

IN THE MATTER OF ARBITRATION

BETWEEN

STATE OF OHIO,)	CASE NO. 27-15-(92-08-19)-
OHIO DEPARTMENT OF CORRECTIONS)	0219-01-03
)	
and)	GRIEVANT: BETH WALDNIG
)	
OHIO CIVIL SERVICE EMPLOYEES)	
ASSOCIATION, AFSCME, LOCAL 11,)	<u>OPINION AND AWARD</u>
AFL-CIO)	
)	

APPEARANCES

On behalf of the Employer:

Roger A. Coe	Labor Relations Officer
Sharon Hilliard	Labor Relations Specialist, OCB
Leroy Payton	Witness

On behalf of the Union:

Harold Bumgardner, Jr.	Staff Representative, OCSEA
Sharon VanMeter-Ralph	Staff Representative, OCSEA

Lawrence R. Loeb, Arbitrator
55 Public Square, Suite 1640
Cleveland, OH 44113
216-771-3360

1. SUBMISSION

This matter came on for hearing pursuant to the terms of the parties' Collective Bargaining Agreement on May 17, 1993 at the Madison Correctional Facility in London, Ohio. The parties stipulated that this matter was properly before the arbitrator, that the witnesses should be sworn and separated and that no post hearing briefs would be filed. Prior to the start of the hearing the Union's representative informed the Arbitrator that the Grievant was aware of the date, time and location of the proceeding. He further stated that he had met with the Grievant and her parents the night before the hearing and had been informed by them that the Grievant would not appear or participate in the hearing. Therefore, the hearing went forward in her absence.

2. STATEMENT OF FACTS

On July 8, 1992, the Grievant received a Notice of Disciplinary Action informing her that she would be removed from her position as a Corrections Officer effective February 10, 1992 for the following violations of ORC 124.34:

Failure of good behavior; #13- Making false statements toward another employee' #27- Failure to immediately report a violation of any work rule; law or regulation; #45- Giving preferential treatment to an inmate; #46 (A)- the exchange of personal information with an inmate; #46(D)- Committing any sexual act with an inmate.

The events which led the Employer to issue the removal began to unfold on May 26, 1992 when the Grievant called her Supervisor and informed him she had just received a call from Inmate S_____ advising her that she should watch herself that week. When the

Supervisor asked the Grievant why she accepted a collect call from an inmate, she stated that she thought the call was from her boyfriend who called her collect on a daily basis.

The Supervisor told the Grievant to file a written report of the incident. As soon as his conversation with the Grievant ended, the Supervisor had Inmate S_____ brought to his office and interrogated him. The inmate admitted that he had called the Grievant who, he said, had given him her telephone number because she trusted him. He further stated that he told the Grievant to call the Supervisor because of the Grievant's problems with Inmate W_____ who was extorting money from her, threatening to tell the authorities that she let him touch her breasts and groin. According to Inmate S_____, the situation had gotten to the point that the Grievant had sent \$200.00 to Inmate W_____'s family. Later the same day the Grievant gave two separate handwritten statements to her Supervisor. In the first, she recounted her telephone conversation with Inmate S_____. In the second, longer statement she indicated that she had been approached by Inmate W_____ who told her that if she sent \$200.00 to an address he gave her he could stop other inmates from spreading rumors about her. The Grievant admitted that she sent the money stating that she did so because she believed that at, best, the inmate would have caused her trouble and at worst, he might have gotten her fired.

The Grievant was subsequently questioned by the facility's Investigator on June 4, 1992 in the presence of a Union

Representative. In the course of the questioning, the Grievant admitted to receiving a telephone call from Inmate S_____ and sending the \$200.00 to Inmate W_____'s family as he directed but she denied that she had touched any inmate's private parts or that she had allowed herself to be touched by any inmate. The question was raised because on May 27, 1992, Inmate W_____ had given the Employer a statement in which he indicated that he and the Grievant had had sexual contact on a number of occasions in a number of places at the prison. His statement was fairly detailed containing references to the color of the Grievant's underclothing and the fact that on one day when she pulled her pants down her "man down" alarm fell off her belt loop.

A man down alarm is a transmitting device correction officers carry for protection. It is engineered so that an officer can verbally transmit with it, or can send an alarm by pressing a button. In addition, the device is designed so that if it tilts a certain distance away from the vertical, the alarm automatically goes off within 3 to 5 seconds. The delay permits the officer to push a reset button which will cancel the alarm if the device has been tipped by accident. The Grievant's man down alarm had not gone off any of the times that Inmate W_____ alleged that he and the Grievant had been engaged in sexual activity.

On June 8, 1992 the Grievant submitted a handwritten statement in which she accused Inmate W_____ of attacking her in his cell, pushing her pants down to her knees and penetrating

her. Management had first become aware of the Grievant's allegations only three days earlier when the Investigator received a short handwritten note from another Officer in which he described a conversation with the Grievant during which the Grievant informed him that Inmate W_____ had grabbed her from behind when she entered his cell and forced one of her arms behind her back, pushed her pants down and assaulted her. Approximately one month later the Grievant underwent a polygraph exam in which she stated that she was forced to have sex with an inmate. At the end of the examination, the polygrapher concluded that no deception had been indicated during the test.

If Management was aware of the results of the test, it was not swayed by them, following through with its decision to discharge the Grievant. Eight days after she was removed the Union completed the Grievance form alleging that:

On 8-10-92 Officer W_____ was removed as a C.O. at MALI for alleged violations #1, 13, 27, 45, 46A, & 46D of the Standard of Employee Conduct. The grievant feels that the removal was without just cause. Also the grievant feels that the discipline imposed was not progressive.

The parties could not settle the matter and it, therefore, proceeded to arbitration, at which time the Union introduced into evidence medical records of the Grievant's hospitalization and subsequent treatment for injuries she incurred in an automobile accident which occurred in March, 1989. At the time, the Grievant, who was employed as a Corrections Officer at the Madison Facility, was driving a car in which her sister was riding. The accident claimed the life of her sister and caused

the Grievant to sustain a traumatic brain injury as well as other severe injuries. The Grievant recovered physically from the accident, but continued to suffer problems as a result of the brain injury and the loss occasioned by her sister's death. She, in fact, continued to receive therapy for both the physical and emotional aftermath of the accident past the date she was discharged from her position at the Madison Correctional Facility.

3. POSITION OF THE EMPLOYER

Management maintains that it was justified in discharging the Grievant who knowingly violated some of the Department's most important work rules. Although the Madison Correction Facility does not necessarily house the worst offenders in the State's prison system, it is nonetheless, a prison. The men who have been sent there have committed serious crimes. To deal with those individuals and others like them around the State the Department has had to adopt work rules designed to insure that the inmate population is safely contained and that guards and other members of the work force who deal with those inmates can carry out their duties as safely as possible. Every one of the Department's work rules is implemented with those principles in mind.

It was the Grievant's decision to deliberately flaunt those rules by having an affair with a prisoner. In and of itself that would have been bad enough. She compounded that mistake by allowing herself to be talked into sending money to his family

through a third party. Both of those actions were in total derogation of the Department's regulations.

Those rules were adopted for a reason. Almost every breach of security, almost every incident of contraband being smuggled into a prison arises out of an improper relationship between a guard and a prisoner. The nature of the work requires that the guards come into daily contact with the prison population. However, there is a difference between that kind of contact and the relationship the Grievant allowed herself to be drawn into with Inmate W____. There can be no question about the nature of that relationship or what the Grievant did.

Detailed investigations by both the Madison Correctional Facility's Staff Investigator and the Ohio State Highway Patrol came to the same conclusion, the Grievant voluntarily entered into a physical relationship with a prisoner and allowed herself to be used as a conduit for money for him. When she did that, she not only violated the Department's rules, but she jeopardized her own safety and the safety of every other employee at the Madison Correctional Facility as well. As a result, Management had just cause to discharge her. It is not a decision which the Arbitrator should overturn.

4. POSITION OF THE UNION

The Union argues that the Grievant has been victimized twice, once when she was raped by a prisoner and then a second time when she was fired by the Ohio Department of Corrections which refused to believe her story and instead took the word of a

convicted felon who claimed that she had voluntarily entered into a physical relationship with him. Nothing could be further from the truth. The prisoner forced himself on the Grievant. Her only crime, if it could be called that was to enter the prisoner's cell to search for contraband in the mistaken belief that he was elsewhere at the time. Unfortunately for her, the prisoner was hiding out of sight in a corner of the cell. What followed was horrible for the Grievant who had already undergone a major physical and emotional trauma just a relatively short time before when she was severely injured and her sister killed in a motor vehicle the Grievant was operating. The Grievant had only shortly returned to work after recovering from the injuries sustained in that accident before she was assaulted. At the time, she was still suffering from the after effects of that accident.

Unfortunately, she handled the assault the same way many women handle such incidents. She did not immediately report it. When she did, the result was predictable. The Employer refused to believe her, choosing instead to take the word of convicted criminal who had every reason to lie about the Grievant who had no similar motivation. The Employer likewise refused to believe that she was blackmailed into sending money for the prisoner. Why Management would take the word of a convicted felon over the Grievant is unknown and beyond the scope of this hearing. What is known, is that the Grievant was reticent to come forward when

these incidents occurred fearing that she would not be believed. As subsequent events proved, her worst fears were borne out.

If the Grievant made a mistake, it was not coming forward sooner. Considering all that she had been through in the past few years, considering her mental state at the time of the incidents in question, she should be forgiven for having made what, in retrospect, was a poor decision. That is all, however, that she is guilty of. It certainly did not contribute to an inmate uprising, smuggled contraband, or any of the other activity the Employer alleges would naturally flow from her actions. It is just that kind of hysteria, though, which has marked the Employer's actions from the beginning of its investigation.

The Contract, though, demands more than mere suspicion and innuendo to justify discharging an employee. Instead, the Employer must have just cause to do so. Considering that the Grievant was the victim of an assault, there is no way that Management can claim that it had just cause to terminate her because of what took place in the prisoner's cell. Since it cannot, she must be reinstated with no loss of benefits or pay.

5. DECISION

In the course of the hearing in this matter both parties concentrated on the question of whether or not the Grievant engaged in consensual activity with Inmate W_____ or was raped by him. While it would be easy to follow the same path which leads directly into a quagmire of competing counterclaims, it would be

a mistake to do. It would not be because the issue can't be resolved, but because it is unnecessary to do so. The Grievant was not charged with committing just one breach of the Department's work rules. If she had been, then the question of what occurred in Inmate W_____'s cell would have to be resolved. The Employer, however charged her with a number of violations, the least of which was that she had sexual relations with an inmate. In defending her, the Union argued that the Employer had essentially overcharged the Grievant, recategorizing and reprocessing the various aspects of the one offense to make the Grievant's behavior seem much worse than it actually was. In criminal law as well as industrial relations that is often true. It is not the case here, though.

At least three of the violations the Grievant is charged with committing, failure to immediately report a violation of any work rule, law or regulation, giving preferential treatment to an inmate and exchanging personal information with an inmate, are separate and distinct "offenses" even though all may have their genesis in the same underlying incident. The result is that it does not really matter whether the Grievant was assaulted as she claims, or voluntarily engaged in physical intimacy with an inmate as the Employer asserts. Whatever happened between the Grievant and Inmate W____ cannot take away from the fact that she sent \$200.00 to Inmate W_____'s girlfriend at his urging, failed to report that Inmate W____ extorted money from her and assaulted her, and gave her telephone number to Inmate S_____.

The Grievant admitted the first two violations, but denied the third, alleging that someone other than she must have given her telephone number to the inmate. The story does not ring true, however.

Not only did Inmate S_____ repeatedly state that the Grievant had given him her telephone number, but the two people the Grievant named in her statement as being responsible for doing so both credibly denied that they had given out her number, which was unlisted at the time. The Grievant seeks to explain their denials by essentially alleging what amounts to a conspiracy to force her out of her job. The Union, which argued the Grievant's position with great emotion was, unfortunately limited in what it could do because of her absence from the hearing.

As the party asserting what is essentially an affirmative defense, it falls on the Union to establish that defense by at least a preponderance of the evidence. Without the Grievant to help, it could not meet that burden. As a result, the undersigned must conclude from all of the evidence in the record that the Grievant voluntarily gave her telephone number to Inmate S_____. That conclusion finds support from the fact that the Grievant accepted the collect call from the inmate. Since the call was collect, the operator had to identify the caller and, therefore, the Grievant had to know who was on the line before she gave her approval to put the call through. In her statement, the Grievant claimed that she accepted the call by mistake,

thinking that it was from her boyfriend who called her collect everyday. Again, without the Grievant present to testify, the Union was unable to establish that claim or overcome the presumption that the Grievant accepted Inmate S_____'s call deliberately, knowing who was on the line, instead of by accident.

Of the three offenses the Grievant is certainly guilty of, failing to report a violation of a work rule or law, giving preferential treatment to an inmate and exchanging personal information with the inmate, the last is the least serious. Standing alone, it would not justify removing the Grievant. In conjunction with the other two offenses she is guilty of, however, her conduct gave the Employer just cause to terminate her.


Whatever reason, the Grievant decided to send money to Inmate W_____'s girlfriend, whether she was blackmailed into doing it or did it as a result of her relationship with inmate W_____, the fact that she sent it indicates that the Grievant crossed the line. She created a relationship with Inmate W_____ which allowed her to be used by him for a prohibited purpose. In doing so, she polluted her role as a Corrections Officer. The same is true of her failure to report the alleged extortion and assault. Whatever the reason the Grievant chose to remain silent regarding those incidents, whatever the reason she chose to send the money to inmate W_____'s girlfriend, her actions violated the

Employer's work rules and demonstrated that she no longer had the judgment required to carry out the duties of her position.

Just as it does not matter why the Grievant violated the three rules under consideration, it does not matter why she failed to exercise good judgment. It may be that she did forge a relationship with Inmate W_____ or it may be that she feared the loss of her job if her actions became known to the Employer, or it may be that her judgment was impaired as a result of the injuries and trauma she sustained in the 1989 motor vehicle accident. Whatever the reasons for her actions, it is beyond the scope of this proceeding to identify the cause of her misconduct, and it is unnecessary to do so. It is enough that she deliberately chose to follow a course of behavior which violated some of the Employer's most important work rules, rules which were adopted to insure the safety of those controlling the inmate population by insuring no relationship arises between the inmates and the corrections officers which would cloud their judgment. Moreover, the nature of the Grievant's misconduct was such as to warrant ignoring the progressive discipline system and imposing the ultimate penalty.

6. DECISION

For the foregoing reasons the Grievance is denied.



Lawrence R. Loeb, Arbitrator
274-42-0730

6/2/93
Date