ARBITRATION DECISION

May 26, 1992

#770

In the Matter of:

State of Ohio, Department of Rehabilitation and Correction, Southeastern Correctional Institute	)	Grievance No. 27-24-911112-111-01-05 Beverly Clark, Grievant
and	)	
Ohio Civil Service Employees Association, AFSCME, Local 11	)	

APPEARANCES

For the Union:

Donald Sargent, Staff Representative, Advocate
Richard Sycks, Staff Representative, Assisting
Beverly Clark, Grievant
Jeff Addington, Chief Steward, Witness
Melvin Ross, Witness

For the State:

Thomas E. Durkee, Labor Relations Officer 3, Advocate
Rodney Sampson, Labor Relations Specialist, Co-Advocate
Thomas Ratcliffe, Institutional Investigator, Witness
D. Steven Greene, Documents Examiner, BCI, Witness
David Garlinger, Food Service Coordinator, Witness
Benjamin Bower, Warden
Richard Hartman, Inmate, Witness
Marcia White, EEO Committee, Witness
Janice Johnson, Business Administrator, Witness

Arbitrator:

Nels E. Nelson

BACKGROUND

The grievant, Beverly Clark, was hired February 11, 1991 as a correctional food service coordinator at the Southeastern Correctional Institute. SCI houses approximately 1,600 medium and minimum security inmates. As a food service coordinator the grievant supervised inmates who worked in the kitchen. Prior to assuming her position she received three weeks of training at the Corrections Training Academy and a week of inservice training at SCI. The training included employee rules of conduct and the supervision of inmates.

The events triggering the instant grievance began on August 22, 1991. The state claims that on that date Corrections Officer Lewellyn was approached by inmate Blake McGilvary who reported that his cellmate, Richard Hartman, told him that he observed the grievant and inmate Roland McCormick, a head cook in the kitchen, having sexual intercourse in a cooler in the kitchen. It maintains that when Lewellyn questioned Hartman, he confirmed what McGilvary had told him. The state indicates that Lewellyn reported what he had been told to Sergeant Mauro, Captain Crabtree, and Deputy Warden Odell Woods.

On August 28, 1991 the grievant complained to Janice Johnson, a business administrator and member of the equal employment opportunity committee, that Lewellyn was making false accusations regarding her and was sexually harassing her. Johnson and the grievant talked to Thomas Ratcliffe, an

institutional investigator. The grievant identified the inmates who she stated were spreading rumors about her. Ratcliffe placed them in security control pending his interview of them. He also spoke to Sergeant Terry Headley who the grievant indicated knew what was going on.

The grievant also met with Marcia White, the chairperson of the EEO committee, and Janice White, the EEO coordinator. The grievant told them that inmate Nichols had told her that several inmates had told him that Lewellyn had ordered them to jump him for serving as a look-out for her and McCormick and that Lewellyn had suggested that something was going on between her and McCormick. She complained that Lewellyn was spying on her and that he was trying to set her up because she refused to go out with him. The grievant reported that she told Headley about Nichols' fear of being jumped and that he had talked to Nichols and Lewellyn.

Marcia White called Headley to the meeting. He stated that Nichols had told him that Lewellyn had given three inmates extra food to jump him because he was serving as a look-out for the grievant and McCormick and that he was mad because they were having sex. Headley reported that when he questioned Lewellyn, he stated that he believed that the grievant and McCormick were having sex but that he had no proof and that he suspected that Nichols was a look-out for them. Lewellyn indicated that Hartman had told him that he saw the grievant and McCormick having sex. At the request of Marcia White, Headley filed an incident report and a copy was

delivered to Ratcliffe.

On August 29 and 30 Ratcliffe obtained statements from the inmates he had placed in security control. Hartman stated that he saw the grievant and McCormick having sexual intercourse in a cooler in the kitchen. McGilvary indicated that the grievant and McCormick were always together and that the grievant sometimes got the clerk not to type up disciplinary tickets that had been given to McCormick. Nichols stated that Lewellyn had accused him of being a look-out for the grievant and McCormick and that he had threatened to try to get more time for him. He also claimed that he saw McCormick give the grievant a backrub and that they were in the cooler together for five to ten minutes.

Ratcliffe also interviewed some of the other food service coordinators. David Garlinger reported that on one occasion McCormick grabbed the grievant's left breast and then took a meat thermometer out of her left breast pocket. He stated that although he felt uneasy, the grievant acted as though nothing had happened. Garlinger also stated that after McCormick had been in a fight with another inmate, the grievant asked about the fight two or three times. Don Milliser reported that after the fight the grievant was concerned about McCormick and almost in tears. He also stated that on several occasions the grievant and McCormick were locked in the officers' dining room for 15 to 20 minutes.

Ratcliffe was also monitoring McCormick's mail. On

August 29 or 30 a letter, which was addressed to Lea McCormick, the grievant's mother's name, at post office box 734 in Circleville, was returned to McCormick. The letter referred to the intended recipient's coming and going and expressed romantic love for the recipient. Since Ratcliffe believed that McCormick would not send such a letter to his mother, he investigated. He found that McCormick's mother lived in Florida and had never visited her son at SCI. At the Circleville Post Office the clerk who had rented the post office box indicated that it had been rented by a slender, white woman in her late 30's. She stated that the woman initially had no identification which was needed to rent the box but that she returned later with a feed bill which bore the name Lea McCormick. Ratcliffe also found that the address on the post office box application was a combination of the grievant's old address and her current address and that the telephone number was only a slight modification of the grievant's old telephone number.

On September 9 or 10 a letter dated September 8 from McCormick to Lewis Otis, another inmate, was found in the mailroom. The letter asked Otis to call and tell "lady" not to go to the post office box. Ratcliffe interviewed Otis and he indicated that McCormick called the grievant "lady." This was repeated in a statement signed by Otis on September 18.

On September 13 Ratcliffe called the Highway Patrol which began an investigation. As part of the investigation a handwriting sample was obtained from the grievant. The

sample, along with the grievant's employment application and the post office box application, was delivered to D. Steven Greene, a documents examiner at the Bureau of Criminal Investigations, on October 10.

Ratcliffe conducted an investigatory interview of the grievant on October 11. The grievant denied being touched by McCormick or being alone with him or having sexual relations with him. She repeatedly denied opening a post office box in the name of Lea McCormick.

On October 18 Greene reported his findings to Ratcliffe. He indicated that there was a positive match between the writing on the post office box application and the grievant's handwriting sample. Ratcliffe reported the results of the handwriting analysis along with the other findings of his investigation to Benjamin Bower, the warden of SCI, on October 21.

A notice of disciplinary action dated October 24 was sent to the grievant. It indicated that effective November 4, 1991 the grievant was being removed. The notice stated:

> As the result of an investigation it has been ascertained that you rented a Post Office Box in Circleville, Ohio for an inmate. You rented the box in the name of the inmate's mother for the purpose of communicating with the inmate.
>
> Your actions constitute a violation of the Standards of Employee Conduct rules: 45. Giving preferential treatment to an inmate; the offering, receiving or giving of a favor or anything of value to an inmate; dealing with an inmate, furloughee, parolee, or probationer without the expressed authorization of DR&C. 46e. Engaging in any other unauthorized personal or business relationship with inmates, ex-inmates, furloughees, parolees, probationers or family or friends of same.

As a result a grievance was filed on November 7. It charges:

> Beverly Clark was removed on Nov. 4, 1991 without just cause or any proof of wrong doing. The only proof S.C.I. Administration supported the removal on was a statement made by T.J. Ratcliffe (SCI Investigator) that personnel at B.C.I. said that they had come up with a positive handwriting example given by Ms. Clark and a P.O. Box application that Ms. Clark allegedly got to correspond with an S.C.I. inmate. As of this date 11-7-91 management has yet to provide any type of statement or evidence from B.C.I. to back their allegations.

The grievance requests that the removal be withdrawn and the grievant returned to work with full back pay.

The grievance was processed through the grievance procedure but was not resolved. It was appealed to arbitration on January 10, 1992. The hearing was held on April 10. Written closing statements were received on April 23.

ISSUE

The issue as agreed to by the parties is as follows:

Was the removal of November 4, 1991 for just cause and commensurate with the alleged violations? If not, what should the penalty be?

RELEVANT CONTRACT PROVISIONS

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. In cases involving termination, if the arbitrator finds that there has been an abuse of a patient or another in the care or custody of the State of Ohio, the arbitrator does not have authority to modify the termination of an employee committing such abuse.

* * *

24.04 - Pre-Discipline

* * *

An employee has the right to a meeting prior to the imposition of a suspension or termination. The employee may waive this meeting, which shall be scheduled no earlier than three (3) days following the notification to the employee. Prior to the meeting, the employee and his/her representative shall be informed in writing of the reasons for the contemplated discipline and the possible form of discipline. When the pre-disciplinary notice is sent, the Employer will provide a list of witnesses to the event or act known of at that time and documents known of at that time used to support the possible disciplinary action. If the employer becomes aware of additional witnesses or documents that will be relied upon in imposing discipline, they shall also be provided to the Union and the employee. The employer representative recommemding discipline shall be present at the meeting unless inappropriate or if he/she is legitimately unable to attend. The Appointing Authority's designee shall conduct the meeting. The Union and/or the employee shall be given the opportunity to ask questions, comment, refute or rebut.

* * *

24.05 - Imposition of Discipline

* * *

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

STATE POSITION

The state argues that the grievant violated rule nos. 45 and 46(e) of the Standards of Employee Conduct. Rule no. 45 prohibits:

> Giving preferential treatment to an inmate; the offering, receiving or giving of a favor or anything of value to an inmate; dealing with an inmate, furloughee, parolee, or probationer without expressed authorization of DR & C.

The penalty specified for a first offense is a one to three day suspension to removal. Rule 46(e) prohibits:

> Engaging in any other unauthorized personal or business relationship(s) with inmates, ex-inmates, furloughees, parolees, probationers, or family or friends of same (nexus required).

The penalty for a first offense is a five to ten day suspension to removal.

The state charges that the grievant showed preferential treatment of McCormick when she opened a post office box for him in his mother's name. It points out that the postal clerk told Ratcliffe that the person who rented the box was a slender, white woman in her late 30's while the grievant's mother is a black woman who lives in Miami, Florida and who has never visited her son at SCI. The state further notes that the grievant wrote to Otis asking him to warn "lady" not to go to the post office box and that Otis identified the grievant as "lady."

The state contends that the most damaging and credible testimony is that of Greene. It notes that he has extensive training in handwriting analysis, has 16 years experience in the field, and has testified 140 times in grand jury proceedings, in court, and before government boards. The state stresses that he stated unequivocally that the grievant's handwriting sample and her employment application matched the handwriting on the post office box application.

The state contends that the grievant engaged in an unauthorized personal relationship with an inmate. It

indicates that Hartman testified that he observed the grievant and McCormick having sexual intercourse in a cooler in the kitchen. The state points out that his testimony was detailed and specific. It notes that his position did not change in the eight months from the incident to the time of the arbitration hearing.

The state maintains that the personal relationship between the grievant and McCormick was corroborated by the testimony of two staff members. It notes that Milliser testified that when McCormick was sent to security control -- the "hole" -- after a fight with another inmate, the grievant was almost in tears and that he observed the grievant and McCormick alone for periods up to 30 minutes. The state points out that Garlinger stated that McCormick grabbed the grievant's breast and then tried to cover it up by removing a meat thermometer from her breast pocket. It stresses that Garlinger testified that he was prepared to restrain McCormick but that the grievant did not react or object.

The state rejects the grievant's claim that the inmates played a game by trying to take her meat thermometer from her pocket without her knowing it. It points out that although she claimed that she counseled inmates when they tried to do it and wrote disciplinary tickets, on the day in question she did not react. The state observes that Melvin Ross, a food service coordinator 2 who testified for the union, stated that on only three occasions in ten years did an inmate take his thermometer from his pocket and that each time he

counseled the inmate.

The state contends that the grievant made shotgun style charges against Lewellyn, Boring, Hensen, and Johnson. It notes that when she charged Lewellyn with sexual harassment, she knew of the inmates' allegations that she was having sexual contact with McCormick and that Lewellyn had questioned inmates and staff about it. The state maintains that the charges of sexual harassment and retaliation against Boring are without specifics and have no merit. It claims that Hensen's warning to the grievant about her conduct with another staff member does not prove that she was in collusion with other employees to get the grievant. The states characterizes the grievant's charges as mere allegations without corroboration.

The state asserts that there is no basis for the grievant's suspicion that Johnson was involved in her problems. It points out that it was Johnson who told the grievant about an opening at SCI. The state acknowledges that the business relationship between Johnson's husband and the grievant had ended four months prior to the incident at issue but claims that she and the grievant remained friends. It notes that when the grievant approached her about the alleged sexual harassment, she referred her to Ratcliffe and Marcia White. The state stresses that Johnson had no access to the grievant's personnel file which would have included her previous address and that her husband had no knowledge of the grievant's old address.

The state rejects the union's contention that the grievant's removal should be based solely upon her renting a post office box for McCormick. It points out that the grievant and Jeff Addington, the chief steward, received copies of all of the statements by staff members and inmates regarding her sexual conduct. The state notes that at the investigatory interview and the predisciplinary conference her intimate personal relationship with McCormick was discussed. It stresses that the disciplinary notice cites rule no. 46(e) of the Standards of Employee Conduct which prohibits unauthorized personal relationships with inmates.

The state rejects the union's claim that it was denied the opportunity to question key witnesses at the predisciplinary hearing. It states that Addington had the opportunity to question Ratcliffe and David Burrus, a labor relations officer at SCI. The state reports that the union called Headley and Ross as its witnesses but did not call McCormick to testify.

The state argues that the grievant's violation of the rules was a serious matter. It maintains that the purpose of the rules is to prevent an employee from being manipulated or blackmailed into supplying an inmate with drugs or money which could be used to run a store, gamble, or buy sex. The state stresses that an employee might bring a weapon into the facility which could be used for an escape or might be used to injure an inmate or staff member.

The state concludes that it has shown that just cause

existed for discipline. It asks the Arbitrator to deny the grievance in its entirety and to sustain the removal.

UNION POSTION

The union objects to the consideration of any charges not listed on the order of removal. It points out that the order states that "as the result of an investigation it has been ascertained that you rented a Post Office Box in the name of the inmate's mother for the purpose of communicating with the inmate." The union stresses that if the grievant was being removed for an inappropriate or illegal relationship with an inmate, it should have been clearly stated on the order. It claims that the state is attempting to add a charge to lend validity and strength to its decision to remove the grievant from her postion.

The union contends that the state had no intention to pursue the allegation that the grievant engaged in an inappropriate relationship. It maintains that this is supported by the fact that McCormick was never made available through the grievance procedure for the union to question. The union asserts that it is a blatant violation of Article 24, Section 24.04 of the contract for the state to build its case on the testimony of an inmate and then not to have him present during the grievance procedure. It indicates that McCormick is the only person who can testify about the alleged relationship.

The union complains that it was denied the results of the handwriting analysis done by the Bureau of Criminal

Investigations. It claims that this hampered its investigation and is in violation of the contract. The union states that the fact that the state finally produced the document weeks after the grievant was removed is of little consequence. It characterizes the state's action as "trial by ambush."

The union argues that Milliser's testimony does not indicate any impropriety on the part of the grievant. It acknowledges that the grievant was upset when McCormick was removed from the work area after a fight with another inmate. The union stresses, however, that the grievant's reaction reflected the fact that she had been put on notice regarding her work performance and was concerned about the loss of one of her best workers.

The union challenges the testimony of Garlinger. It questions why he waited weeks before coming forward to put in writing the alleged incident involving the grievant and McCormick. The union points out that Garlinger was a new employee at the time and had just completed his training so he knew what was required of him if he saw an inmate touch a female employee on the breast. It asserts that it is easy for a probationary employee like Garlinger to be used or influenced by the state.

The union maintains that the charges of an improper relationship are unfounded. It claims that it is strange that none of the charges or allegations arose until the grievant was in the process of filing sexual harassment

charges against Lewellyn who made the initial allegations that prompted the entire investigation. The union accuses the state of relying upon hearsay, second-hand hearsay, and the testimony of convicted felons.

The union points out that the grievant denies renting a post office box in the name of Lea McCormick. It notes that she also denies writing to McCormick. The union does acknowledge that the grievant developed a working relationship with McCormick because he is the chief cook who assigns jobs to other inmates and because she relies upon him for information about who is not doing his job.

The union contends that the grievance should be upheld in its entirety. It charges that the state violated Sections 24.01 and 24.04 of Article 24. The union asks that all records of the incident be removed from the grievant's personnel file and that she be reinstated with full back pay and benefits. It further requests that the grievant be afforded the right to transfer to the first same or similar position in Franklin County.

The union asserts that even if the Arbitator finds that some discipline is warranted, removal is not appropriate. It maintains that discharge is punitive in nature and not commensurate with the offense as required by Section 24.05 of Article 24. The union points out that rule no. 45 of the Standards of Employee Conduct calls for a penalty of a three to five day suspension to removal for a first offense and that rule no. 46(e) calls for a penalty of a five to ten day

suspension to removal. It urges the Arbitrator to apply the lowest possible degree of discipline should he believe that some discipline is warranted.

ANALYSIS

The grievant is charged with violating rule nos. 45 and 46(e) of the Standards of Employee Conduct. Rule no. 45 prohibits:

> Giving preferential treatment to an inmate; the offering, receiving or giving of a favor or anything of value to an inmate; dealing with an inmate, furloughee, parolee, or probationer without expressed authorization of DR & C.

Rule no. 46(e) bars:

> Engaging in any other unauthorized personal or business relationship(s) with inmates, ex-inmates, furloughees, parolees, probationers, or family or friends of same (nexus required).

The violation of rule no. 45 is based upon the allegation that the grievant rented a post office box in the name of the grievant's mother in order to correspond with him. The Arbitrator believes that the evidence clearly supports this charge. First, Greene, a highly qualified handwriting expert from the Bureau of Criminal Investigations, testified that the handwriting on the post office box application matched the handwriting in the handwriting sample given by the grievant and the handwriting on her employment application. Second, the address on the post office box application is a combination of the grievant's previous address and her current address and the telephone number is only a slight variation of her old telephone number. Third, Ratcliffe testified that the

postal clerk reported that the post office box was rented by a slender, white woman in her late 30's. While such testimony is hearsay and as such is entitled to very little or no weight, the Arbitrator notes that Ratcliffe made the same statement at both the predisciplinary hearing and the step three meeting yet the union indicated that it did not talk to the postal clerk. Although such testimony does not establish that the grievant rented the post office box, it is consistent with the other evidence that indicates that she was the one who rented the post office box.

The union complained that it was improperly denied the report of the handwriting expert at the predisciplinary hearing and during the grievance procedure. While it is true that the union did not have Greene's report per se, it did have Ratcliffe's sworn statement indicating that Greene had informed him that there was a positive match between the grievant's handwriting sample and the post office box application. Greene's subsequent official report said nothing more. There was no indication whatsoever as to how the union was in any way prejudiced. Clearly, the union had more than ample opportunity to attempt to rebut Greene's findings.

The violation of rule no. 46(e) is based upon the alleged personal and/or sexual relationship between the grievant and McCormick. In support of this charge the state offered the testimony and/or statements of Hartman, McGilvary, and Nichols and staff members Garlinger and

Milliser. In a statement dated August 29 and in his testimony at the arbitration hearing Hartman indicated that he observed the grievant and McCormick having sexual intercourse in a cooler in the kitchen. McGilvary gave a statement indicating that the grievant and McCormick were always together. Nichols stated that he saw McCormick give the grievant a backrub and that they would be in the cooler together for five to ten minutes.

Although the Arbitrator believes that great caution should be exercised in considering the testimony and/or statements of inmates, the testimony of two staff members also indicates an inappropriate relationship between the grievant and McCormick. Garlinger testified that he saw McCormick grab the grievant's breast and the grievant did not react or protest. Garlinger made it quite clear that it was not accidental contact made while trying to remove a meat thermometer from the grievant's pocket. Milliser testified that when McCormick was taken to security control after a fight with another inmate, the grievant was nearly in tears and that it was clear to him that the grievant expressed much more than normal concern for an inmate. He also indicated that on several occasions the grievant and McCormick were locked in the officers' dining room together for 15 to 20 minutes. The Arbitrator does not feel that there is any reason to believe that either Garlinger or Milliser were mistaken or untruthful about what clearly indicates more than a normal relationship between a staff member and an inmate.

The union argued that the Arbitrator cannot consider the charge that the grievant engaged in a personal relationship with McCormick because it was not listed on the order of removal. The Arbitrator must disagree. First, this allegation was discussed at the predisciplinary hearing and at step three of the grievance procedure and all of the statements regarding the alleged relationship were given to the union. The union clearly was not "ambushed" as it claimed. Second, although the order of removal describes the renting of the post office box and does not mention the alleged sexual relationship between the grievant and McCormick, it does cite rule no. 46(e) which prohibits an employee from "engaging in any ... unauthorized personal ... relationship(s) with inmates." Third, it is not clear that renting the post office box and the alleged relationship are separate and distinct offenses. If the grievant did not have a personal relationship with McCormick, there would have been no reason to rent a post office box to correspond with him.

The union appeared to claim that the charges against the grievant are the result of her charge of sexual harassment against Lewellyn and Boring. The Arbitrator must reject this position. The testimony and evidence indicate that many of the allegations against the grievant were made before the charges were filed. In fact, the grievant's complaint to Johnson and Marcia White was that Lewellyn had been spreading rumors about her involvement with McCormick. More importantly, the fact stands that the testimony and evidence

establishes that the grievant rented a post office box in the name of Lea McCormick for McCormick to use to write to her. Whether Lewellyn's alleged requests for a date and discussion of a movie of his sexual activities constitutes sexual harassment is another matter.

The remaining issue is the proper penalty. The union argued that the discharge penalty imposed is punitive and excessive in violation of Article 24, Section 24.05. The Arbitrator must disagree. If an employee becomes involved in an inappropriate relationship with an inmate in violation of the Standards of Employee Conduct, he or she may become subject to undue influence and/or blackmail. This could result in drugs, money, or weapons being brought into the facility. The possible consequences of such actions are so severe that the discharge penalty is not inappropriate.

This Arbitrator's decision regarding the discharge penalty is consistent with the two prior decisions submitted by the state. In State of Ohio, Department of Rehabilitation and Correction, Chillicothe Correctional Institute and Ohio Civil Service Employees Association, Local 11, AFSCME, AFL-CIO, September 21, 1990 a female corrections officer was charged with preferential treatment to a male inmate and engaging in an unauthorized, personal relationship with the inmate. The specific allegations included spending time alone with the inmate in a restroom and having intimate contact with him. Arbitrator Hyman Cohen upheld the discharge. In State of Ohio, Department of Rehabilitation

and Correction, Lima Correctional Institute and Ohio Civil Service Employees Association, Local 11, AFSCME, AFL- CIO, OCB Case No. 27-12-890224-0029-01-03, May 7, 1990 a food service coordinator was removed for her involvement with an inmate which came to light after he sent flowers to her home. Arbitrator David Pincus rejected a number of claims by the union of procedural defects and upheld the employee's removal. He recognized that the grievant was feeling extreme pressure and that the inmate had begun to establish the foundation for future extortion which could have had dire consequences for the institution. The conduct engaged in by the grievant in the instant case is no less serious than the conduct in the cases before Arbitrators Cohen and Pincus and there is no basis for a less severe penalty.

AWARD

The grievance is denied.

Nels E. Nelson
Arbitrator

May 26, 1992
Russell Township
Geauga County, Ohio