

STATE OF OHIO
LABOR ARBITRATION TRIBUNAL

#711

In the Matter of the Arbitration Between:

Department of Rehabilitation Correction and)
Office of Collective Bargaining)
State of Ohio)

OPINION AND AWARD

and)

GRIEVANCE OF
AL HARRIS

Ohio Health Care Employees Union)
District 1199)
National Union of Hospital and)
Health Care Employees, SEIU)
AFL-CIO)

This matter came on for hearing on October 16, 1991, in a conference room at the Office of Collective Bargaining in Columbus, Ohio, before Margaret Nancy Johnson, member of the Arbitration Panel selected in accordance with the terms of the agreement between the parties.

Maria Margevicius, Staff Representative, presented the case on behalf of the Ohio Health Care Employees Union, District 1199, hereinafter "Union." Also in attendance for the Union were Donna Black-Brown, delegate; and Alfred Harris, grievant.

Margaret S. Lee, Assistant Chief of Labor Relations, Department of Rehabilitation and Correction, argued the case for the "State," hereinafter also "Agency," "Department" and "Authority." In attendance on behalf of the Agency were: Rodney Sampson, Second Chair, Office of Collective Bargaining; Thomas O. Ginter, Unit Supervisor, Cleveland Regional Office, Adult Parole Authority; Charles B. Newlen, Unit Supervisor, Cleveland Regional

Office, Adult Parole Authority; Darla Miller and Jeanne Enright, witnesses; Nick Sanborn, Superintendent, Adult Parole Authority, Parole Supervisor Section; Ron Darling, Deputy Superintendent, Probation Development Section; and Jerry Hillelson, Deputy Superintendent, Parole Supervisor Section.

There were no objections as to the arbitrability of the pending matter, either upon procedural or upon substantive grounds. Accordingly, this matter is properly before the Arbitrator for a final and binding decision.

GRIEVANCE

The Union grieves the removal of Al Harris asserting the dismissal was "without just cause and the discipline was not progressive." Contract provisions allegedly violated include: Articles 1; 5; 6; 8.01, 8.02, 8.03; 21.06; 33; and 43.09. The grievance, processed through the contractual procedures, was denied by Management and appealed to arbitration by the Union.

ISSUE

The parties stipulated the issues to be as follows:

1. Was the removal of the grievant on June 4, 1991, for just cause?
2. If not, what is the appropriate remedy?

CONTRACT PROVISIONS

The Arbitrator finds that the following provisions from the Agreement between the parties are dispositive of the pending matter:

ARTICLE 8 - DISCIPLINE

§8.01 Standard

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

§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.

STATEMENT OF CASE

Effective June 4, 1991 the employment of the aggrieved as a Parole Officer for the Department of Rehabilitation and Correction was terminated. The grievant had been employed by the State for nineteen (19) years, eighteen of which were with the Adult Parole Authority. There is no evidence of a disciplinary record prior to the removal now in controversy. The removal notice dated May 17, 1991 cites eight (8) specific rule violations. The incidents giving rise to the discipline were reviewed and assessed by the Agency at three separate Pre-Disciplinary Conferences, held January 8, 1991, March 12, 1991 and April 15, 1991.

The function of the Adult Parole Authority is to render rehabilitative support services to releasees and at the same time to provide protection to the community. Proper performance of

job duties is governed by the Standards of Employee Conduct and Bulletins which are issued by the Authority and disseminated to all employees. Included within the Standards of Conduct are specifically enumerated rule violations with corresponding penalties. The following Bulletins are deemed pertinent to matters of job performance now in dispute:

Bulletin 680: Parole Violators at Large

Bulletin 450: Weapons

Bulletin 560: Case Planning

Bulletin 515: Interstate Compact

Bulletin 640: Parole Revocation

Bulletin 300: Ethics.

The job duties of the grievant in fulfilling the mission of the Agency included supervision of offenders on probation or parole in the Cleveland area. The evidence establishes that in a large metropolitan area such as Cleveland, the case load of probation officers is greater and includes a higher percentage of "substantial risk" releasees than in less populated areas. Clients under the grievant's supervision included those under the jurisdiction of Ohio through interstate compact agreements.

In performing supervisory duties parole officers have discretion in issuing out-of-state travel passes. Additionally, a parole officer is in contact with the sentencing state ensuring proper compliance with conditions of release, including restitution. Whenever a releasee assigned to a parole officer is subsequently arrested, it is the obligation of the officer to

promptly report the arrest to proper state officials. Maintaining contact with the releasee and reporting when contact is lost are essential. When a releasee absconds supervision, the individual is deemed a Parole Violator-At-Large necessitating proper reporting by the parole officer.

The tasks associated with the supervisory duties of parole officers include writing reports, completing forms, case planning and appropriate weapon use. The specific duties relating to supervision of releasees are set forth in the bulletins referenced above. Proper compliance with stated procedures assist in providing protection to the public and to law enforcement officers.

The decision to terminate the grievant was made following a two and one-half (2½) month investigation into the case load of the grievant. It is established that the case load audit was ordered on November 14, 1990 after the Agency was informed by the grievant's Unit Supervisor about an incident involving the Lakewood Police Department. Pursuant to a subpoena, on November 14, 1990, the police had initiated a search into the records of the grievant. The police were already in his office when the grievant arrived at work. He was carrying a duffle bag which he then placed on a desk. Although there is some conflicting testimony as to what happened, the evidence establishes that a police officer removed a .38 caliber revolver from the grievant's duffle bag. The Unit Supervisor testified that when parole officers are in the office, their weapons are to be stored in a cabinet. The

allegedly improper storage of a weapon in violation of Bulletin 450 was heard at a Pre-Disciplinary Conference on January 8, 1991. A determination was made by the Agency that the action of the grievant constituted a violation of Rule 8: "Failure to follow post orders, administrative regulations and/or written policies or procedures."

On the same day as the police search, the grievant was advised that he was "to do no more field work" and that all his "work will be performed in the office" (Union Exhibit #9). The next day a memorandum was issued to the grievant informing him that he was not to have any contact with releasees (Union Exhibit #7). The restriction imposed by the Agency was not lifted until February 1, 1991, when the grievant received a memo advising him that except for women releasees, he was "authorized to resume supervision of cases" (Union Exhibit #4).

Prior thereto, on December 18, 1990, the grievant was ordered by his Unit Supervisor to "assist on a Prisoner Return Trip to the Lorain Correctional Facility" (Management Exhibit #4). The grievant refused to do so indicating the Central Office had removed him from field work. This refusal to carry out a written order was cited as a violation of Rule 7, Insubordination, and at the conclusion of the January 8, 1991 Pre-Disciplinary Conference, it was found to be cause for discipline.

On January 9, 1991, the grievant was ill and did not report to work. He had asked his girlfriend to call in his absence. Although the office has a thirty minute call-in rule, the report-

off was not made until 10:40 a.m., more than thirty minutes after the grievant's starting time. This infraction of Rule 3 was found to be cause for discipline at the March 12, 1991 Pre-Disciplinary Conference.

On January 25, 1991, the case audit initiated by the Agency was completed and the results issued. It was concluded therein that a number of Standards of Employee Conduct had been violated by the grievant. Included within the report were two incidents involving women releasees. These occurrences gave rise to the charges of sexual harassment (Rule 14(b)) and misuse of official position (Rule 18). The latter alleged rule violation was reported to the Agency in late August, 1990, by J. E., a client assigned to the grievant. At that time, the client had asked her parole officer for a travel pass. The grievant reportedly told J. E. that he wanted "three hours of pleasure" with her as "collateral" for the travel permit. J. E. pursued the matter reporting it first to Mr. Ginter and then to Mr. Brindza. Thereafter on September 26, 1990, J. E. provided the Agency with a written statement of the occurrence (Employer Exhibit #7).

On November 16, 1990, a female probationer assigned to the grievant, D. M., made a report of sexual harassment giving rise to the alleged violation of Rule 14(b). She stated that for a four year period of time, the grievant had repeatedly put his arm around her waist, made comments about her good looks and references to alleged tardiness in making restitution. The parolee further reported that on August 4, 1990, the grievant had taken

her picture for his "black book," had made comments about her needing a rich "lover" and had asked if he could apply for the position.

The conduct of the grievant in relation to these two female releasees was considered at the March 12, 1991 Pre-Disciplinary Hearing. The conclusion was reached that the grievant's behavior violated the Employee Standards and constituted cause for discipline.

The remaining rule violations cited by the Agency arise from poor job performance discovered in the course of the audit of the grievant's case load. These include "failure to follow post orders, administrative regulations and/or written policies or procedures" and "failure to carry out a work assignment."

The evidence establishes that when a parolee is arrested the Parole Officer must make a prompt report of the arrest. Additionally, parole revocation proceedings must be pursued when a parolee absconds supervision. Proper reporting is essential for determining eligibility for final release. A failure to issue proper reports may result in the dismissal of an individual not entitled to release, thereby endangering the community.

Reports were allegedly not made in the case of J. D., convicted of rape, and W. B., a convicted burglar subsequently arrested for attempted abduction of two minors. For a period of eighteen (18) months, during which he was arrested for drug abuse, R. D. had failed to report to the grievant, his probation officer. Neither the arrest conviction nor parole violation of

R. D. were reported by the grievant. In the case of L. A-B., the grievant failed to report her indictment on September 27, 1990. Additionally the state alleges that the grievant failed to complete timely reports in the cases of three parolees.

The grievant testified that he had no way of knowing about the arrests in question. He was absent the day L. A-B. brought in her indictment papers which were subsequently filed without the knowledge of the grievant. Moreover, the grievant's parolees did not appear on the 201 list compiled at the Cuyahoga County Justice Center and bearing the names of arrested parolees and/or probationers.

The charges arising from case mismanagement were heard at Pre-Disciplinary Conferences held on March 12, 1991 and April 15, 1991. The hearing officer concluded the Agency had just cause for the issuance of discipline arising from failure to make reports and pursue revocation procedures.

The Agency concluded the conduct of the grievant merited removal. The matter is now before the Arbitrator for determination on just and proper cause for termination.

POSITION OF THE AGENCY

The Agency contends that it had just and proper cause to remove the grievant from his position as a parole officer. The conduct of the grievant flagrantly violated Standards of Employee Conduct. Evidence submitted by the Agency establishing the wrongdoing of the aggrieved is reliable and credible.

The grievant abused his position of trust when he solicited sexual favor from a female probationer who requested a travel permit. His willingness to grant the pass on condition of "three hours of pleasure" with the probationer is an outrageous misuse of his position. Another female probationer testified as to sexual harassment and intimidation by the grievant. Sexually suggestive comments and conduct such as putting his arms around her waist and taking her picture are repugnant examples of employee misconduct.

The case audit conducted by the Agency revealed numerous irregularities in case management by the grievant. The grievant had failed to perform a number of specific job duties associated with his responsibilities towards parolees and probationers. The evidence establishes the importance of reporting parole violations and parolee arrests to supervisory and law enforcement personnel. It is essential to public safety that officials be kept apprised of the status of releasees under the jurisdiction of the State. A failure to do so jeopardizes both the public and law enforcement officers. The grievant neglected his duties in this regard. In the case of R. D., the grievant failed to report the parolee had absconded supervision from March 16, 1989 to October 9, 1990. Moreover, the grievant neglected to report the arrest and conviction of R. D. on March 12, 1990. In the case of probationer L. A-B., the grievant failed to report her indictment. The arrest of J. D. and W. B. were never reported to the Unit Supervisor or the Parole Supervision Section.

The Agency deems this neglect of duty to be a serious failure to follow post orders, administrative regulations and written policies. The grievant herein jeopardized the safety of the public by failing to carry out his duties in regard to releasees.

The manner in which the grievant carried his revolver in a tote bag on November 14, 1990 constituted a deviation from administrative regulations. The weapon was improperly stored in violation of Bulletin 450. The Bulletin specifically requires that weapons be stored in locked cabinets when not in use. There is such a cabinet in the office for storage of parole officers' weapons. The grievant, however, failed to put his gun away.

The refusal of the grievant to obey a direct order from his supervisor on December 19, 1990 can only be deemed insubordination. The grievant was advised that the emergency order to assist with the transport of a prisoner was authorized by the Central Office. Yet, he refused to comply. Insubordination is a serious form of employee misconduct.

On January 9, 1991, the grievant failed to properly report off. The Agency has a thirty minute report-off rule. If an employee is to be absent from work, he must advise the Authority within thirty minutes from the start of the shift. The absence of the grievant was not reported until well beyond the thirty minutes. This constitutes an infraction of the attendance rules governing employee conduct.

The Agency contends that the violations of work rules by the grievant are numerous and severe. The grievant's disregard of ethical and work standards amply justifies the removal order issued by the Employer. His conduct affected not only his work performance but also impugned the Agency's credibility.

The grievance should be denied.

POSITION OF THE UNION

The Union maintains that the removal of the aggrieved contravenes accepted standards of due process and just cause. The grievant is an employee with almost twenty years of service to the State unmarred by any disciplinary action. The grievant has become a scapegoat in this proceeding for administrative and supervisory failures. The removal of the grievant was part of a "rooting out" process executed without regard to the contractual rights of this employee.

The procedural flaws in the termination of the grievant are numerous. During the course of the long and drawn out investigatory process, the grievant sought an administrative leave. The problems at work and at home with a chemically dependent and abusive son required the grievant have professional help to cope with the stress. Yet, the Agency cavalierly refused to permit the grievant to take a contractual leave of absence.

At the time of the investigation, the grievant was confined to working in the office. He had been issued three memoranda specifically prohibiting him from field work and/or contact with

releasees or prisoners. Yet, on December 19, 1990, the grievant was directed to assist in transport, which is undeniably field work. Had the grievant performed this assignment, he would have been in direct violation of orders from Central Office. It is clear the Agency could have sought assistance for the transport from elsewhere. This work directive is an example of stacking the cards against the grievant.

Other incidents occurring during the course of the investigation are similarly unfounded and unjustified. The alleged failure to report off severely falls short of the requirement of equitable treatment. The grievant acknowledges his absence was not reported within thirty minutes. However, this was due to a mistake on the part of the grievant's companion who forgot to make the requested call. Moreover, this was the grievant's first instance of a failure to report off. There is no evidence of any employee in the unit receiving removal for the failure to report off. The severity of the penalty far exceeds that of the offense.

It is alleged that on November 14, 1990, the grievant inappropriately stored his weapon. Yet, the evidence clearly establishes that the grievant had no time to remove his revolver and put it away after arriving at work. The Police were already in his office, endeavoring to access his client files. The grievant ought not to be charged with violation of the Weapons Bulletin under these circumstances.

The grievant is charged with failure to issue several reports pertaining to releasees. The evidence establishes, however, that extenuating circumstances contributed to these failures. For example, the report of an arrest of a parolee was made on a day when the grievant was absent. A secretary filed the report without advising the grievant. Moreover, the method of generating reports in the office of the grievant is unreliable.

Finally, the Union maintains that procedural deficiencies warrant reinstatement of the grievant. The grievant was not permitted to confront witnesses against him until the Arbitration hearing. He was denied the right to record proceedings at the disciplinary conferences. An undue delay in charging the grievant with sexual harassment and misuse of office, both of which he categorically denies, violates procedural safeguards. Both women were in violation of the conditions of their probation. The use of unnotarized statements and polygraph tests in this case does little to bolster the unreliable testimony of these women.

The Agency has failed to meet its burden of proof in this case. Moreover, while some penalty is appropriate, the evidence does not warrant removal.

The grievance should be sustained.

DECISION

The grievant herein was dismissed from his position as a Parole Officer for allegedly violating several of the Employer's Rules of Conduct. Each of the charges against the grievant must be analyzed herein and a decision rendered, first, as to whether cause for discipline existed and, second, as to whether the discipline assessed was appropriate under the circumstances. Because of the number of rule infractions under analysis, the Arbitrator has grouped the charges into the following four categories for consideration in this decision: (1) insubordination; (2) attendance; (3) neglect and non-performance of job duties; and (4) ethical impropriety in regard to female probationers.

1. Insubordination

The charge of insubordination arises from the refusal of the grievant to assist with the transport of a prisoner on or about December 19, 1990. The evidence incontrovertably establishes that on the date in question, the grievant was ordered by his supervisor to accompany on the transport. It is further established that the grievant refused to do so. The Agency deems the action of the grievant to be insubordination. The Union contends, however, that the grievant believed the order to assist to be in violation of instructions from Central Office.

There is no dispute that the transit of a prisoner is considered "field work" in contrast to "office work." At the time the order was issued to the grievant, his duties had been restricted to office work. Written directives from the Central

Office curtailed the work function of the grievant and the work order of the supervisor in this case would have been at variance with restrictions imposed on the grievant by the Central Office.

The grievant, however, was very specifically told in writing that the disputed assignment had been approved by Central Office. In spite of this knowledge, the grievant continued to refuse the work order.

A principle adhered to in labor arbitration is that all orders must be followed unless the assignment is illegal or presents the possibility of injury to the employee or others. There is no contention that the order in question can be so categorized. Accordingly, the grievant was obligated to carry out the job and then, if he felt it violated prior orders, to pursue channels for clarifying his work responsibilities. The unilateral decision of an employee to refuse a work order cannot be condoned in any employment situation.

The grievant erred in the matter of the work assignment. His insubordination is a serious form of employee misconduct. Under certain circumstances, the refusal to carry out a work assignment may justify a removal on the first occurrence. The severity of the discipline in this case, however, must take into account the factual reality of two apparently conflicting work orders. In the opinion of the Arbitrator, the situation under consideration does not warrant a summary discharge. The specific facts of this occurrence require a mitigation of the penalty. The grievant must be advised that he is obligated to carry out

all supervisory directives. Should he believe the same are improper, then he has recourse through the negotiated channels to clarify or correct an improper work order. The reliance of the grievant on the prior order was, in the opinion of the Arbitrator, misplaced. It must be deemed, however, to at least mitigate the severity of the penalty.

2. Attendance

The rule violation with which the grievant is charged pertaining to attendance is the failure to report-off on January 9, 1991 within the requisite thirty minutes of starting time. The facts relative to the charge are undisputed. The grievant acknowledges a proper report-off was not made. He had asked a companion to make the necessary call and she had forgotten to do so.

The Union contends, however, that the grievant had never previously been disciplined for any attendance infractions and that this was the first time the grievant had neglected his obligation in this regard. Moreover, the Union asserts the Agency has not enforced the report-off rule with any regularity.

The Arbitrator finds that the grievant was in violation of an established work rule. The grievant testified he had requested his friend to make the call to the office. He stated that had he known the call had not been made, he would have made it himself or reported to work. By so testifying, the grievant acknowledges the need to comply with the rule.

Additionally, the Arbitrator finds the evidence as to unequal enforcement is inconclusive. Based upon the testimony given, the Arbitrator cannot hold there has been disparate enforcement of the regulation.

The Arbitrator further finds, however, that the parties herein have specifically negotiated the concept of corrective discipline into their Collective Bargaining Agreement. This principle is apparent in the Employer Standards of Conduct developed by the Agency. Thus, the Employer is obligated to assess corrective penalties for rule infractions warranting the same.

In the opinion of the Arbitrator, violations of this nature are routinely subject to corrective discipline. It is virtually unheard of in an organized work environment in the United States that an employee be subject to a removal for the first instance of a tardy report-off.

The Arbitrator is of the opinion that while a penalty is appropriate in this case, it must conform to the requirements of corrective discipline. The grievant is, thus, assessed a warning for his failure to properly report his absence.

3. Neglect of Duty and Failure to follow regulations.

a) Weapons

The grievant is charged with failure to follow procedures in regard to the storage of his weapon which was found, on November 14, 1990, in his duffle bag. It is the contention of the Agency

that the "storage" of his revolver was in violation of Bulletin 450.

The occurrence giving rise to the charge took place on November 14, 1990 when the grievant was subject to a search pursuant to a warrant issued to the Lakewood Police. When the grievant arrived at work, his office was already occupied by police. The evidence establishes the grievant became agitated and uncooperative, apparently arguing the validity of the subpoena. The fact, crucial to this discussion, is that a police officer removed the grievant's revolver from the duffle bag carried by the grievant into the office.

This incident gives rise to several questions. An initial issue to be resolved is whether the grievant improperly stored his weapon. The regulations issued by the Agency clearly provide that "when not carrying while on duty, firearms may be stored only in secure locked cabinets." It is uncontroverted that while Parole Officers were performing office duties as compared to field work, their weapons were to be stored in a locked cabinet. The Agency seems to argue that because the grievant had not removed the gun from the duffle bag and placed it in the cabinet, he was in violation of the storage requirements.

The Arbitrator finds, however, that the explanation of the grievant for his failure to remove the gun is reasonable and logical. He had just arrived at work when he was confronted with a search warrant. His normal routine was interrupted immediately upon his arrival. Had the grievant been in the office for some

period of time before the Lakewood Police arrived, clearly a different conclusion would be reached. In the opinion of the Arbitrator there simply was not sufficient time for the grievant to perform the perfunctory work details normally undertaken at the start of the day. Having just arrived at work, the grievant had not yet had the opportunity to "store" his weapon.

A second argument made by the Agency is that Safety Rule 8 provides that "when in the field, firearms are not to be left in . . . briefcases . . . where they are vulnerable to theft or use by others." The Arbitrator finds that this rule, too, is inapplicable. The grievant was not in the field; he was arriving at his office. Nor had the grievant left his gun unattended; it was not vulnerable to theft or use by others. The Arbitrator finds, therefore, that the grievant was not in violation of the intent and purpose of the Safety Rules.

It remains to consider whether the grievant's method of carrying the gun violated Agency rules, regulations and procedures. While this Arbitrator may question the wisdom of carrying a weapon in a duffle bag, she cannot find it in violation of post orders. The regulations for carrying a firearm state that "wearing the firearm is the most secure . . ." way to carry it. But the rules do not mandate this manner of transportation. If the firearm is worn, then, it ought to be carried in a holster. However, the Arbitrator could find no prohibition upon carrying the weapon in either a tote bag or a briefcase.

The grievant's method of carrying his weapon did not violate any clearly identified regulation. In the absence of a specific rule, this Arbitrator cannot find the grievant in violation of Bulletin 450.

b) Timely reporting and record keeping.

There is sufficient evidence to conclude that the grievant herein failed to make timely reports in numerous cases under his supervision. The evidence establishes the duty to turn in reports, to notify appropriate officials of arrests and convictions, to maintain contact with a releasee and to report when contact is lost. In numerous cases the grievant failed to perform these tasks.

Bulletin 680 sets forth detailed procedures to be followed when a releasee absconds supervisor, and his or her whereabouts are unknown for thirty (30) days. Such releasee is deemed to be a Parole Violator at Large. In the case of four releasees assigned to the grievant, he had failed to process the paperwork necessary for the Parole Violator at Large even though the last contact with the parolee exceeded thirty days.

Agency regulations set forth in Bulletin 640 require specific action to be taken in the case of an arrest of a parolee. The time limits accompanying the reporting process are clearly identified. The evidence conclusively establishes that in the cases of parolees L. A-B., J. D., W. B., and R. D., the grievant failed to report their arrests.

The grievant proffered explanations for his failure to report the arrests and/or convictions. In one instance he was absent from work when the paperwork was brought in and subsequently misfiled. In another case charges were dropped by the alleged victim. Further, the grievant alleges that the arrests did not appear on the computerized lists generated by the Justice Center. Additionally, the grievant maintains that the system for generating timely reports was not as efficient in his unit as others that he worked under.

The Arbitrator would be inclined to accept the explanation of the grievant in an isolated or single occurrence. In the case of the grievant, however, the evidence establishes repeated failure to perform and process necessary paperwork. Indeed the auditing supervisor testified that the files and paperwork maintained by the grievant were in disarray. While 100 percent compliance with regulations may not be possible, the grievant's repeated failure to process necessary forms is inexcusable.

Thus, in the opinion of the Arbitrator, the grievant is subject to disciplinary action for his failure to perform Parole Officer duties as spelled out in the Bulletins. An eighteen year veteran must be deemed to know the contents of his job duties and to recognize the necessity for compliance therewith.

It remains, then, to determine the appropriate penalty for misfeasance of this nature. The Agency stresses the potential harm to the public which non-action of this type may cause. The

Arbitrator is cognizant of the danger which failures such as those at issue can cause.

Yet, the misconduct of the grievant can only be characterized as neglect. There was no intentional or deliberate subterfuge in the actions of the grievant. He failed to do his job in an appropriate manner.

The Arbitrator has carefully considered and researched the question of proper discipline for non-performance of job duties. It appears from reported case law that consistently a failure to perform is the type of misconduct that will generate warnings prior to removal. The reason for this is that due process mandates giving the employee an opportunity to rectify job deficiencies before termination. Only when the evidence establishes that the employee is incapable of proper job performance is removal appropriate.

In the case at hand, the grievant had never previously been disciplined for poor performance. He had never been advised that his work conduct was unacceptable or that improvement was required for continued employment. On the contrary, the Employee Performance Review issued to the grievant slightly more than one month prior to the onset of his case audit indicates the grievant "generates the amount of work expected;" "completes most of his work in a timely fashion;" "organizes and plans his work well." In the opinion of the Arbitrator it verges on inconscionable to remove an employee from the work force for failure to follow job

requirements after the issuance of a job evaluation advising the employee that he is doing an acceptable job.

The Arbitrator herein does not intend to minimize the severity of the wrongdoing uncovered by the audit. She must, however, put it into the proper perspective and view it in the context of employment fairness.

In the opinion of the Arbitrator removal is too severe for failure to follow post orders, regulations or procedures, in the absence of prior disciplinary warning or penalty. The repeated nature of neglect of the grievant, however, mandates certain restrictions and conditions be placed on the grievant's reinstatement which shall be without any monetary award. The conditional reinstatement of the grievant is more fully set forth in the conclusion which follows.

4. Improper and unethical conduct towards female probationers.

The final charge against the grievant considered herein is that of improper conduct towards female probationers under his supervision. The Agency charges the grievant with sexual harassment and with misuse of his office for personal gain, specifically, sexual favor.

Although the grievant categorically denies the alleged instances of impropriety, this Arbitrator finds the testimony of the women straightforward and credible. Probationer J. E. testified the grievant requested "three hours of pleasure" in exchange for a travel permit. The grievant points out that the

probationer had violated conditions of probation in the past by traveling out of state, and that his refusal to issue the pass was based upon these past parole violations. These facts, however, do not impugn the veracity of the witness; on the contrary, such circumstances make it all the more feasible to misuse official authority. The Arbitrator is convinced the aggrieved engaged in the wrongdoing with which he is charged in the case of J. E.

The second witness against the grievant is probationer D. M. The testimony of D. M. focuses on comments made by the grievant to the probationer. The Arbitrator finds the comments were clearly distasteful and inappropriate. Indicating that a female probationer "needs a rich lover" is inexcusable and reprehensible. It lacks the decorum that the situation requires.

In the opinion of the Arbitrator these instances of employee misconduct are very severe and of all the charges made against the aggrieved, these alone would warrant immediate removal. Given the seriousness of the contention of these two women under the jurisdiction of the state, it ought not to have taken the agency almost one-half a year to process these charges.

The parties are cognizant that the Arbitrator herein has deliberated over this matter for some time. In the process she has carefully weighed and balanced the principles of due process with those of managerial prerogatives. Of concern, was the question whether the requirement of due process can be excused

when the evidence so convincingly establishes employee misconduct. The Arbitrator has concluded that it cannot.

Our system of employment jurisprudence has adopted the principles embodied in civil rights. These include the prompt processing of charges against an individual. While some Collective Bargaining Agreements explicitly require the Employer to process charges within a certain period of time, the Agreement between the parties does not incorporate a specific time frame. Nonetheless, implicit within the concept of just cause agreed upon by the parties is the expectation that the Employer will promptly pursue charges against an employee when they have become known.

The Agency seeks to excuse the delay in this case by relying upon the lengthy case audit being conducted into the affairs of the grievant. In the opinion of the Arbitrator, the reliance of the Agency is misplaced. First, all of the facts pertinent to the case of J. E. were first known to the Agency by late August or early September 1990 and, in the case of D. M. by November 16, 1990. Nothing further was learned from the case audit pertaining to these two women. Second, the Agency did, in fact, process charges against the grievant while the audit was pending. On January 8, 1991, a Pre-Disciplinary Hearing was scheduled to consider charges against the grievant. There is no acceptable explanation for the failure to pursue the matter involving the women at that time.

It is the opinion of the Arbitrator that this significant violation of due process mandates the reinstatement of the grievant. However, given the severity of the proven charges, the Arbitrator has imposed conditions on the return of the grievant to his former employment.

5. Procedural Considerations.

In addition to the due process argument addressed above, the Union raised other issues which the Arbitrator must address. First, the Union objects to the testimony of witnesses not made available to it prior to the hearing. There is no contention, however, that any of these witnesses were "surprises" to the Union, or that the Union was not cognizant of what the substance of their testimony would be. Under such circumstances, the Arbitrator cannot find that the unavailability of the witnesses to the Union prior to arbitration constitutes a due process violation.

Second, the Union maintains that irregularity in the course of the Pre-Disciplinary Conferences deprived the grievant of procedural rights. The grievant had asked to tape the conference which, pursuant to Agency regulations, he was entitled to do. However, the hearing officer refused to permit the taping.

While the hearing officer erred, the Arbitrator cannot find that this error constitutes grounds for setting aside the discipline. The error was non-prejudicial and, unlike the right to prompt processing of charges, it is not fundamental to the concept of due process.

Third, the Union argues that the use of the polygraph test in the Pre-Disciplinary Conference was improper. The matter of just cause, however, was determined herein without the use of the polygraph. The Arbitrator did not give any weight to the results of the polygraph. Rather, the veracity of the witnesses was determined solely on the basis of their testimony and demeanor at the hearing.

Finally, the Union alleges that the refusal of the Agency to grant an Administrative Leave pending his case audit was improper. In the opinion of this Arbitrator, however, this grievance is not the proper forum for determining that question. Had the Agency erred, a grievance could have been filed addressing the specific issues. In the absence of such a grievance, the failure to grant a leave does not constitute a defense in this proceeding involving the aggrieved.

CONCLUSIONS

The grievant herein was removed from his job as probation officer due to several charges which the Agency assessed in the aggregate warranted termination. Having individually analyzed the charges, the Arbitrator orders reinstatement without back pay and with certain conditions imposed on the grievant, as follows:

1. The grievant is to monthly review his current case load with his immediate supervisor until such time as the supervisor deems it no longer necessary.

2. The grievant is to pursue counselling with an Employee Assistance program to ensure proper understanding of his role and relationship with female probationers.
3. The grievant is not to supervise any female probationers until such time as the Agency is notified the aggrieved has satisfactorily completed counselling and may continue to work with female releasees.
4. In the event the grievant cannot secure such clearance within six months from the issuance of this award, his termination will be upheld.

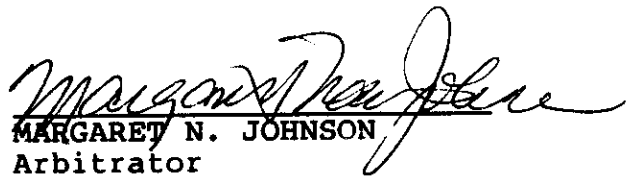
The grievant must realize that his continued employment is tenuous and requires a concentrated effort on his part. The reinstatement is an opportunity for the grievant to correct apparent deficiencies in his work performance, but it is not a chance to start anew. Rather, the grievant returns with the equivalent of a long-term suspension for poor performance. Thus, the grievant must demonstrate his capacity to follow work orders and to appropriately work with female probationers, in order to continue his employment with the Agency.

The Arbitrator recognizes that an outside investigation involving the grievant is yet underway. Moreover, the Arbitrator understands from perusal of the documentation that the performance of the aggrieved has raised additional questions of propriety. However, the Arbitrator can consider only those matters brought before her by the parties themselves. Her decision must be based upon the documentary and testimonial evidence admitted

at the hearing. Accordingly, the Arbitrator has endeavored to address this case based upon the evidence presented and the principles of due process involved and without regard to extraneous considerations.

AWARD

The grievance is sustained to the extent the grievant is reinstated without back pay and under the conditions set forth in the conclusion above.


MARGARET N. JOHNSON
Arbitrator

Dated and made effective this 27th day of December, 1991.