ARBITRATION SUMMARY AND AWARD LOG

OCB AWARD NUMBER: 658

OCB GRIEVANCE NUMBER: 27-15-901218-0136-01-03

GRIEVANT NAME: SPEER, RAND

UNION: OCSEA/AFSCME

DEPARTMENT: REHABILITATION & CORRECTIONS

ARBITRATOR: SMITH, ANNA

MANAGEMENT ADVOCATE: DURKEE, TED

2ND CHAIR: KITCHEN, LOU

UNION ADVOCATE: VanMETER-BAILEY, SHARON

ARBITRATION DATE: JULY 17, 1991

DECISION DATE: AUGUST 30, 1991

DECISION: DENIED

CONTRACT SECTIONS AND/OR ISSUES: REMOVAL FOR MISUSING OFFICIAL POSITION FOR PERSONAL GAIN; GIVING PREFERENTIAL TREATMENT TO AN INMATE; AND EXCHANGING PERSONAL INFORMATION WITH AN INMATE.

HOLDING: UNION BASED ITS CASE ON CHARGES THAT MANAGEMENT "STACKED" THE CHARGES AGAINST GRIEVANT AND ACTED WITH MALICE TOWARDS HIM. EVEN THOUGH MANAGEMENT MAY HAVE HELD NEGATIVE VIEWS ABOUT MR. SPEER, THE ARBITRATOR FINDS THAT IT DID NOT BIAS THEIR ACTIONS - INVESTIGATION, PRE-D, GRIEVANCE PROCEDURE, AND PENALITY - AGAINST HIM. GRIEVANT REMOVED FOR JUST CAUSE.

COST: $994.64

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In the Matter of Arbitration
Between

STATE OF OHIO,
DEPARTMENT OF REHABILITATION
AND CORRECTIONS

and

OHIO CIVIL SERVICE EMPLOYEES
ASSOCIATION, LOCAL 11,
A.F.S.C.M.E., AFL/CIO
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OPINION and AWARD

Anna D. Smith, Arbitrator

Case 27-15-(12-18-90)-136-01-03

Rand W. Speer, Grievant

Removal

#658

I. Appearances

For the State of Ohio:

Thomas E. Durkee, Advocate and Labor Relations Officer, Department of Rehabilitation and Correction
Lou Kitchen, Second Chair, Office of Collective Bargaining
Jeff Wamsley, Deputy Warden-Programs, Madison Correctional Institution, Witness
Paul Lester, Correction Officer, Madison Correctional Institution, Witness
Dave Watkins, Correction Officer, Madison Correctional Institution, Witness
Derek Peterman, Auto Mechanic, Madison Correctional Institution, Witness
Carl Osborne, Inmate, Madison Correctional Institution, Witness
Ken Turner, Sergeant, Madison Correctional Institution, Witness
Leroy Payton, Investigator, Madison Correctional Institution, Witness

For OSCEA Local 11, AFSCME:

Sharon VanMeter-Bailey, Advocate and Staff Representative, OCSEA Local 11, AFSCME, AFL-CIO
Patrick Mayer, Second Chair and Staff Representative, OCSEA Local 11, AFSCME, AFL-CIO
Rand Speer, Grievant
James Mong, Attorney-at-Law, Witness
Phillip Lomax, Labor Relations Officer, Madison Correctional Institution, Witness
Frank Penwell, Chapter President, Observer
Jeff Steele, Steward, Observer.

II. Hearing

Pursuant to the procedures of the parties a hearing was held at 9:00 a.m. on July 17, 1991 at the offices of the Ohio Civil Service Employees Association, 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. At the conclusion of oral argument the record was left open to receive citations of supporting authority. The record was closed on July 23, 1991, reopened on August 21 by the Arbitrator without objection to receive corrections to joint submissions, and reclosed on August 22, 1991. This opinion and award is based solely on the record as described herein.

III. Issue

By agreement of the parties, the issue is:

Was the removal on December 14, 1990 of Rand Speer for just cause? If not, what should the remedy be?

IV. Joint Exhibits and Stipulations

Joint Exhibits

1. 1989-91 Collective Bargaining Agreement
2 Discipline Trail
3. Grievance Trail

Joint Stipulations of Fact

1. Rand Speer was hired on February 3, 1986, as a correction officer for London Correctional Institution and transferred to Madison Correctional Institution on February 15, 1987.

2. Grievant was discharged on December 14, 1990.

3. Grievant's prior discipline history includes a one-day suspension on May 23, 1989, for violation of the

Standards of Employee Conduct Rule #11.a., Sexual Harassment.

4. Grievance is properly before the Arbitrator.

V. Relevant Contract Provisions

Article 2 Non-Discrimination

§2.02 - Agreement Rights

No employee shall be discriminated against, intimidated, restrained, harassed or coerced in the exercise of rights granted by this Agreement, nor shall reassignments be made for these purposes.

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 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.

§24.03 - Supervisory Intimidation

An Employer representative shall not use the knowledge of an event giving rise to the imposition of discipline to intimidate, harass or coerce an employee.

...

§24.05 - Imposition of Discipline

The Agency Head or, in the absence of the Agency Head, the Acting Agency Head shall make a final decision on the recommended disciplinary action as soon as reasonably possible but no more than forty-five (45) days after the conclusion of the pre-disciplinary meeting.

...

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

Article 25 Grievance Procedure

§25.08 - Relevant Witnesses and Information

The Union may request specific documents, books, papers or witnesses reasonably available from the Employer and relevant to the grievance under consideration. Such request shall not be unreasonably denied.

VI. Background

This case has its genesis in a 1988-89 investigation of the Grievant's wife, Theresa Speer, who was employed as a correction officer at the mininum and medium security Madison Correctional Institution, as was her husband before his removal. As a result of the investigation--conducted by Captain Leroy Payton, now Institutional Investigator at the prison--Mrs. Speer filed sex discrimination charges against the facility. The case received some notoriety at the prison and in the community through the press.

The Grievant was discharged following an investigation of an inmate's claim that Correction Officer Speer had solicited information from him about Capt. Payton that could be used in a contemplated lawsuit against him over the 1988-89 investigation, and an irregular visit by Mrs. Speer's attorney, James Mong, to the inmate on August 11, 1990. The relationship of Attorney Mong to the Grievant, how he came to visit Inmate Osborne, and the subject of their conversation on that visit are in dispute and will be reviewed below.

The inmate reported the visit to Capt. Payton, who reported it to Deputy Warden Wamsley. Capt. Payton then obtained the attorney's business card from the inmate and the attorney's visitor sign-in sheet, and wrote a memo detailing the inmate's allegations

(Employer Ex. 1). On the basis of these, an investigation was launched: Major Stanley interviewed the inmate, obtaining his written statement September 27, 1990; the inmate voluntarily submitted to a polygraph on October 16, 1990; the polygraphist reported his opinion that the inmate was truthful in his answers to the questions put to him about the affair (Employer Ex. 5). On October 17, 1990, Deputy Warden Wamsley conducted a disciplinary investigatory interview with the Grievant, who admitted having talked with Inmate Osborne and knowing Mong to be his wife's attorney, but denied most of Osborne's charges, gave equivocal ("not quite") answers to questions about alleged inducements offered, and asserted that Osborne is a "Captain's snitch." At the conclusion of the interview, Wamsley ordered the Grievant and his union representative not to discuss the case with anyone except each other (Joint Ex. 2).

The following day Speer called his former supervisor, Ken Turner, who testified that the Grievant told him of the accusations against him, admitted he told Inmate Osborne he would go to the papers for him, and asked Turner to say that he doesn't "mess around with inmates." Turner reported the incident (Employer Ex. 12).

Correction Officer Lester saw the Grievant the morning he was placed on administrative leave. He testified the Grievant appeared mildly upset and stated to Lester that he did not understand why management was mad at him for doing something that management itself does: he was just trying to get information on someone

else. Lester further testified to his positive experience with the inmate when Osborne was his clerk at London Correctional Institution.

On October 22, 1990, Attorney Mong wrote to Warden Zent, stating amongst else that his activities with inmates at Madison Correctional Institution "have nothing to do with Mr. Speer" and requesting permission to attend disciplinary meetings (Union Ex. 3).

A predisciplinary conference was held on October 29, 1990, Phillip Lomax, Labor Relations Officer, presiding. Attorney Mong appeared on behalf of the Grievant. Mr. Lomax nevertheless concluded that there was just cause for discipline (Union Ex. 4). He testified that his report was placed in the Union mailbox, as was usual. Speer, however, testified that he did not receive it until after he was terminated. The removal order was signed by Department of Rehabilitation and Corrections Director Wilson on December 12, 1990 and served on December 14, 1990 (Joint Ex. 2). Rule infractions cited on the removal order are:

18 - Misusing official position for personal gain;
45 - Giving preferential treatment to an inmate, dealing;
46 (A) - The exchange of personal information with an inmate.

At the time of his removal, Rand Speer had worked for the Department for nearly five years. He had held a variety of Union offices, including president, and had had occasion to file grievances and unfair labor practice charges against his employer. He had completed a variety of law enforcement training programs, both through this employer and elsewhere (Union Ex. 7). He also

testified that he had been on special committees and task forces, and received recognition for his efforts. According to Payton, he was a "boisterous but average" officer when Payton supervised him. The Grievant, himself, stated he was evaluated as a fair officer: not a star, not a laggard. Speer had a one-day suspension on his record, for sexual harassment, dated May 23, 1989.

A grievance was filed on December 14, 1990, alleging violations of articles "2.01, 2.02, 24.01, 24.02, 24.03, 24.04, 24.05, disparate treatment, and any other article, law, policy or procedure that apply" (Joint Ex. 3).

On January 10, 1991, Payton received from the Warden records on institutional phones available to inmates and staff. He thereupon began an investigation that involved the Grievant's personal phone. The records and reports of this investigation were offered and then withdrawn as evidence in this arbitration. Payton testified that he did not know how long the Warden had the records. He also stated that he gave Labor Relations Officer Lomax a copy when requested after January 10. At the time of the predisciplinary hearing Mr. Lomax was not aware if there had been an attempt to check the inmate's dorm phone records.

A Step 3 meeting was held on January 14, 1991. At this meeting, the Union raised among else two procedural objections. One was that the Employer did not provide telephone records as requested by the Union, in violation of Article 25.08. The other was that the Employer did not impose discipline until after the 45-day time limit specified by the Contract (Article 24.05) (Joint Ex.

3). The grievance was denied and subsequently moved to arbitration where it presently resides.

Management's Version of the Relevant Events

According to the testimony of Payton and Inmate Osborne, the inmate reported to Payton in the summer of 1990 that the Grievant had approached the inmate for any "dirt" the inmate could dig up on Payton to help Speer in a contemplated lawsuit against Payton for the alleged improprieties in the investigation of his wife. Osborne testified that Speer said Payton was out of control. He had destroyed the Speers' personal lives. According to Osborne, Speer first wanted Payton's job and money. Then he changed his objective: he wanted to get part of Payton's paycheck every week. The inmate claimed in his written statement given September 27, 1990 that Speer offered him certain inducements: "the attorney would work on getting me out of prison for my assistance" and "nothing would happen to me, and if anything did he would quit his job and go to the newspapers to help me" (Employer Ex. 15). He further testified that he was approached multiple times over the course of more than a year. These conversations took place at the garage where he was then assigned. Auto mechanic Derek Peterman confirmed that the inmate and Grievant had conversations at the garage, including some of a personal nature. However, he did not hear anything related to the events surrounding the grievance, and other correction officers talked with Osborne as well. When approached, Osborne stalled, saying he would let Speer know. He reported the alleged solicitation to Payton, for whom he had once

clerked. Payton said to keep him posted, and reported the inmate's claim to Deputy Warden Wamsley. It was decided that there was insufficient evidence to launch an investigation.

On one of these alleged approaches, Speer is claimed to have given the inmate the business card of Attorney Mong and told the inmate to call him at 4:00 p.m. According to the inmate, Mong was expecting his call and asked if he could visit him that Saturday, before he left the country on a trip. The inmate did not do the paperwork that would have given the attorney the right to visit him, for he did not really expect to see him. Nevertheless, Mong appeared at the prison on Saturday, August 11, 1990 and was admitted, against Administrative Regulation 5120-9-20. The inmate testified that Mr. Mong asked him about his own case, explaining that he could then claim that was the subject of their conversation. Then they talked about Speer's legal affairs and Mong asked him if he had any information for him about Payton. The inmate had nothing to give. The inmate subsequently reported the visit to Payton. He testified that he felt the situation was out of hand and, being caught between two staff members, feared retaliation, particularly as other staff chose up sides.

The Union's Version of the Relevant Events

Attorney Mong testified that he represented the Grievant's wife since mid-1989. The Grievant did not become his client until he was joined to Mrs. Speer's lawsuit against Payton et al. in January, 1991. Moreover, he said his only discussion about Inmate Osborne with the Speers was whether they knew him, and they did.

Mr. Mong also testified as to how he came to visit the inmate on August 11, 1990. He said that he received an anonymous phone call from someone--he cannot remember exactly when or whether the caller was a male or female. However, he thinks it was a female who used the name "Osborne." The caller asked for his assistance in helping an inmate prepare for a parole hearing. Mong testified he went to visit the inmate according to directions and out of protocol on a weekend in August, 1990--he thought on August 11. He had put the visit off for two or three weeks and wanted to do it before traveling on August 12. He told the visiting room that Osborne was a potential client and was escorted to meet Osborne. The door to the room was uncharacteristically left open and uniformed officers hung around the door but did not enter. On cross-examination, Mong stated that he and Osborne discussed the background of Osborne's case, his prior parole board hearings, and the next one. Mong might have raised the Payton-Speer issue. He asked if Osborne knew them. Mong declined to provide further information on this subject, claiming attorney-client privelege. He further testified that he might have given Osborne his card. After his visit with Osborne, he never again heard from him, nor was he contacted by Management until after he wrote the October 22 letter to Warden Zent (Union Exhibit 3). Mr. Mong stated he was asked at the prediscipliniary hearing if he gave his business card to Osborne. He said, "I would have." It was his custom to do so. The Hearing Officer's Report does not reflect the question or his

answer. Mong further testified that he does not remember much about the hearing.

The Grievant also testified about his relationship to Attorney Mong. He said that Mong was his wife's attorney, being engaged the date the retainer check drawn on their joint account was signed, February 22, 1990 (Employer Ex. 17). He became a party to the lawsuit when he was terminated on December 14. He denied the alleged relationship with the inmate--giving him the business card, e.g.--and testified that he had consistently done so from the time of the investigatory interview. He further testified that the predisciplinary hearing report was inaccurate: it is biased and omits a lot of Mong's and Wamsley's testimony, and an objection lodged by the steward. The Step 3 report, too, he said, omits objections raised by the Union. He did admit that he talked with Turner after the investigatory interview, but stated that he did so because he needed a character reference and Turner had been his supervisor. He said that statements he made to Turner were taken out of context: what he actually told Turner was that Payton said he--the Grievant--told the inmate he would quit his job and go to the newspapers for him. Speer also admitted that he had discussed his personal affairs prior to his discharge with a number of people and did talk with the inmate many times in the garage, but never had a conversation with him about Mong. He did not remember a conversation with C.O. Lester about his discharge.

VII. Arguments of the Parties

Arguments of the Employer

The Employer contends that it had just cause to remove Rand Speer from his position as correction officer. At first glance the case appears to be one just of contradictory statements between an officer and an inmate, with credibility as the issue. A second look, however, reveals more to it than that. Management's version of events is supported by three bargaining unit employees and one sergeant with specific recollections of discussions with the Grievant and statements he made about his lawsuit and use of the inmate in developing that lawsuit. The testimony of the Union witness Attorney Mong was vague, and he was unable to recall specific details. He testified that he had not represented any others at Madison Correctional Institution, but then changed his story when reminded on cross-examination. In the predisciplinary meeting he said he represented four inmates and ten employees. Mr. Mong has either poor recall or questionable credibility. Then there is the question of his compensation. That he expects to be paid for his appearance here suggests that his testimony is tainted. Nevertheless, he, like Management's witnesses, corroborated portions of the inmate's story.

Management's chief witness, the inmate, gave testimony consistent with his written statement. He also provided specific details: the urgency to contact the attorney was because of the out-of-country trip, a fact corroborated by the attorney; the numerous visits at the garage, corroborated by Peterman; the

business card was how he got the attorney's phone number and he did not hear of him in any other way; he had recently been before the parole board and got a five-year "flop," so he had no other motive to contact Mong except that provided by Speer. Osborne, Management contends, had nothing to gain by coming forward: no promises were made, no assistance with parole hearing, etc. He testified that he accepts his time and is making the best of it. On the other hand, he had something to lose: retaliation, loss of job status and privileges, hole time during the investigation, etc. Osborne testified that Speer told him Capt. Payton was out of control, that people were falling left and right, and he might be next.

Against this there is Speer's denial and his motivation: the newspaper articles made him angry; he wanted revenge against Payton--part of his paycheck each week as testified by Speer; the lawsuit by which the Speer family stands to gain substantially, even if settled out of court. It is improbable, Management asserts, that the lawsuit was only his wife's business.

Finally, the Employer cites the physical evidence in support of its case: the business card, the unusual Saturday visit supported by the sign-in sheet, and the personal check drawn on a joint account in February, 1990.

With respect to the Union's position, the Employer says that lacking facts and a credible case, the Union raises procedural smoke. First, it claims that the investigation was tainted by Payton's bias. Yet Payton's role was limited. He merely passed on information and was not involved in the discipline. Next the Union

claims the prediscipline was tainted. But Lomax was not in the supervisory chain and did not participate in the investigation. The hearing officer's role is not the same as an arbitrator's. The hearing officer must only find if there is probable cause. With respect to the hearing officer's report, Mong's testimony shows why Lomax accorded the weight he did to the evidence before him. Next the Union raises the serpentine of union animus. However, an allegation of harassment is not proof, and no independent proof was offered to support the claim. Two Union officers were available to testify on this and did not do so. In fact, Lomax had little recollection of Speer's union activity since Lomax was appointed. Finally, the Union raises timeliness of discipline. Arbitrators, the Employer claims, have ruled that §24.05 means that management has 45 days in which to make the final decision. Management's signature was fixed to the removal order on December 12, 44 days after the predisciplinary hearing.

In conclusion, the Employer believes that the case boils down to a credibility issue. If the Arbitrator looks at the whole picture she will see Management had more than the word of an inmate against that of an officer in making its decision. Therefore, the Employer asks that the removal be upheld and the grievance denied in its entirety.

Position of the Union

The Union contends that Management's case against the Grievant is motivated by a desire to retaliate against him for his union activities, a lawsuit brought by the Speers against the

institution, and for embarrassment suffered by the notoriety of Mrs. Speer's problems at the institution. As such, Management lacks just cause for removing the Grievant in violation of Article 24 and has also violated §2.02. It claims when Management got Rand Speer out of the way, it turned on his wife.

The investigation was not fair and thorough, according to the Union. Not all relevant witnesses were interviewed, notably Mr. Mong. The telephone logs were not checked to confirm the inmate's alleged call to Mr. Mong. Management personnel who were biased against the Grievant were used in the investigation and predisciplinary process.

Management documents were deliberately tainted: the Hearing Officer's Report omits Mr. Mong's testimony that he gave his business card to the inmate, and the Step 3 report omits the critical procedural objection raised by the Union about untimely imposition of discipline in violation of §24.05.

Management lacks clear and convincing evidence against the Grievant, the Union goes on. There is only the inmate's word, and he is a self-confessed liar and convicted murderer. The polygraph used to support his statement cannot be given great weight because of its known unreliability. That the inmate's testimony is asked to be judged more credible than that of a licensed attorney's appalls the Union. Beyond the inmate's testimony, there is nothing to link Speer to him since the business card was given to the inmate by the attorney, not Speer. Management makes much of the impropriety of the attorney's visit, but the Union contends that

that is a matter between Madison Correctional Institution and Mong, and does not involve the Grievant.

The charges against the Grievant were stacked. There could have been but one charge.

Discipline was imposed 46 days after the predisciplinary hearing in violation of §24.05. Failure to adhere to the terms of the Contract hinders the Union's ability to guarantee other employees the right of timely due process. If the Union missed a deadline for moving a grievance forward, it would be considered dropped.

In the Union's view, the penalty imposed is inappropriate. None of the charges call for an automatic removal on the first offense. Removal is not commensurate with the offense since no actual harm resulted. The Grievant's seniority and work record alone should mitigate the penalty. There is no evidence a lesser penalty would not have been corrective. Clearly, Management imposed this harsh discipline in retaliation for the Speers' civil action against the department and institution.

Finally, Management failed to adhere to §25.08 by not supplying phone records when requested.

The Union asks that the grievance be sustained, the Grievant reinstated, made whole, granted back pay including overtime, roll call and holiday pay, including any an all benefits due him. If the Arbitrator determines just cause for discipline did exist, the Union asks for a lesser, more commensurate penalty than removal.

VIII. Opinion of the Arbitrator

The Investigation and Predisciplinary Hearing

The first test of just cause at issue is the fairness and completeness of Management's investigation. It is true that the matter was brought to light through a report to a management official who has a stake in the outcome, being the subject of a lawsuit and potentially motivated by revenge. However, once Capt. Payton reported the inmate's allegations and turned over the two pieces of physical evidence, his role ceased. Thereafter, a number of other individuals--none of whom report to Payton--followed up on the report to ascertain the validity of its allegations and make disciplinary recommendations or decisions. Another management official the Union suggests was biased is Phillip Lomax, who conducted the predisciplinary hearing. Aside from the fact that this individual is management staff, the record contains no indication that he had a particular ax to grind. He recalled three grievances Speer had filed, but was not at the facility when Speer was chapter president. The Grievant testified that at the predisciplinary hearing Wamsley said he lied in a previous case, and that the Union objected to this. On the face of it, the Wamsley statement seems relevant, since the Grievant's credibility is at the heart of the present case. But without further information the Arbitrator has no way of knowing whether Management violated its own policy (Union Ex. 5) or the Contract (§24.03) in this particular intercourse some other way. In any event, Lomax testified that if Management made derogatory remarks about the

employee during the hearing, he cut them off, and Wamsley's alleged statement did not make it into the Hearing Officer's Report. Moreover, when asked about potential bias against Speer, Payton admitted that it was uppermost in his mind, but that he did not see any. If these individuals had ill feeling towards the Grievant, it was not manifested in evidence presented to the Arbitrator.

As to the completeness of the investigation, Management did not take the initiative to interview Attorney Mong. It did, however, hear from him at the predisciplinary hearing when he appeared on behalf of Mr. Speer. It also may not have checked the phone logs of the inmate's dorms prior to the predisciplinary meeting--no witness had knowledge of these records prior to January 10, 1991. Due process does not require that management turn over every stone in an investigation of charges against an employee, only that it actively seek to ascertain the validity of the charges. This means that it must look for proof, for disproof, and for extenuating circumstances. If it has made a reasonable effort to do so, then it has met its investigatory obligation. Here Management obtained Payton's report, the inmate's statement and polygraph, the Grievant's interview, the business card and signed visitor's report, and Turner's report. At the predisciplinary hearing it heard from Mr. Mong and received the Speers' check to him. The telephone records may have provided additional helpful information. Certainly the investigation would have been more complete with them, but it was not fundamentally unfair without them.

The Union contends that the Hearing Officer's Report is deliberately tainted since it omits Mr. Mong's testimony about his business card. A predisciplinary hearing officer is well advised not just to hear both sides of the case, but also to present his or her findings fairly, lest upper management make its disciplinary decision without a full understanding of the facts as they are known at the time. A crucial fact withheld deliberately or through careless oversight could result in management's decision being overturned, lax workplace discipline, and harm to the employment and bargaining relationships. But a hearing officer need not place everything in the report. Some judgment will be necessary as not all will be relevant. In the case of what Mr. Mong said about his business card, the omission did not harm the Grievant's case. In arbitration Mr. Mong did not testify that he gave the inmate his card or that he said he did at the predisciplinary hearing. What he said was he "would have." And to the question, "Did you leave him anything?" the reply was, "Maybe my card." Given that Mong was introduced to Lomax as Speer's attorney and the uncertainty of Mong's answers, one can readily see why Lomax did not think the evidence probative and that higher management would have given it little weight had it been reported. The Arbitrator further notes that Management's policy on predisciplinary hearings (Union Ex. 5) requires the Hearing Officer to set forth findings of fact, not produce a transcript of the proceeding.

Proof of Guilt

As proof of the charges against the Grievant, Management offers the testimony of the inmate and various supports that it claims lend credence to his testimony: the business card, the visitor's report, the polygraph results, written statements and interview reports, and the testimony of various witnesses. The business card and visitor's report are consistent with either Management's or Union's version of events. The polygraph cannot be credited because of its doubtful reliability. I am prepared to believe, as the Union suggests, that Speer's "not quite" answers to questions put to him in the investigatory interview were given with sarcasm. I thus take them to be denial of the charges rather than admission of wrong-doing. This leaves the testimony of the inmate and his written statement, which I find to be credible. Looking at the testimony and statement themselves, they are detailed, specific, consistent and do not contradict facts otherwise established. Inmate Osborne did not give evasive, vague, uncertain or conclusionary answers. To be sure, he did admit pleading "not guilty" when on trial for charges of kidnapping and murder. But this does not prove he lied about this matter. Correction Officer Lester, in fact, testified to Osborne's character, and his record while incarcerated speaks in his behalf. Nevertheless, because of Osborne's known capacity for dishonesty, his testimony here must be subjected to close scrutiny before it is accepted.

The Union also attacks the inmate's motive. Osborne did receive a desirable job assignment since the dismissal of the

Grievant. But he also received his most harsh discipline in over ten years of a relatively clean record since he was moved off death row, and he had a relatively privileged status in the penal system before the events of this case. He also had recently been before the parole board and was denied. It is therefore hard to see what he had to gain by coming forward, except what he said: he was caught between two officers and could best protect himself by coming clean.

There is also external support for his allegations. The auto machanic had observed conversations between the two at the garage with the identical frequency reported by Osborne; Osborne did not leave his office very often, but he did to talk to Speer; their conversational topics included personal material. Correction Officer Lester testified that Speer admitted to him on the morning he was placed on leave that he had tried "to get information on somebody else." Sgt. Turner reported a conversation he had with the Grievant following the investigatory interview. "That he told Osborne he would quit his job and go to the newspapers for him" (Employer Ex. 12) could mean that Speer said Wamsley, Payton or Osborne accused him of telling Osborne this, but on cross-examination Turner clarified that "Speer said he told Osborne he would go to the papers." In sum, the inmate's testimony is corroborated and credible. The Employer has a convincing case.

Against Management are the Grievant's denials and Attorney Mong's testimony. Mr. Mong's testimony is thoroughly ambiguous and therefore does not successfully weaken Management's case. He

remembered very little, and what he did recall was uncertain and open to interpretation. For example, he received an anonymous phone call, maybe from a female, and he was led to believe the name was "Osborne." If this anonymous person was a telephone operator with a collect phone call from Osborne, both Mr. Mong and the Grievant would have been telling the truth. There is a similar problem with the testimony about the business card: Mong does not state affirmatively that he gave it to Osborne; he merely implies that it was so. Yet a third problem is how he came to visit on a Saturday. He testified that he followed directions. The implication is that the anonymous caller provided the directions, but they could instead have been provided by the Speers who were also likely to be aware that it would be easier to get in on the weekend. A fourth problem is with the date of the phone call, which Mong says occurred long before August 10. Again Mr. Mong does not deny speaking with the inmate on August 10. In fact, he was not asked this. What he did say was that he got a phone call about the inmate in July. He well could have without negating the inmate's testimony that he called Mong on August 10 at 4 p.m. The inmate is specific about this and explains the date with a reason that would be hard to come by without information from either Speer or the attorney: the planned out-of-the-country trip by the attorney. Other points made by Management about the reliability of Mr. Mong's testimony are well taken: since he is apparently being paid on a contingency basis, he has a stake in the outcome; he changed his story about whether and whom he has represented at

Madison Correctional Institution; Osborne's current need for legal assistance, which Mong alleges was the motive for his visit, is remote. It is further noteworthy that Mr. Mong said he "might have raised" the Payton-Speer situation in his interview with Osborne, that he asked Osborne if he knew them, and <u>then</u> claimed attorney-client privilege for the rest of that conversation. From this the inference can be drawn that they had a conversation of substance on the matter, since Mong could have no other reason for claiming the privilege. This, too, supports the inmate's assertion that they talked about Payton and Speer.

Finally, there is the testimony of the Grievant. Unlike Mr. Mong's testimony, Speer's is unambiguous. He denies the charges entirely, even that Mong was his attorney prior to his removal. As corroboration of the latter claim, the Union offers Mr. Mong's testimony that when he paid the visit to Inmate Osborne, he only represented Theresa Speer in her sexual harassment action and the retainer check of February, 1990 signed by Mrs. Speer. Despite these disclaimers and the signature on the check, there is ample evidence that Speer was planning to sue his employer and/or members of the management staff before the visit to the inmate. Management witnesses testified he talked about it, and the Grievant even admitted it. Then there is the manner in which Mr. Mong does business: he evidently takes some time with his potential clients discussing their cases before establishing a formal relationship. He testified that this was the case with Osborne, and both he and Speer said it was so with Mrs. Speer. It is reasonable to conclude

that Mong had a relationship with Mr. Speer as well as with his wife before the suit was filed and before Speer was terminated. Speer's termination and the investigation preceding it merely added fuel to the lawsuit from which both Speers stood to gain.

There are other indications that the Grievant's testimony is self-serving: he predicts he will be one of the best correction officers if reinstated to his former position, yet states his prior performance was fair, and gives no reason for the predicted improvement; and he states the third step report omits any mention of procedural objection except §25.08, when that document sets forth both parties' positions and the Step 3 response on the §24.05 objection (this document also discusses the Union's charge of supervisory intimidation, but in relation to Payton, not Wamsley).

In sum, the Grievant's testimony is self-serving, inconsistent with facts independently established, and lacking in reliable corroboration. As such, it does not create sufficient doubt about Management's case for a finding of no just cause. I accordingly hold that Management has carried its burden of proof on the guilt of the Grievant. I am convinced the Grievant, over a period of time, offered an exchange of favors with the inmate (legal assistance for information) for his own and/or his wife's financial gain, in the course of which the inmate became privy to personal information about the Grievant and his wife.

Imposition of Discipline

The plain language of the Contract is that not that discipline shall be effective, but that "the Agency Head...shall make a final

decision...no more than forty-five (45) days after the conclusion of the pre-discipline meeting." The Director of the Agency signed the removal order indicating his final decision on December 12, 1990, 44 days after the pre-discipline meeting and within the requirement of §24.05.

<u>Charges and Penalty</u>

The Union claims the charges were stacked to be sure that one stuck or that removal would result from their multiplicity. Inasmuch as the Grievant was charged with six violations at the pre-disciplinary meeting, but three were dropped, that the remaining three are related one to another and to the fact pattern, and that the grid permits removal on a first offense of any of these rules, an arbitrary or malicious stacking of charges is not apparent. The real question, in any event, is whether the penalty actually imposed is consistent with the actions of the Grievant and the surrounding circumstances. Very plainly, the Grievant here dealt with an inmate, soliciting from him information about another employee and promising certain favors in return. That no actual deal was cut or exchange took place (other than the business card) is of little importance. The Arbitrator is well convinced that dealing with inmates or offering to do so is among the most serious offenses within the penal setting, constituting as it does a breach in security and thereby striking at the very heart of the institution's mission. In expressing a desire to exchange any sort of favor with an inmate, the correction officer lets it be known that he is willing to deal and makes himself vulnerable to

solicitation, blackmail, and the like. Despite the Grievant's length of service and prior disciplinary record, the Employer has not abused its discretion in imposing the penalty of removal. Aggravating the offense and supporting Management's decision is that the Grievant was not a new or naive employee who was insidiously drawn into the relationship. Rather, he was a long-term, seasoned employee and former Union official who was well aware of the consequences of unauthorized relationships, and yet he initiated the contact and repeated it over a period of months.

The Grievance Process

The Union's assertion that the Step 3 response omits the Union's procedural objection on imposition of discipline (§24.05) is erroneous. The positions of the parties are stated on page 2, and the Step 3 response is set forth on page 4.

As to discovery of telephone records, since the Employer did not rely on them in the imposition of discipline, it was under no obligation to supply them prior to the Union's request and then only under the contingencies of §25.08. The Union did request them at least as early as January 14, 1991, but there is no evidence of an earlier request. If it did try to get them sooner, there is no evidence they were available prior to January 10 when the Warden gave them to Payton. In any event, the Union did get them after the Step 3 hearing, so the Grievant's rights were not harmed in arbitration. The record does not disclose whether there was an unreasonable withholding of relevant records that were requested and available prior to January 10, 1991.

Conclusion

The theory of the Union's case is that Management acted with malice toward the Grievant. Its desire for revenge, contends the Union, tainted every stage of the case--the investigation, prediscipline, choice of penalty, and grievance procedure--and is responsible for actions taken against the Grievant's wife. The Arbitrator can imagine that Management would have been embarrassed by the notoriety of the Speers' allegations about investigatory practices at the facility and annoyed about having to defend itself and its officers against charges levied by the Speers. However, to the extent that Management may (and I emphasize "may" since the record is inconclusive) have held negative views about Mr. Speer, this attitude does not seem to have biased their actions towards him, for I can find no evidence that they would have acted otherwise had he been more favorably viewed.

IX. Award

For the reasons given, Rand Speer was removed on December 14, 1990 for just cause. The grievance is accordingly denied in its entirety.

Anna D. Smith, Ph.D.
Arbitrator

August 30, 1991
Shaker Heights, Ohio