS OF THE PARTIES

The Employer Position

The evidence makes out a clear case of violation of the department rules and calls for the immediate removal of the Grievant from her employment. The rule involved is reasonably related to the mission of the department and the relationship that the Grievant established and carried on created a great risk of physical harm and potential extortion to both the Grievant and her fellow employees. The Grievant knew of the existence of the rule and that she was violating it. The removal was not punitive in nature. It was simply a matter of the risk of retaining the employee who had so thoroughly lost her judgment being too high for the department to face.

The Union has been forced to fall back on the claim of disparate treatment. This is an affirmative defense which has to be pleaded and proved and is directed to informing employees of the consequences of their actions. Here it is clear that the Grievant knew full well the consequences of her actions. The Union has been unable to show that the cases to which it cites involve "like or similar" cases. They are not even violations of the department's rules. The Employer requests that the arbitrator deny this grievance in its entirety.

The Union Position

The Union emphasizes the Grievant's virtually unblemished work record and the fact that removal is an unexpected consequence of

her actions. Other people in similar situations have not been removed and it is unfair to require the removal of the Grievant. The Employer has to resort to decisions under another contract, that of the OSCEA, to find support for its position on disparate treatment. This contract should have absolutely no application to the present case.

The Grievant may have violated Rule 46, but the violation surely does not call for the removal penalty. The relationship involved was one that pre-dated the Grievant's employment at Lebanon and indeed the incarceration of Inmate Whitaker there. Such relationships are common in institutional life and there was no showing by the Employer of any clear cut rule requiring that employees report the relationship to the authorities.

The Grievant's removal should be set aside and she should be restored to her position with full back pay.

V. DISCUSSION

A. Introduction

The Employer has established a set of "Standards of Employee Conduct" (Employer Ex. 3). Rule 46 a. of those Standards bans:

> "The exchange of personal letters, pictures, phone calls or information with an inmate, furloughee, parolee, or probationer without the express authorization of DR&C."

Part of the Standards is a grid which specifies the range of penalties for the 1st, 2nd, 3rd, 4th and 5th offenses. The penalties for violation of Rule 46 a. are set out as being from a 1 to 3 day suspension to removal. No attack is made by the Union

upon the validity of the rule.

Two questions are presented. The first is whether the Grievant's conduct violated the rule. If so, the second question is whether the removal penalty for the first offense was unduly severe in light of the penalties imposed by the Employer in other cases. We turn to those questions in the order stated.

B. The Violation of the Rule

As stated above the Grievant admits that she wrote the letters; that the relationship was personal; and that she knew the letters were in violation. Union Delegate Luken in his testimony similarly indicated that a rule violation took place but that the penalty was improper.

The only glimmer of a contention that the rule was not violated took place in the early portion of the Grievant's testimony in which she justified the relationship as a "pre-existing" one. This was based on the fact that her family and Inmate Whitaker's family knew each other back in Dayton and, apparently, that she knew Inmate Whitaker prior to his incarceration. But, there was no testimony that there was any romantic relationship which pre-dated Inmate Whitaker's incarceration. The relationship as of the end of 1989 thus appears to have been fundamentally different.

Even if there were a pre-existing relationship it must be kept in mind that Rule 46 a. is directed toward the "exchange of personal letters" with inmates without express authorization. There is no exception for pre-existing relationships. Had the Grievant

been exchanging letters with Inmate Whitaker prior to his incarceration, she should have sought the required authorization, for any continuance.

The arbitrator concludes that the Grievant's sending of the letters to Inmate Whitaker was a violation of Rule 46 a.

C. Disparate Penalties for Violations of the Rule

The Union contends essentially that "this sort of thing goes on all the time" in terms of relationships with inmates and that the most severe penalty that anyone has ever gotten is a suspension. The standards pertaining to this type of claim were recently set out by Arbitrator Rivera in an Employer/OSCEA case[2]:

> "Discipline, commensurate and progressive discipline, is designed to have a `corrective' educational effect, not just on the recipient but on all employees. If the discipline meted out to employees differs from that stated in official Employer statements or varies arbitrarily or discriminatorily among employees, the corrective effect is lost. Moreover, the `notice' element of procedural fairness is also destroyed. An employee cannot be on `notice' of consequences, if the consequences vary unreasonably or arbitrarily. (See: Seaway, 94 LA 389.)
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> Where an employer has shown a prima facie case of just cause for an employee's discipline, the allegation of disparate treatment shifts the burden of proof to the Union. AFSCME Ohio Council 8 and Ohio Council 8 Staff Employees Union (Feldman (1989), 92 LA (BNA) 1257; E.B. Eddy Paper, Inc. and United Paperworkers International Union AFL - CIO, Local 51 (Borland 1990), 94 LA (BNA) 325. The Union must, at a minimum, provide evidence that other employees in a similar situation to Grievant were treated differently. Showing a `similar situation' involves showing a number of important factors:
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> Step 1. The Union must show that other employees

[2] OCSEA, Local 11, AFSCME, AFL-CIO and OCBOhio Department of Mental Health; Grievance G23-06- (89-11-13)-01-03; Grievant Dennis Jennings; October 5, 1991.

have (a) committed the same or a very closely analogous offense and (b) have received different discipline.

Step 2. Once the proof of employees with similar offenses being disciplined differently has been shown, the question becomes do relevant factors exist (aggravating or mitigating) which rationally and fairly explain the different treatment.

These factors could include, but are not limited to, the following:

a. The degree of the employee's fault
b. The employee's length of service
c. The employee's prior discipline.

Factored into this appraisal must be some recognition that absolute homogeniety of discipline in a work force is impossible. What is required to quote Arbitrator Graham is a `range of reasonableness.' Moreover, the employer must have known or have had reason to have known of the particular disparities. One instance of disparate treatment on an employer's part (unless shown to have been an intentional act) will not suffice. On the other hand, a clear pattern of arbitrary or discriminatory discipline infers motivated different treatment which is manifestly prohibited. (Opinion, pages 13-15)

The Rivera opinion is not cited by the present arbitrator as binding precedent. It does, as the Union points out, involve a different union and a different contract. It is rather cited as a distillation of the general arbitral principles on the subject.

It appears to the present arbitrator that what Arbitrator Graham is quoted as referring to as a "range of reasonableness" refers to the basic fairness of the actions of the Employer. Assume, hypothetically, that, in July of 1989, a Substance Abuse Coordinator at the Warren Correctional Institution named Sally Smith had been found sending romantic letters to an inmate at Lebanon Correctional Institution. Assume that Sally Smith had been given only a three day suspension. The Grievant was found doing the

same thing six months later. Both had the same prior disciplinary record. On the assumed facts, it would offend basic notions of fairness and just cause to uphold the removal. There is no reason on these facts why Sally Smith should get a relatively light three day suspension and the Grievant a removal.

But, in the real world things seldom work out as crisply as the above hypothetical. The "benchmark" disciplinary penalties put forth by a union as justifying the lighter penalty may well be more remote in varying degrees from the case involved in the arbitration. The remoteness can be in terms of geography (e.g. instances at other institutions accross the State of Ohio); in terms of time (e.g. instances which took place five or ten years ago) and in terms of the offenses involved (e.g. different rules or different violations of the same rule).

We turn to the application of the standard described in the preceding paragraphs. In the present case the claim of disparate penalty rests largely upon a listing of some ten "Staff - Inmate Relationships" compiled by Union Delegate Luken (Un. Ex. 1 hereafter referred to simply as "the List"). The List sets out the institution where the relationship is claimed to have existed, the nature of the relationship and the disciplinary action taken. The arbitrator has examined this list carefully. It appears that the following aspects are relevant to the application of the standard described in the preceding paragraphs:

> 1. The List as described by Luken in his testimony was based on institutional scuttle rather than any systematic records. The Union no doubt maintains that they are forced to rely on such sources because of Employer

refusals to hand over records. Nevertheless the hearsay nature of the sources detracts from the strength of the evidence.

2. The Employer objected to the admission of the List in evidence on the ground that it had not been provided to the Employer during the grievance procedure. The Union indicated that the List had been prepared in the week preceding the arbitration hearing. It was admitted into evidence by the arbitrator. Nevertheless, it is clear that the Employer under the circumstances did not have a chance to research the incidents contained on the List and thus to show that they did not occur or that the circumstances were different. This too detracts from the strength of the evidence.

3. The Grievant is charged with violation of Rule 46 a. in exchanging personal letters with an inmate. None of the ten incidents deals with such an exchange by an employee.

4. For the most part the description of the incidents does not indicate whether the employee took his/her actions surreptitiously; openly without informing the DR&C; or openly after informing the DR&C. This factor obviously makes a difference in assessing the seriousness of the offenses.

5. Four of the ten incidents deal with institutions other than LeCI or WCI.

6. The descriptions of the incidents do not give any dates. This makes a difference as to the Employer's ability to cross-examine. It also makes a difference as to the fairness of using them for benchmarks in the sense of whether they were "fresh" in the minds of the parties.

After a review of these six factors, especially the third one dealing with the difference in the offenses, the arbitrator is of the opinion that it cannot be said that the Union has established the affirmative defense of disparate penalty. **The Grievant was on notice by virtue of the express terms of Rule 46 a. that removal was one of the penalties which could result from an exchange of personal letters with an inmate.** She knowingly undertook the

exchange and took several steps to conceal the exchange from the DR&C. The Employer has classified the offense as a severe one because it apparently opens employees to the possibility of blackmail and has the potential for interfering with the proper exercise of their judgment in emergency situations. For the reasons set out above the arbitrator is not convinced on the basis of the List that the decision of the Employer to impose the removal penalty was unfair or a violation of the contractual just cause standard.

VI. AWARD

Grievance denied.

Jerry A. Fullmer, Arbitrator

Made and entered this
8th day of July, 1991
at Cleveland, Ohio