

In the Matter of the
Arbitration Between

Ohio Education Association

Union

and

State of Ohio,
Department of Rehabilitation
and Corrections

Employer

Grievance Nos. 27-12-(92/02/28)-
0374-06-02
27-12-(92/09/19)-
0414-06-10
27-12-(92/09/28)-
0424-06-10

Grievant (Keiffer, Robert)

Hearing Dates: April 15, 1993
April 16, 1993

Brief Date: May 2, 1993
Award Date: June, 16, 1993
Arbitrator: R. Rivera

For the Union: Grant D. Shoub, Esq.
Henry Stevens

For the Employer: Roger Coe, Esq.
Lou Kitchen

Present at the Hearing in addition to the Grievant and Advocates were Carrie Smolik, OEA Labor Relations Consultant (observer), C.O. Hammer (witness), C.O. Fisher (witness), Inmate Bridgeman (witness), Inmate Maddox (witness), Barbara Thomas, Teacher (witness), C.O. Toothman (witness), Paul Davenport (witness), TIE Deputy Warden, Steve Bivona, LT (witness), Don Tchour, Storekeeper (witness), Inmate Cobble (witness), David Nell, Principal (witness), Inmate Yocum (witness).

Preliminary Matters

The Arbitrator asked permission to record the hearing for the sole purpose of refreshing her recollection and on condition that the tapes would be destroyed on the date the opinion is rendered. Both the Union and the Employer granted their permission. The Arbitrator asked permission to submit the award for possible publication. Both the Union and the Employer granted permission. The parties stipulated that the matter was properly before the Arbitrator. Witnesses were sequestered. All witnesses were sworn.

Issue

Was the 5-day suspension of Grievant on March 2, 1992 for just cause? If not, what should the remedy be?

Stipulated Facts

1. Grievant was appointed July 17, 1989 as a Librarian at Lima Correctional Institution.
2. Grievant received a copy of the Standards of Employee Conduct.
3. Grievant's prior disciplinary history includes the following:

<u>Date</u>	<u>Violation</u>	<u>Action</u>
3/9/90	#6c & 26 - unsecure man down alarm, took institution keys home.	Written Reprimand
12/24/90	#30 - locked keys in restroom	1-day suspension
4/8/91	#45 - making phone calls for inmates	2-day suspension
6/19/91	#45 - making 43 copies of maps and legal papers for inmates	Written Reprimand
9/16/91	#26 - Tardiness	Oral Reprimand

Relevant Contract Sections

Article 2.01 - Non-Discrimination

Neither the Employer nor the Association shall unlawfully discriminate against any employee on the basis of race, sex, creed, color, religion, age, national origin, political affiliation, handicap, or sexual preference/orientation, in the application or interpretation of the provisions of this Agreement.

The Employer and the Association hereby state a mutual commitment to affirmative action, as regards job opportunities within the agencies covered by the agreement.

ARTICLE 5 - GRIEVANCE PROCEDURE

Article 5.01 - Purpose

The State of Ohio and the Association recognize that in the interest of harmonious relations, a procedure is necessary whereby employees are assured of prompt, impartial and fair processing of their grievances. Such procedure shall be available to all employees and no reprisals of any kind shall be taken against any employee initiating or participating in the grievance procedure. The grievance procedure shall be the exclusive method of resolving both contractual and disciplinary grievances except where otherwise provided by this Agreement.

The parties intend that every effort shall be made to share all relevant and pertinent records, papers, data and names of witnesses to facilitate the resolution of grievances at the lowest possible level.

An employee who elects to pursue a claim through any judicial or administrative procedure shall thereafter be precluded from processing the same claim and incident as a grievance hereunder. This restriction does not preclude, however, pursuing a claim which has been heard in the grievance and arbitration procedure, in another forum, subject only to the State's right to file a motion for deferral.

Article 6.05 - Arbitrator Limitations

Only disputes involving the interpretation, application or alleged violation of provisions of this Agreement shall be subject to arbitration. The arbitrator shall have no power to add to, subtract from or modify any of the terms of this Agreement; nor shall the arbitrator impose on either party a limitation or obligation not specifically required by the express language of this Agreement.

ARTICLE 13 - PROGRESSIVE DISCIPLINE

Article 13.01 - Standard

Employees shall only be disciplined for just cause.

Article 13.04 - Progressive Discipline

The Employer shall follow the principles of progressive discipline. Disciplinary action shall include:

1. oral reprimand (with appropriate notation in the employee's official personnel file);
2. written reprimand;
3. suspension without pay;
4. demotion or discharge;

Disciplinary action shall be commensurate with the offense.

Article 14.01 - Work Rules

Work rules shall be all those written policies, regulations, procedures, and directives which regulate conduct of employees in the performance of the Employer's services and programs.

Work rules shall not conflict with any provision of the Agreement. The Association shall be furnished with a copy of the work rules a minimum of fifteen (15) working days in advance of their effective date. The Association shall designate an address for receipt of this communication.

Work rules shall be made available to affected employees prior to their effective date.

In emergency situations, as defined by the Employer or the employing agency, the provisions of this Section may not apply. The Association and affected employees will be notified promptly of such declared emergencies and their duration.

Joint Exhibits

1. Contract
2. Discipline Trail (Video case)
3. Grievance Trail (video case)
4. Discipline Trail (book case)
5. Grievance Trail (book case)
6. Discipline Trail (materials case)
7. Grievance Trail (materials case)
8. ODRC Standards of Employee Conduct

Employer Exhibits

1. Video tape marked Ragtime believed to be "2069 A Sex Odyssey."
2. Three (3) copies of Serious Pleasure Lesbian Erotic Stories.
3. ODRC Policy on "Challenged Library Materials."
4. Post Orders Front Gate Control.
5. Grievant's Civil Service Application.
6. ODRC Policy on Microcomputer Policy (Assess to Floppy Disk/Data).
7. Statement of Barbara J. Allen dated August 10, 1992.
8. Both Grievance Trails and Disciplinary Trails for all three cases mailed to Grievant.
9. Draft of Letter Re: LSCA Grant.

10. Statement of Inmate Brown dated September 7, 1992.
11. Statement of Davenport dated August 12, 1992.
12. Discipline Record of Grievant (including 3 cases currently in dispute).
13. Photo.

Union Exhibits

1. ODRC Policy on Printed Materials dated January 4, 1993.

This Opinion concerns three separate disciplines and the related Grievances. All three Grievances were before the Arbitrator during a two (2) day hearing. The three Grievances will be dealt with seriatim in chronological order.

Grievance No. 27-12-(92/02/28)-0374-06-02

This situation took place at Lima Correctional Institution. The Grievant was a Librarian 2. At the time of the events in question, he had been an ODRC employee for approximately two (2) years. His prior discipline consisted of 1) a written reprimand for violation of Rules 6C and 26 - Unsecure man down alarm and taking institutional keys home, 2) December 24, 1990 a one (1) day suspension for violation of Rule #30 for locking keys in the restroom, 3) April 8, 1991 a two (2) day suspension for a violation of Rule #45 - for making phone calls for inmates, 4) June 19, 1991 written reprimand for making 43 copies of maps and legal papers for

inmates, a violation of Rule #45, and 5) September 16, 1991 an oral reprimand for violation of Rule #26, tardiness. The Grievant stipulated that he had received a copy of the Standards of Employee Conduct. (See Stipulated Facts.)

One of the Grievant's duties was to order video tapes for the Institution. On or about July 9, 1991, an order for video tapes was faxed to Pro Media Service. The fax cover sheet indicated that the sender was the Grievant. The order consisted of a 1-1/2 page printed list of video titles. Against each title was either the word no or the price written either in ink or pencil. On page 2, the ninth title was 2069 A Sex Odyssey; against that title \$15.03 and Y were listed. (Joint Exhibit 2) The Grievant said that he had no memory of ordering this particular video. The whole order was apparently sent to ODRC's central office. (See invoice dates August 12, 1991 in Joint Exhibit 2.) Subsequently, the videos arrived at Lima Correctional Institution via "mail" truck from Central Office. Usually, such orders would come into the Warehouse first and then be distributed. However, in this case, the videos came directly to the library. Who brought it to the library and when it was brought remains a mystery. The Grievant believed that C.O. Hammer picked up the video order. The Grievant testified that the usual procedure was for Inmate Yocum to add the videos to the computer list, mark them, label them, and place them in a cupboard in the Grievant's office. C.O. Hammer testified that while he was stationed in the library in the Fall of 1991 that he questioned the Grievant as to whether the Sex Odyssey video in question was

"appropriate" for the prison. Hammer claims that the Grievant told him "to mind his own business" and then locked the video in a cabinet. The Grievant denies that this conversation with Hammer ever took place. Apparently, sometime after the video reached the library, Office Fisher had Inmate Yocum re-label the video with the label "Ragtime" and secure it with other R-rated videos. (See Employer Exhibit 1) At the Arbitration, Fisher was unavailable to testify but in his written statement he confirms that he was the person who caused the label to be changed. (Joint Exhibit 2)

In the early evening on November 19, 1991, two inmates (Bridgeman and Maddox) approached the Grievant and asked for the video 2069 - A Sex Odyssey. The Grievant refused to give the video to the inmates at that time and indicated that he would talk to them about it the next day. The next morning, early (7:30-8:00 a.m.), the inmates returned and asked the Grievant for the video. He got the video, placed in a brown envelope, and gave it to them. The inmates took the video to the AV room, where Teacher Thomas let them in when they told her they were supposed to clean the AV room. The inmates had barely begun watching the tape when they were discovered by C.O. II Toothman who confiscated the tape and notified Mr. Nell, the School Facilitator, and Lt. Bivona, Shift Supervisor.

Inmate Bridgeman stated that he had learned of the tape from the library clerk Yocum. Both Inmates Bridgeman and Maddox spent 15 days in the "hole" for their behavior.

C.O. II Toothman indicated that when he caught Maddox and Bridgeman, Maddox called the Grievant. Subsequently, the Grievant called Toothman and said that he (the Grievant) had given the tape to Maddox and it was "all right" for him to have it. Toothman handcuffed both inmates and took them to security control pending an investigation for "being out of place." Mr. Davenport was also notified. After reviewing the tape, Mr. Davenport and Lt. Bivona went to the library to speak with the Grievant. The Grievant said he had no idea how the tape got ordered, that he had never reviewed it but that he had known of its existence. He admitted that the previous evening Inmates Bridgeman and Maddox had asked for that tape and that he had told them he'd have to think about it. He also admitted that he had given them the tape that morning. When he was asked why, the Grievant replied that he had thought to himself "oh well, why not." He was again asked why? The Grievant replied "I felt like doing him (Maddox) a personal favor."

As a consequence, the Grievant was charged with two Rule violations. Rule #9 - Failure to carry out a work assignment or the exercise of poor judgment in carrying out an assignment and Rule #45 - Giving preferential treatment to an inmate, the offering, receiving or giving of a favor or anything of value to an inmate. (See Joint Exhibit 2)

A pre-disciplinary conference was held January 24, 1992. The Hearing Officer found that the Grievant had violated Rule 8 by exercising poor judgment in ordering this particular video and poor judgment in controlling access to the film. He also found a

violation of Rule 45 in that the Grievant extended preferential treatment to Inmates Maddox and Bridgeman. On February 4, 1992 the Grievant was suspended for five (5) days. A Grievance was filed on February 26, 1992. A Step 3 statement was issued July 20, 1992. (Joint Exhibit 3) Request for Arbitration was made on May 7, 1992. The Arbitration Hearing was held April 15-16, 1993.

The alleged infraction of Rule 9 was that the Grievant exercised poor judgment "in ordering the particular film and in its review and control after its receipt." [From Hearing Officer's Report (Joint Exhibit 2).] The Grievant's defense on this issue points out that the particular video had never been determined to be "obscene" under R.C. 5120.9-19 nor had the video been properly reviewed by a prison panel. Because the video in question had never been expressly or properly banned, the Grievant argues that "content" of the film cannot be used to heightened any alleged Rule violation charged to the Grievant. This argument is highly persuasive because the Arbitration Hearing revealed that the Grievant was operating in a near vacuum in that he was not given any formal procedures to follow. The Hearing Officer declined to find that a Rule 8 infraction occurred due to the absence of any Post Orders. (Joint Exhibit 3) Moreover, during the Arbitration Hearing, various prison officials indicated various levels of ignorance about ODRC policies with regard to the proper procedure for challenged literature.

However, on the other hand, the Grievant is a mature and educated person. He holds both a Bachelor's degree and a Master

of Library Science degree. (Employer's Exhibit 5()) Almost all his answers indicated a bizarre lack of knowledge about how the library operated or was supposed to operate. He seemed to have no idea about the processing of videos for circulation purposes and was unable to state whether the video in question was or was not in general circulation. He claims virtually no knowledge of the existence of the video before Inmates Maddox and Bridgeman asked for it. Yet when asked by Maddox, he knew enough about its contents to cause him to hesitate about releasing it, and he knew enough about the video to be able to locate it (marked with the name "Ragtime") the next morning.

While no strict orders existed forbidding videos on sexual matters, surely a mature librarian would have intuitive good sense to not order a questionable tape or to inquire about its propriety. Sex Odyssey 2069 does not strike this Arbitrator as an artistic endeavor with redeeming cultural work so as to quicken a librarian's duty to assert its worth by making a First Amendment challenge to its censorship. On the other hand, as the Grievant points out other works of questionable artistic worth and highly sexual (i.e., Playboy) are allowed prisoners. No ODRC rules distinguish books from videotapes and/or films. I agree subjectively with the Hearing Officer that the Grievant exercised poor judgment in his choice of videotapes. However, my subjective feelings are irrelevant. The Grievant was given no objective standards against which to make decisions. I, too, conclude that the Grievant ran the library in a lax and confusing manner.

However, again the prison produced no standards under which the Grievant was supposed to operate. The absence of procedures and policies against which to judge the Grievant causes this Arbitrator to find no just cause for a Rule 9 infraction.

In his brief (page 8), the Grievant admits he erred in allowing the inmates to have the movie outside normal channels (whatever they were). Moreover, the Grievant agrees discipline would be appropriate. This violation was Grievant's third violation of Rule #45 (giving preference to inmates) since April 8, 1991 -- the third within 5 months. Under the grid used with the Standards of Conduct, a third offense had possible discipline ranging from a 5-10 day suspension to a removal. The Grievant, after 2 prior disciplines, was clearly on notice about the severity of this type of conduct. The Standards of Employee Conduct devotes 2 pages to spelling out such violations. Getting involved with an inmate -- no matter how innocent and how well-intended -- no matter how "small" the favor -- is a danger to the security of all prison personnel and ultimately the security of the public. Prisoners are well-known for their ability to manipulate. Once at the mercy of a prisoner, a well-intended prison employee will often find himself the object of extortion or pressure. A compromised employee is a danger to all employees. The rule exists for good reason. This action was the Grievant's third infraction of the same rule. He took the action after a night's "thought." He admitted he "thought" -- oh well why not? If the Grievant did not at this

point in his prison career know "why not," a five day suspension was a reasonable and just discipline.

The Grievant argues that since the "content" of the movie played "a part" in formulating the 5 day suspension, the 5 days should be reduced. The Arbitrator finds just cause for discipline under Rule 45 and that a 5 day suspension was commensurate and progressive for a third infraction regardless of the content of the video. (Contract Articles 13.01, 13.02)

Grievance No. 27-12-(92/09/19)-0414-06-10

On Friday, June 19, 1992, C.O. Donald Tchour, Storekeeper II, while carrying out his normal duties, ran across three (3) copies of a book within a library shipment. Apparently, the paper cover was "eye catching." Upon examination of the books, C.O. Tchour took the books in question to Paul Davenport, the TIE Deputy, and raised the issue of whether the content was appropriate for a prison library. Mr. Davenport contacted Mr. Nell, the School Facilitator (Principal), and they both went to speak to the Grievant, the Librarian. Nell and Davenport told the Grievant "to return the books to the supplier and to not allow the books to circulate to the inmates." According to Mr. Nell and Mr. Davenport, the Grievant responded "just leave them (the books) here and I'll take care of them."

The Grievant has testified that he was directed by his two superiors as indicated above. The Grievant said that he called the supplier either Friday or Monday and was told that the supplier

would not take the books back. The Grievant then, according to his own testimony, took the covers off the books (dust jackets) and threw the covers away. He then said that he left them on a desk but does not remember which desk. He said he had "no intention" to disobey an order. He also agreed that he did not call Mr. Nell or Mr. Davenport to inform them of the quandary caused by the supplier's refusal to take the books back.

On Wednesday June 24, 1992, someone (unidentified) told Mr. Davenport that the books were still in the institution and were circulating among the library clerks (inmates) in plain covers. Mr. Davenport called the Grievant in with his Union Representative present. The Grievant told Davenport that the book vendor would not take the books back, that he did not know what to do with them, and that such a situation had never happened to him before. The Grievant said he was "terribly frustrated" about what to do with them," and "it did not occur to him to ask anyone what to do."

On August 10, 1992, a pre-disciplinary hearing was held. The Hearing Officer found just cause to discipline the Grievant under Rule 7 and Rule 9. The Rule 7 was insubordination for disobeying the direct order of a superior (i.e., he failed both to send the books back, and he failed to keep the books out of inmate hands). Rule 9 was failure to carry out a work assignment and the exercise of poor judgment in carrying out a work assignment. The Hearing Officer specifically noted that the Grievant (after receiving Davenport's and Nell's directions) placed the books on the processing table that was not in his office but on a table

accessible to inmates (Joint Exhibit 4). On August 12, 1992, the Grievant was suspended for 5 days. On September 3, 1992, a Grievance was filed and on January 20, 1993, a 3rd Step Answer was made (Joint Exhibit 5). On April 15-16 the Grievance was submitted to Arbitration.

At the Arbitration Hearing, the Grievant said that he was given no time frame in which to get rid of the books and that he had no intention to disobey the order. Mr. Davenport testified that when he next saw the books (after Friday) was on Wednesday. He called Grievant and told him to bring the books to him. Instead, an inmate delivered the books. They had the original covers replaced by plain grey covers. (The books as introduced into evidence had no covers.) (Employer's Exhibit 2) Both Mr. Nell and Mr. Davenport agreed on cross-examination that they had not read the books nor were the books reviewed under any administrative procedure. Both men agreed that they ordered the Grievant to get rid of the books and keep them from the inmates based solely on the title (Serious Pleasure and Lesbian Erotics).

Inmate Cobble who worked in the library said one of the copies appeared on his desk from the processor (Inmate Miller). He maintained that C.O. Martin was the person who ordered the plain grey covers put on the books. He said that the Grievant told him at some point that the books at issue were going back to the supplier.

The Grievant's defense to the charges is two fold. First, that the incident would never have arisen but for the supposed

nature of the content of the book and since the book was not properly reviewed, the prison officials had no cause to order the book returned to the publisher. Second, the Grievant did attempt to return the books to the supplier and was unable to do so because the supplier refuse to take the books back. (See Grievant's brief at p. 10.)

In reviewing these charges, the Arbitrator finds that the charge of Rule 9 and Rule 7 are for essentially the same behavior. (See Joint Exhibit 8) Rule 9 disciplines one for insubordination and Rule 7 penalizes one for failure to carry out a work assignment. In this case, the "work assignment" and the "order" are the same -- return the books to the supplier and do not let them fall into inmate's hands. Charging the Grievant with two rule infractions for the same conduct is "stacking."

Insubordination is one of the most serious industrial offenses. To constitute insubordination, the order must be clearly expressed, and the employee must be made aware of the possible consequences. The fact of insubordination is not dependent on the validity of the superior's order. The rule of the shop is clearly "obey now; grieve later." The only exception to the "obey now" rule is when the order will cause the employee to do work that is "unusually hazardous, substantially injurious to health, or abnormally dangerous." (See Grievance Guide, 8th Edition, pp. 34-43). In this case, if the Grievant was insubordinate, then that violation (Rule #9) clearly encompasses Rule #7.

The order and its content were clear. The Grievant restated the order at the Arbitration Hearing. The testimony shows that the Grievant attempted to comply with the first part of the order. However, when the Grievant found that the supplier would not accept the books, he did not take the next logical step and report the refusal to Nell and seek further direction. The Grievant testified "that he did not know why he didn't seek direction -- he just didn't think of it." The second part of the order was to keep the books from the inmates. Here the behavior of the Grievant is inexplicable. He admits he placed the books on the processing table available, at a minimum, to inmate workers in the library. Had he locked the books up while he found the proper way of disposing of them, he would have complied with the second part of the order and was still attempting, in good faith, to comply with the first part. The Grievant received a direct order and disobeyed. The order did not subject the Grievant to danger, health hazard, or unsafe risk. The Grievant was not simultaneously given a specific warning of consequences. However, given his recent discipline record, he was certainly aware of the possible consequences. The Grievant also was the recipient of ODRC Standards of Conduct. (See Joint Exhibit 8 and Stipulated Facts.) The Arbitrator finds just cause for violation of Rule 7, and the Rule 9 charge is struck. While insubordinate, the Grievant was not confrontational; his insubordination was by omission rather than commission. This lack of overt confrontation lessens the severity of the insubordination.

The Grievant argues that since the books in question had never been banned from the institution in either a procedurally or substantively correct manner that discipline is unwarranted (Brief at p. 11). This argument fails. An employee is to obey the orders of his or her supervisor regardless of the correctness of the content unless safety or health is jeopardized. If the Grievant felt the direct order was invalid, he should have obeyed and grieved. In his testimony, the Grievant alluded to his status as a librarian making him sensitive to book destruction and censorship. This Arbitrator is highly sensitive to those issues as well. However, the Grievant had a procedural way to raise the issue, and he failed to utilize it.

Secondly, the Grievant must recognize the difference between a prison library and a library in society. The functions of a prison library are narrower, and employment within prisons is always subject to issues of security.

The discipline imposed by the Employer in this second grievance was a five day suspension. Under the grid, a first offense of Rule 7, the penalty suggested is a 1-3 day suspension. However, this discipline was the 11th infraction between January 19, 1990 and August 31, 1992. (Grievant's start date was July 29, 1989.) Once just cause has been established, the Arbitrator should not substitute her judgment for that of the Employer. The award of a five day suspension is not a clear abuse of the Employer's prerogative so as to justify an arbitrator's intervention.

Grievance No. 27-12-(92/09/28)-0424-06-10

The third disciplinary action with its corresponding Grievance is the removal of the Grievant on September 18, 1992. The Grievant was accused of violations of Rule 5, Rule 40, and Rule 45 -- all three alleged violations occurring during the first week of August, 1992. A pre-disciplinary conference was held September 14, 1992 with regard to all the violations. The Hearing Officer found just cause. A Grievance was filed September 25, 1992, and a Step 3 decision was rendered November 11, 1992. (Joint Exhibits 6 and 7) On April 15-16, the Grievance was heard by the Arbitrator.

On August 5, 1992, C.O. Greg Myers was on duty at the front gate where he was to conduct a search of any bag/package taken into the prison by either employees or visitors. During that search, he found some pills loose within Grievant's bag. He claims that he told the Grievant to log in the medication. According to Myers, the Grievant turned toward the medicine log but, instead of logging in the medicine, turned and went through the gate with a group of entering employees. C.O. Myers claimed that he called to the Grievant who continued on into the Institution. C.O. Myers called a supervisor. The Grievant was found in the Institution, walking toward his duty station, accompanied by an inmate who was carrying the Grievant's bag. A thorough search of the bag revealed 5 loose tablets, a bubble pack of 6-8 pills, and a tube of an ointment. The Grievant stated that he had not heard C.O. Myers either direct him to log in the medicine nor to come back. In addition, he said

he was unaware that any medications were in the bag. He agreed that he knew the rules about medications (See Employer's Exhibit 4) and that, on earlier occasions, he had logged medicines into the Institution. C.O. Myers strongly believed that the Grievant not only heard him but deliberately ignored him. Testing showed that the pills etc. in question were not illicit drugs but were over-the-counter medicines. The Grievant claimed that some of the pills he had no knowledge of but that some of the pills were his and were inadvertently left in the bag. Grievant was charged with a Rule 5 violation. The grid recommends discipline ranging from an oral reprimand to a 3 day suspension for violation of this Rule. The Rule focuses on "carelessness or negligence resulting in . . . an unsafe act." (Joint Exhibit 8) Standing alone, the Grievant's act seems to warrant solely an oral reprimand.

The second charge was a Rule 40 violation and a Rule 45 violation. Rule 40 forbids any act or commission not otherwise set forth herein which constitutes a threat to the security of the Institution, its staff or inmates. This "Rule" is so vague that it fails to give an employee clear notice of what is prohibited. The Arbitrator strikes this charge. The alleged violation of Rule 45 arose because Inmate Yocum and other inmates had allegedly entered and stored personal information in the Library computer. The Grievant is faulted for allowing the inmates such access and failing to issue citations for their misconduct. The evidence presented at the Arbitration was insufficient to support the charge that any inmate other than Yocum had used the computers improperly.

While some supervisors talked about the alleged problem, no direct evidence sufficient for discipline was produced. The Grievant admitted that Inmate Yocum had access to three (3) computer games that came with the equipment. No evidence was adduced that Yocum stored personal data on the computers. Standing alone, the breach of Rule 45 by allowing Yocum to play computer games barely rises to the level of "preferential treatment."

The last alleged violation is the most serious. The Grievant is alleged to have violated both Rule 45 (preferential treatment) and Rule 46(a) Unauthorized Relationship. (Joint Exhibit 6) First, the Employer charged that the Grievant utilized the inmate (Brown) who was the library "runner" in inappropriate manner by asking the inmate to draft a grant letter that would be sent out of the prison over Grievant's signature. The Grievant freely admits this action. The Employer characterizes this act as one of "preferential treatment." The correctness of this characterization is less clear to the Arbitrator. Apparently, inmates work in and for the Institution. Brown, the inmate in question, worked for the library and was under the Grievant's supervision. Ordering a subordinate to draft a document on its face does not seem to fit "preferential treatment." The Employer presented no clear statement that such work was forbidden. However, if the Grievant requested the inmate to help him (the Grievant) out, a different situation arises. The inmate was not available to testify at the Arbitration Hearing. While access to the inmate's prior statements can be used to shed some light on the events, this Arbitrator

cannot rely on such statements to determine the alleged modus operandi of the Grievant. The Arbitrator cannot characterize the drafting order/request as a Rule 45 or 46 violation. However, the use of the inmate seems to this Arbitrator to have been unwise. Given the prior discipline and/or charges of preferential treatment, using the inmate-worker in this manner arguably provides an appearance of impropriety.

The Employer also charges the Grievant with preferential treatment and unauthorized relationship with regard to a second issue. The Employer charges that the Grievant undertook to utilize the inmate's advice and talents to defend himself against perceived harassment by the Employer. The Employer alleges that the Grievant gave the inmate a copy of the contract, copies of all his disciplines and other such records, seeking the inmate's advice and help in a lawsuit. (The inmate was a lawyer.) Again, this inmate did not testify at the Hearing. However, the Grievant admitted giving the inmate the contract and his personnel/personal information. The Grievant admitted seeking advice and counsel from the inmate. The Grievant stated that he turned to the inmate for advice after having a conversation with the inmate (Brown) and other inmates about his employment situation. He said he discussed his problems with his employer with the inmates in some detail. The Grievant denies leaving his personnel/personal papers in the inmate's hands (he said the inmate gave them all back), and the Grievant only denies asking the inmate to help him (the Grievant) frame a complaint.

Soon after he was asked to write the grant draft, the inmate went to Sgt. Allen and informed the Sergeant of the Grievant's requests and alleged to Allen that he (the inmate) was uncomfortable with the request and felt like he was getting in the middle of something. (Employer's Exhibit 10) Sgt. Allen, on instructions from her superiors, told the inmate to play along with Grievant at least temporarily. Subsequently, the inmate allegedly brought to Allen a stack of Grievant's personal papers that he (the inmate) claimed Grievant had entrusted to him. Moreover, the inmate turned over to Allen a polaroid photo that the inmate found mixed in with the papers. The photo was of the Grievant without clothes in an explicit sexual pose. (Employer's Exhibit 13) The Grievant agreed that he had shown his personnel/personal papers to the inmate but claimed that the inmate returned them. Grievant maintained that he had placed the returned papers in his personal bag, and Inmate Brown must have taken the papers from the bag to give them to Sergeant Allen. With regard to the photo, the Grievant adamantly denied that he intentionally placed the photo within the papers. He agreed that the photo was of him, but he said he had no idea how the photo got into the Institution and amongst the papers.

Using the Grievant's own admissions, the grievant clearly violated Rules 45 and 46(a) -- discussing his personnel/personal situation with inmates was clearly inappropriate. Seeking advice from Inmate Brown and allowing Brown to peruse those papers was the continuation of an unauthorized relationship. The Arbitrator

believes the Grievant when he says he did not intend for the picture to be within those papers. On the other hand, the Arbitrator finds that the Grievant acted with gross negligence and with reckless disregard by allowing a personal photograph of that nature to be found within the Institution. The only logical way that the picture got to the Institution was by the carelessness of the Grievant. The Arbitrator finds just cause for discipline under Rules 45 and 46(a).

The Grievant has raised two continuing defenses that must be addressed. The first defense relates to the Sex Odyssey video tape and the three copies of Lesbian erotic books. The Union points to the clear fact that neither of these items were banned under proper administrative procedures. (See Union Exhibit 1) Implicitly, this argument raises a first amendment concern. This Arbitrator has closely reviewed the written record and the testimony. That record does not show that the Grievant's actions were made out of principle -- that he did the things he did to protect the free interchange of ideas. The prison administration never got a real chance to "censor" the video tape. Before that issue could be raised, the Grievant had given the tape "as a favor" to inmates and given it to them in a manner admittedly out of the normal circulation scheme. This conduct was admitted by the Grievant. With regard to the books, the Grievant was told to "send them back to the supplier and keep them out of inmates hands." The Employer's act was clearly idiosyncratic censorship. No correct procedure was used to review this book. (See Employer's Exhibit

3) However, did the Grievant say to his superiors "I believe you are improperly restricting library materials, and I will appeal to the warden for a proper administrative review and if that is unsuccessful I'll grieve it." Did he say "you are exercising improper censorship, and I'm going to disobey you as a matter of conscience. When you discipline me, I'll grieve it." No, during his testimony the Grievant said he did not know how the books were ordered, and he maintained that if he had seen the book order, he would have struck it. The issue in this case is not censorship, but the Grievant's conduct.

Secondly, the Grievant claims that the discipline imposed on him is a result of sexual orientation discrimination (See Art. 2.01). The Grievant related a number of nasty discriminatory remarks made to and at him that clearly indicated that his co-workers perceived him as a gay male. The Arbitrator believes these homophobic and ignorant remarks were made to the Grievant. Having arbitrated in the prison system for about 7 years, the Arbitrator can attest to the sexism, racism, and homophobia that exists among both the personnel and the inmates. The Arbitrator also believes that a number of people in the system were happy to see the Grievant removed because they believed him to be gay. Unfortunately, the Grievant's own conduct caused his removal and not the conduct of his perceived enemies. The Grievant is a trained librarian presumably a book lover, trained to keep books "secure" not people. The first purpose and duty of an employee of ODRC is security of the inmates. Looking at the disciplines of the

Grievant, one could conclude that he has never fully appreciated the security function. Correctional employees have found that one cannot treat one prisoner differently from another. Most prisoners are in prison for very good reasons. If given half a chance, they will manipulate non-prisoners. If one tries to befriend a prisoner, the prisoner will turn around and use that friendship to his advantage. Inmate Brown's behavior should have given the Grievant insight. Brown was an educated man; perhaps trusting him seemed reasonable to the Grievant. As soon as Brown could see his own advantage, he turned on the Grievant.

If some employees wished the Grievant harm because they thought he was gay, their wishes came to fruition by the Grievant's continued carelessness, negligence, disregard for rules -- rules, rigid though they may be, set up to protect prison employees and the public.

Award

All three Grievances are denied.

June 16, 1993
Date


Arbitrator