

**ARBITRATOR'S DECISION
AND AWARD**

IN THE MATTER OF ARBITRATION
Between
The State of Ohio
Department of Administrative Services
Office of Collective Bargaining

and
District 1199
The Health Care and Social Service Union
Service Employees International Union
AFL-CIO

Grievance No. 27-20-920521-1514-02-12
Discipline, Richard J. Leary

APPEARANCES:

For the Employer:

Roger A. Coe, Ohio Department of
Rehabilitation and Correction
Labor Relations Officer

Colleen Wise, Ohio Department of
Administrative Services, OCB

For the Labor Organization:

William Quincy, Union Representative

Richard J. Leary, Grievant

James L. Ferree
Arbitrator

Authority

Grievant Richard J. Leary filed a grievance on May 19, 1992 alleging that the Ohio Department of Rehabilitation and Correction "unjustly disciplined" him "not in a timely manner," in violation of Articles 8.01 and 8.02 of the contract. A third step meeting was held and the grievance was denied on August 20, 1992. Pursuant to Article 7 of the Agreement, the grievance was submitted for arbitration. The hearing was conducted November 8, 1993, at which time the parties made oral arguments and waived briefs. Neither party challenged the arbitrability of the issue or the authority of the arbitrator to decide the issues under Article 7 of the Agreement.

Issues

The parties did not propose a statement of the issues. Based on the evidence submitted and the arguments made at the hearing, I find the issues to be whether the discipline imposed upon the Grievant violated Sections 8.01 and 8.02 of the contract and, if it did, what should be the remedy.

Summary of Facts

The Grievant has been employed five or ten years as a Correctional Program Specialist or Case Management Specialist in the Mansfield Correctional Institution of the Ohio Department of Rehabilitation and Correction, a job which involves interacting with prisoners. The Department's "Standards of Employee Conduct" (Joint Exhibit 4) includes a rule prohibiting unauthorized relationships between employees and inmates, including telephone calls whether the employee is on duty or off duty.

The events giving rise to the discipline which is the subject of the grievance in this case occurred two years ago, in October and November, 1991. An inmate of Mansfield prison was monitored making telephone calls to the home of a correctional officer who was, in turn, connecting third parties. One of the recipients of these third party calls was the home of the Grievant. The Grievant's wife, who had been conducting a job search, was contacted about employment and met a woman to discuss it. The woman she met is the correctional officer's girlfriend. The Grievant attended his wife's next meeting with the woman, at a hotel building in Mansfield, Ohio with a real estate agent whose firm was attempting to sell the building.

The State investigator who monitored the telephone calls developed information regarding a suspicious business deal being put together by the inmate, through the correctional officer, to buy the building with the assistance of the correctional officer's companion and the Grievant's wife. After obtaining telephone records and interviewing the correctional officer, the Grievant and others, the investigator made his report. The correctional officer was consequently terminated and the Grievant was suspended fifteen working days without pay for violating Rule 46A, which prohibits unauthorized contacts with inmates. The Grievant denies violating the rule.

Pertinent Contract Provisions

The parties submitted the current collective bargaining agreement, which is effective by its terms from July 1, 1992 through May 31, 1994, as a joint exhibit. The discipline at issue here, and the grievance challenging it, arose under the previous contract. For purposes of this proceeding, there is no significant difference in the language of the two documents. The following language is from the 1989-1992 contract, which governs this dispute.

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.

Chronology of Events

A brief summary of the testimony follows.

The State's first witness was **Shirley Harrison**, an employee of United Telephone company who authenticated Management Exhibit 1, a computer printout of long distance telephone calls billed through United Telephone from Mansfield prison to the residence of Randy S Valance for October, 1991. She testified that the document indicates that Mr. Valance used "three-way calling" to connect incoming calls with third parties through his telephone.

The second State witness, state investigator **Terry M. Knight**, referred extensively to his printed report, "Mansfield Correction Institution Investigator Interview Sheet Supplement," (Management Exhibit 2) while testifying. He said his investigation in this matter began on October 30, 1991 when he monitored a call from inmate William Booze in Unit 2 of the prison to a male who placed three-way calls for Booze. Booze first spoke with a woman about hiring "Debra" and "Karen" to set up an office and then talked with a real estate agent, Mr. Mabey, about the purchase of a hotel. Mr. Knight's investigation revealed that the male making the third-party telephone connections was correctional officer Randy Valance, that "Debra" was Valance's girl friend, Debra Lape, and that "Karen" was the Grievant's wife, Karen Leary.

On December 2, 1991 Investigator Knight interviewed the Grievant, who said that he has known Booze since the latter was in reformatory and that he had recently notarized

some papers for Booze. Knight testified that the Grievant said his wife first told him she was meeting with a woman about renting office space in the "old" Brass Building and becoming an office manager; his wife later told him who the woman was, correctional officer Valance's companion. At first, Grievant Leary told investigator Knight, he didn't know who had offered to hire his wife, but when she told him it was Booze, he advised her that Booze was an inmate and that she should not to have anything to do with him. She was supposed to meet Ms. Lape and a real estate agent at a hotel building in Mansfield, Ohio to see whether the building was worth buying to open a restaurant and bar. The Grievant also attended the meeting, arriving from his job at the prison after his wife, Ms. Lape and real estate agent Mabee did. Knight further testified that, in response to a question, the Grievant conceded that he may have mentioned to inmate Booze that his wife needed a job. He also told Knight that later when he notarized a paper for Booze, he asked Booze why he called his wife and Booze said he wanted her to be his executive manager. The Grievant told Knight that he expressed doubts to his wife that Booze had money to buy a building or to pay her salary.

Investigator Knight testified that he arranged to subpoena telephone records which showed telephone calls in addition to those he had monitored between the prison, correctional officer Valance's home, and Grievant Leary's home. Several such calls were identified on Management Exhibit 1. In his interview with the Grievant, Knight said, Mr. Leary said he knew of only three such calls although some others occurred at times when Mr. Leary was off duty. Mr. Knight testified that other cases he investigated regarding inappropriate contacts with inmates resulted in removals of the employees.

On cross examination, Mr. Knight said there are 80 pay phones in the institution, four in Unit 2 where inmate Booze was housed, and that he only monitored two of the calls in Management Exhibit 1 and has no knowledge of who spoke on the other calls. Inmate Booze had been convicted as a con artist. Grievant Leary customarily notarizes things for inmates.

The State's last witness was **Ken Mabee**, a commercial Realtor from Mansfield, Ohio who testified to speaking with a Mr. Booze on the telephone about purchasing the Park Place Motel and arranging a meeting with Ms. Lape, Mrs. Leary and an "appraisal consultant" who would inspect the property for Mr. Booze. That "consultant" was the Grievant, who represented himself as a "counselor" from Mt. Gilead, Ohio. After Mr. Mabee showed the front of the building to the women, Mr. Leary arrived shortly after 3:00 p.m. and the two men inspected the back end, which was badly in need of repair; they discussed specific items such as an elevator and glass. Those identical items were mentioned by Mr. Booze when he called Mr. Mabee that night. Mr. Mabee testified that he had met the two women previously for the purpose of inspecting space in the "new" Brass Building which could be leased as an office, but the purpose of the later meeting was for the sole purpose of getting a property appraisal from Mr. Booze's consultant. When Mr. Booze told him how much he paid his appraiser, Mr. Mabee thought it was too much because the Grievant did not appear to know much about property appraisals.

On cross examination, Mr. Mabee testified that the Grievant never said he worked for Booze, nor did he bring any message from Booze to Mabee. Mr. Leary's wife did not say he was an appraiser, and Mr. Mabee was uncertain who said he was a consultant. When Mabee asked him what he did in Mt. Gilead, Mr. Leary said he was a counselor.

The Union's sole witness was the Grievant, **Richard J. Leary**. He testified that his first knowledge of the business at hand came when his wife told him she had received a call, maybe in response to a résumé she had sent out, from a lady seeking an office manager. She was to meet the woman at the Ohio Brass Building to look at a suite of offices with a real estate agent. The next report he got from his wife was that Ms. Lape had called again and talked salary, but he told her he would believe it when he saw it. She told him she had an appointment with Ms. Lape to look at a hotel or motel, and the owner of Ms. Lape's company, Mr. Booze, was sending a representative. The Grievant told his wife that there was an inmate named Booze, and if it is the same person, she should have nothing to do with him. He told her he would come by the meeting after work to see if it was on the up and up. While there, he told Mr. Mabee that he does counseling in Mt. Gilead because he is a crisis intervention counselor. After the meeting, he decided Mr. Mabee was OK but the deal was a scam, and he told his wife to drop it.

On cross examination, the Grievant said he doesn't know how they came to call his wife for the job, but she was never actually employed by Booze. His wife mentioned calls from Ms. Lape and discussions of money, but she didn't mention Booze's name until the night before the meeting at the hotel building, and that was when the Grievant decided to attend, to protect his wife. He testified that he stayed with his wife after he arrived at the meeting, and that they were together with Mr. Mabee in the kitchen when Mr. Mabee mentioned the need for an elevator. Mr. Leary got the impression from the meeting that Ms. Lape did not know about business. He had no direct contact with inmate Booze about the proposed business deal, and his only subsequent contact with him was to notarize documents, at which time they did not discuss the matter. He said he did not know correctional officer Valance, and all his wife said about him was that Valance was useless because he beat Ms. Lape. The Grievant testified that his position, Correctional Program Specialist, is also known as "counselor." He is familiar with Rule 46, as well as Rule 27 requiring certain reports, but he did not report the meeting at the hotel because he did not want to have anything to do with the matter, and prior reports on other matters were not acted upon.

Recalled to the stand, investigator **Knight** said that the Grievant's testimony in the hearing was inconsistent with what he said in the investigation. Knight testified to the effect of, "I asked Leary if he saw Booze after Booze called his wife, and he said when he notarized some papers in the library he asked Booze about the deal and said he'd believe it when he saw the check," which is substantially the account on page 6 of Knight's report (Management Exhibit 2).

The **Grievant** took the stand again and stated that Mr. Knight's report is out of sequence: maybe he said something to Mr. Booze, but not at that time. Grievant Leary testified that he does not recall asking Mr. Booze about the deal.

Employer's Contentions

In summation, the State argued orally that it had acted correctly in disciplining the Grievant for violation of Rule 46, parts A through E. That rule reads:

STANDARDS OF EMPLOYEE CONDUCT RULE VIOLATIONS AND PENALTIES

Steps in Progressive Discipline:

- (OR/WR) - Oral / Written Reprimand
- (WR/1) - Written Reprimand / 1-day suspension
- (1-3) - 1- to 3-day suspension
- (5- to 10) - 5- to 10-day suspension
- (R) - Removal

Offenses				
1st	2nd	3rd	4th	5th

* * *					
*46.	Unauthorized Relationships				
a.	The exchange of personal letters, pictures, phone calls or information with an inmate, furlougee, parolee, or probationer without the express authorization of DR&C	WR/R	5-10/R	R	
b.	Visiting an inmate, parolee, furlougee, or probationer without express authorization of DR&C	1-5/R		R	
c.	Residing with a furlougee, parolee, probationer, or ex-inmate without express authorization of DR&C	5-10/R		R	
d.	Committing any sexual act with an inmate, furlougee, parolee, or probationer	R			
e.	Engaging in any other unauthorized personal or business relationship(s) with inmates, ex-inmates, furlougees, parolees, probationers, or family or friends of same (nexus required)	5-10/R		R	

*Denotes rule violation for "on" or "off" duty conduct.

The State points to the multiple calls to the Grievant's telephone, sometimes when the Grievant was not on duty, and argues that a presumption should be made that the Grievant discusses prospective jobs with his wife, about whom he was concerned enough to attend a meeting with the representative of an inmate at the risk of his job. What was the purpose of his visit to the motel building? The women had already seen the property, and Mr. Mabee was given to understand that the meeting was for Mr. Leary to see it. Nor did Mr. Leary ever disabuse Mr. Mabee of the impression that he represented the buyer. Mr. Mabee discussed renovation of the building with inmate Booze after the meeting, and only the Grievant had discussed the specifics with Mabee prior to that, so the inference must be drawn from this circumstantial evidence that the Grievant reported back to inmate Booze, in violation of Rule 46.

Union's Contentions

The Union asserted that the Grievant did not violate the Rule. His wife needed a job, and it was only reasonable that she should take one when offered. Inmate Booze could not, in fact, get information about the Grievant's wife while he was in prison. The State cannot punish the Grievant for his wife's conduct, in any event. The Union argued on the record at the hearing that the evidence is only circumstantial that Mr. Leary had any unauthorized contact with the prisoner and that, failing to meet a sufficiently rigid test of evidentiary reliability, it does not support the finding of misconduct; the Union asks that the Grievant be made whole for wages and benefits lost.

Findings of Fact and Opinion

The issues before me, as discussed above, are: did the discipline imposed upon the grievant violate Sections 8.01 and 8.02 of the contract and if it did, what should be the remedy? Article 8 of the Contract, "Discipline," specifies in Section 8.01, that "Disciplinary action may be imposed only for just cause." I will apply a series of tests commonly used by labor arbitrators in considering "just cause." As summarized by one author:¹

Carroll R. Daugherty has developed seven criteria that he has set forth and applied in a number of published decisions on discipline cases. The stature of this arbitrator makes these standards particularly noteworthy. They are embodied in seven questions.

1. Did the employee have foreknowledge that his conduct would be subject to discipline, including possible discharge?
2. Was the rule he violated reasonably related to the safe, efficient, and orderly operation of the company's business?
3. Did the company make a reasonable effort before disciplining him to discover whether he in fact did violate this rule?
4. Was its investigation fair and objective?
5. Did it obtain substantial evidence that the employee was guilty of the offense with which he was charged?
6. Was its decision nondiscriminatory?
7. Was the degree of discipline given him reasonably related to the seriousness of his proven offense and/or to his record with the company?

...Daugherty's carefully reasoned standards are the most complete and yet succinct. ... to be upheld, all 7 questions must be answered in the affirmative.

¹ Arbitration for the Practitioner, Walter E. Baer (McFarland, Jefferson, NC 1988) Chapter 6, Concepts - Theories - Issues, P. 126.

Test One: Forewarning

With respect to the first test, whether the employee had foreknowledge that his conduct would be subject to discipline, I conclude that the Standards of Employee Conduct, Joint Exhibit 4, were explicit enough that the State can rely upon them to put the Grievant on notice that he was expected to avoid unauthorized relationships with inmates. Although the State referred at the hearing to violations of subsections a. through e. of Rule 46, the record reveals that the Grievant's discipline was based only on a violation of subsection a.

Test Two: Reasonableness of the Rule

On its face, the rule which the Grievant was charged with breaking appears to be reasonably related to the Agency's ability to accomplish its mission. The Union did not assert that the rules are unreasonable. I believe this test was met.

Test Three: Management Investigation

Section 8.03 of the 1989-1992 Contract provides that "prior to the imposition of a suspension of more than three (3) days, . . . the employee shall be . . . confronted with the charges . . . to offer his/her side of the story . . . in accordance with the 'Loudermill Decision' . . . on pre-discipline due process requirements." Testimony at the hearing and documents indicate that management conducted an investigation which included an investigatory interview with the Grievant on December 2, 1991, and that a "Predisciplinary Conference Hearing" was conducted on March 26, 1992, with the Grievant present and testifying. The procedural safeguard was afforded, and the third test was met.

Test Four: Fairness of Investigation

The Contract requires that the opportunity for an employee to be confronted and to offer his side of the story must be in accordance with the "Loudermill Decision", 470 US 532 (1985). In that decision, which arose from the discharge of an Ohio civil servant, the Supreme Court said that the predetermination hearing "need not be elaborate", that "'something less' than a full evidentiary hearing is sufficient" if it is "an initial check against mistaken decisions -- essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action". The Court held that the "essential requirements of due process . . . are notice and an opportunity to respond. . . . The tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story. . . . To require more than this prior to termination would intrude to an unwarranted extent on the government's interest in quickly removing an unsatisfactory employee."

The Grievant testified at first that he had not been given a chance to present his side of the story before being disciplined, but on re-cross examination he recalled participating in the hearing before Hearing Officer Robert Riddle. Riddle's April 1, 1992 report found "just cause" for discipline due to a violation of Rule 46-A, but "No just cause for discipline" based on #46-E. Given the specific reference in the Contract to the Loudermill decision as the standard, I am in no position to impose a higher standard. I find that the procedural requirements of Section 8.03 of the Contract were met, as was "test four."

Test Five: Evidence of Misconduct

Although the pre-disciplinary hearing seems to have met the procedural standards set forth in Loudermill, the Hearing Officer found specifically that:

... Mr. Leary did not have a direct business relationship with inmate Booze. However, due to the indirect involvement through participation with his wife it is just cause for discipline on Rule #46-A. I feel Mr. Leary's participation was exchange of information with an inmate however indirectly it may have been.

In my opinion, such an interpretation rewrites Rule 46, which makes no reference to indirect unauthorized relationships except in part e, which forbids unauthorized relationships with "... inmates ... or family or friends of same (nexus required)." Clearly, the Hearing Officer was not referring to this language, for he found no just cause for discipline under "#46-E." Thus, the hearing officer failed to find evidence of misconduct as defined in the rule. If the Department wishes to rewrite its rules to include a prohibition on employee unauthorized conduct with inmates indirectly, through a spouse of the employee, it may do so, but that is not what Rule 46 says. Adding to the Rule without notifying employees of the change before it is enforced would fail to meet the first test of "just cause," discussed above. I am unwilling to find the Grievant guilty by association with his wife.

I am not bound by the decision of the hearing officer but, like him, I find the evidence that the Grievant personally "exchanged phone calls or information with an inmate" to be too weak to support the conclusion that he violated the rule, as written. The Union's initial argument was that there is only circumstantial evidence of misconduct and that the State failed to carry its strict burden of proof. The State asserted that the circumstantial evidence is sufficient to prove its case:

- numerous phone calls by inmate Booze to the Grievant's home,
- the Grievant's participation in the meeting to inspect the hotel property, and
- Booze's purported comments to Mr. Mabee that evening which could only stem from Mabee's conversation with the Grievant some hours earlier.

There was circumstantial evidence that the Grievant was likely to have had the opportunity to know about inmate Booze's telephone calls to the Grievant's home. Neither Booze nor Mrs. Leary was called to testify, however. Testimony was in conflict regarding whether the Grievant confessed to later discussing the matter with Booze. Given the passage of time (two years!) it is no wonder that memories have faded or

distorted. Investigator Knight's testimony was aided by his contemporaneous report, but even that document was apparently incomplete, containing only page 1 through "Page 8 of 9." In short, there was no direct, first-hand evidence that the Grievant discussed the proposed business transaction with inmate Booze. Should an arbitrator be satisfied with less reliable proof? As one authoritative source on arbitration practices has said:

However, the quantum of required proof in this area is unsettled. In some cases proof beyond a reasonable doubt has been required. But in other cases a lesser degree of proof has been required, such as a preponderance of the evidence, or "clear and convincing" evidence, or evidence "sufficient to convince a reasonable mind of guilt."²

Whichever quantum of proof I were to choose here, I am unconvinced that the Grievant personally engaged in an unauthorized relationship with inmate Booze. Therefore, I find that the fifth test of "just cause" is not satisfied.

Test Six: Nondiscriminatory Decision

I do not wish to imply that the State had no grounds to suspect the Grievant of misconduct. Investigator Knight did well to follow up on the evidence implicating the Grievant. No evidence was presented that the Grievant's treatment was different from the treatment of any other employee in the same or similar circumstances. In the absence of any contention that the Agency's decision to discipline him was discriminatory, I conclude that this test is satisfied.

Test Seven: Penalty Suits the Offense

The imposition of an appropriate penalty presupposes a finding of misconduct. The Agreement states, in Section 8.02, that "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." Where there was no "just cause" to find an offense occurred, there can be no corresponding punishment. Thus, having failed to satisfy Test Five, above, the State is unable to meet the requirement of Test Seven.

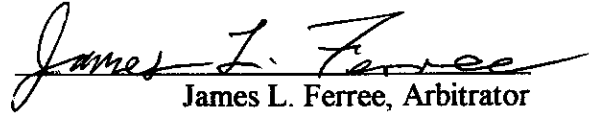
Decision and Award

For the reasons set forth above, I find that the discipline imposed upon the Grievant was not for just cause. Therefore, the Agency violated Article 8 of the Contract, "Discipline," and I hereby grant the grievance in its entirety.

² Frank Elkouri and Edna Asper Elkouri, How Arbitration Works, Fourth Edition (Bureau of National Affairs, Washington, 1985), p. 662; footnotes omitted.

The State is hereby ordered to remedy the contract violation by rescinding the Grievant's suspension of 15 working days without pay, amending the Grievant's personnel record by removing any reference to the suspension, paying the Grievant backpay in the amount of 15 days' pay at his regular rate which was effective during the suspension he served from May 21 to June 11, 1992, and taking any further action necessary to make the Grievant whole, including readjusting his seniority dates if appropriate.

Issued at Loveland, Ohio, this 12th day of November, 1993.


James L. Ferree, Arbitrator