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OCB-OCSEA VOLUNTARY GRIEVANCE PROCEEDING
ARBITRATION OPINION AND AWARD

In The Matter of Arbitration Between:	*	
THE STATE OF OHIO Department of Rehabilitation and Correction	*	Case No. 27-16-950714-2270-01-03
-and-	*	Decision Issued: April 27, 1996
OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION, OSCEA/AFSCME Local Union 11	*	

APPEARANCES

FOR THE EMPLOYER

Colleen Wise	OCB Advocate
Georgia Brokaw	OCB Advocate
Shirley Rogers	Warden, MCI
Thomas Diven	Investigator
Debora J. Miller	Case Manager
Steven Greene	OAG Investigator
Margaret Saupe	BCI Scientist
Kevin Smith	OHP Investigator
Sheryl L. Mahan	BCI Examiner
K. Butler	Inmate

FOR THE UNION

Butch Wylie	Advocate
Pat Howell	Lead Steward
Darrell Starcher	Chapter President

Jonathan Dworkin, Arbitrator
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Amherst, Ohio 44001

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THE ISSUES

The Employer removed a Corrections Officer (Prison Guard) for allegations of misconduct stemming from the Employee's purported relationship with an inmate. There are two connected issues:

Is there adequate proof that the Employee committed the misconduct?

Was the removal for just cause?

DISPUTE SUMMARY

Explanatory Note: The following recites the State's allegations. It is not a finding of facts. If it seems otherwise, it is because the Arbitrator wants to escape the need to begin nearly every sentence with conditional phrasing such as: "The Employer alleges." It should be carefully observed that OCSEA disputes the Employer's "facts." That is its chief defense, and these preliminary statements are not intended to prejudge that defense.

* * *

If there had not been a lovers' squabble, the Employer probably would not have learned of the four-month romance between Grievant and a prisoner at the Marion (Ohio) Correctional Institution. Grievant would not have been discharged

from her position as Corrections Officer -- a job she held just over three years.

For reasons that are not altogether clear, the affair soured. Consequently, the inmate (KB), who was serving five to twenty-five years for aggravated robbery, vowed to "bring [Grievant] down."

KB began his undertaking by "confessing" to the Marion Unit Secretary assigned to Unit 4. The Secretary knew KB and, while she recognized that he was a potentially dangerous person with a volatile temper, she respected his "honesty." So when he told her that he and Grievant were in love and having a sexual affair, she did not dismiss it as just another "inmate fantasy." Neither did she report what she had been told. She knew the information, if false, could unfairly cost Grievant her career. Then there was the danger of retaliation against KB from Grievant's husband, who also served as a Marion Corrections Officer.

KB approached the Secretary again a few days later. That was when he told her the salacious details. He spoke of love making, described intimate quirks of Grievant's anatomy and even her underclothes. He said they were planning to be together after his release from prison. KB seemed to know private things about the Employee's troubled marriage. And, he

knew minutia -- where Grievant and her husband had gone on vacation, architectural layout of her home, the doll house in her bedroom. He said he kept coded records of each tryst and would use them to expose Grievant for betraying his love.

The second meeting with KB put the Unit Secretary in a quandary. She hated the thought that she might be instrumental in ruining Grievant's life. Nevertheless, she knew it was her duty to report what she had been told, a duty she already violated once. She could not make the decision herself. She needed reliable guidance, so she turned to a Corrections Officer she knew well, whose judgment she respected. He warned her that she must end the concealment.

The Secretary heeded the Corrections Officer's advice. She went to a Highway Patrol Trooper stationed at Marion and told him KB's story.[1] The Trooper reported it to the Warden, and they initiated an extensive probe. Before it ended, the investigation received thorough input from three Agencies: the Department of Rehabilitation & Correction, Ohio State Highway Patrol, and the Ohio Bureau of Criminal Investigation & Identi-

[1] This was the Secretary's second breach. There is a chain of command in the prison system that she did not follow. She should have gone to the Warden first; it was not her prerogative to call in the State Highway Patrol while keeping the Warden in the dark. The Secretary was reprimanded on that account. Even so, she delayed about a year before complying with the Warden's directive to fill out a written Incident Report.

fication (BCI), an arm of the Attorney General. The evidence they amassed was sufficient for the Warden to recommend Grievant's removal. A predisciplinary meeting went forward May 24, 1995, and on July 14, the Department issued Grievant the following notice:

> You are to be REMOVED for the following infractions: Violation of Ohio Department of Rehabilitation and Correction Standards of Employee Conduct #46 A, (the exchange of personal letters, pictures, phone calls or information with an inmate, furloughee, parolee, or probationer without the express authorization of DR&C), and #46 E, (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).
>
> You did open a P.O. box so that an inmate could correspond with you. There are notes you wrote to an inmate. The hand writing was compared by B.C.I. You did give an inmate eleven (11) pictures. You also gave personal information about your sister's family to an inmate. The inmate described items inside your house. Your uniform was altered so that you could have intercourse. You were seen kissing an inmate. You sent a care package to the inmate and a $40.00 money order. You were observed having oral sex with an inmate. Your husband did admit that he had destroyed letters from inmates.
>
> Your actions constitute violation[s] of Ohio Department of Rehabilitation and Correction Standards of Employee Conduct #46 A and #46 E. Therefore you are hereby removed from your position of Correction Officer effective July 14, 1995.

* * *

As a Corrections Officer, Grievant belonged to a State-wide Bargaining Unit represented by the Ohio Civil Service Employees' Association, OCSEA/AFSCME Local 11. Consequently, she had grievance rights and, three days after the discharge, the Chief Steward of the Marion OCSEA Chapter initiated this grievance. The grievance essentially claims that the removal violated the Collective Bargaining Agreement because it was not progressive discipline, corrective discipline, or for just cause. The remedy demanded is:

> For Grievant to be restored to her former position with all back pay and benefits due her. For all record of this to be expunged from files and to be made whole.

The Employer stuck to its decision in all preliminary grievance levels, and the dispute advanced to arbitration. It was heard at Mansfield, Ohio February 21 and 23, 1996. At the outset, the Employer stipulated that the grievance was procedurally arbitrable, and both sides agreed that the Arbitrator was authorized to issue a conclusive award its merits. That arbitral authority is expressly limited by the following language in Article 25, §25.03 of the Agreement:

> Only disputes involving the interpretation, application or alleged violation of a provision of the 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 he/she impose on either party a limitation or obligation not specifically required by the expressed language of this Agreement.

APPLICABLE AGENCY REGULATIONS AND CONTRACTUAL PRINCIPLES

Article 24 of the Agreement establishes explicit standards to confine Management's disciplinary powers. Section 24.02 requires progressive, corrective discipline in most cases of misconduct, to salvage employees who are salvageable:

> **§24.02 - Progressive Discipline**
>
> The Employer will follow the principles of progressive discipline. Disciplinary action shall be commensurate with the offense. Disciplinary action shall include:
>
> A. One or more verbal reprimand(s) (with appropriate notation in employee's file);
>
> B. One or more written reprimand(s);
>
> C. One or more suspension(s);
>
> D. Termination.

Section 24.05 reinforces the underlying doctrine, repeating the mandates that discipline must be "commensurate with the offense" and reasonable. To those qualifications, it adds language prohibiting punishment for its own sake:

§24.05 - Imposition of Discipline

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

In an effort to meet these requirements, this Department (and most other State Agencies) adopted and distributed an extensive document titled, "Standards of Employee Conduct." In it, the Department gives special attention to interactions with prisoners. It goes on at length, meticulously advising employees that they are not to "become emotionally, physically, or financially involved with inmates, parolees, probationers, furloughees or their families, or establish a pattern of social fraternization with same."

The Standards conclude with a misconduct list superimposed on a disciplinary grid. The apparent purpose is to forewarn employees of how the Agency intends to deal with particular offenses. This points to an unexplained oddity in this dispute. The major charge against Grievant is that she pursued a protracted sexual relationship with an inmate in the Institution. Rule 46(d) prescribes removal for "committing any sexual act with an inmate." According to the Employer's evidence, Grievant broke Rule 46(d) possibly one hundred times between April and July 1994. Yet, the Rule was not cited in formal charges. Instead, the Agency accused Grievant only of violat-

ing Rule 46(a) (unauthorized exchange of personal letters, pictures, phone calls, or information) and 46(e) (engaging in any other unauthorized personal or business relationship). Both are ***comparatively*** modest charges. Rule 46(a) carries discipline for a first offense ranging from a written warning to removal; the stated penalty for a first-time violation of Rule 46(e) is a five-day suspension to removal. The penalty ranges relate to the seriousness of the misconduct and records of prior infractions. Grievant had a discipline-free record. It is of course arguable that Rule 46(e) implicitly includes sexual conduct in its prohibition of personal and business affiliations. Still, if the Agency believed its own evidence, its decision not to include the direct charge of sexual misconduct is puzzling.

* * *

Neither the charges nor the Agency's Conduct Rules control this dispute. The overriding issue is whether the removal was for just cause. Article 24, §24.01 of the Agreement provides that no matter what the reason, the Employer is powerless to issue discipline to any Bargaining Unit employee without just cause:

§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.

Consistent with §24.01, Grievant will be reinstated and made whole unless the evidence proves that she committed the misconduct alleged. Moreover, even if the Agency meets that burden of proof, Grievant will be reinstated if the record establishes that the harsh penalty overstepped the boundaries of just cause.

THE CASE AGAINST GRIEVANT

KB, the inmate, appeared in the arbitration as the State's chief witness. During the period in question, he was housed among sixty inmates in the Marion E-Dorm. As Dorm Clerk, he had greater freedom than other prisoners and more opportunities for contact with on-duty Corrections Officers.

KB testified that he knew Grievant about a year before becoming intimate with her. He said that she had been the "girlfriend" of two other inmates, one of whom -- Tereq Abualqhanan -- went from prison to deportation. The Arbitrator observes that KB's allegation about other inmate relationships was irrelevant hearsay, not proven fact. It was significant,

however, for another reason. According to KB, shortly after his own friendship with the Employee began, she told him she had a post office box they could use to secretly correspond. The box was in a fictitious name -- "Kim (Grievant's own first name) Abualqhanan." KB provided the information when the Highway Patrol interviewed him on April 5, 1995. The Patrol followed up, securing Postal Service records. It found that on October 14, 1993, Grievant purchased a box in the name of Kim Abualqhanan.

KB said that his bonding with Grievant began slowly with chaste conversation. As it developed, the conversations became longer and more familiar. The inmate learned about Grievant's family and particulars of her life. The following excerpt from the State Highway Patrol's investigative report reveals the astonishing extent of Grievant's alleged disclosures to KB:

> Inmate [KB] was questioned about his own knowledge of [Grievant]. [H]e stated she lives at [address deleted] Marion, Ohio and telephone # [deleted]. She is married to [husband's name deleted]. They have no children. She ha a sister who lives 3 hours from her that has (2) children, a boy and a girl. [Grievant] considers [these] children as her own. [Grievant] is reported to have a large doll house, which he has seen pictures of. She owns a (4) post water bed. He stated she wears various colors under clothes. He described black bras, black panties, burgundy panties with lace in front, black bra with lace in front. She wears a black swim or body suit to work under her uniform that has (3) snaps at the bottom that he could unfasten.

The evidence is that conversation led to kissing in the E-Dorm utility room; then nature took its predictable course. May 3, 1994, KB's birthday, Grievant's alleged present to him was oral sex. When the affair reached full-bloom, according to the inmate, they had sex of various kinds in the utility closet as many as six times a day when Grievant was on duty. They spent five to six hours a day together. The utility closet is at the head of a stairway leading to the dorm, and they kept the door ajar so they could hear anyone who came near. Frequently, they petted outside the closet. Sometimes they played a game -- "shakedown" -- in which Grievant assumed the classic position for a search and KB patted her down. In the process, he took money and keys from her and kept them until the end of the shift.

A remarkable aspect of KB's statement and testimony was his description of how Grievant altered her uniform trousers. The inmate preferred "normal" intercourse. To accommodate that preference in the cramped utility closet, Grievant allegedly opened the bottom of her trousers, then fixed the seam with velcro. The objective was to allow KB quick and easy access. On August 1, 1994, State Troopers executed a search warrant at Grievant's home. They found and seized the velcroed trousers and personal items that matched KB's depictions. Also they

photographed the doll house and the four-poster waterbed the inmate had described.

Anyone at all familiar with prisons knows that convicts have surprising ability to make their lies seem truthful. When the State depends on inmate testimony to underpin a removal, it bears a heavy burden of proof. This is especially true here, where KB exacted special concessions in exchange for cooperating. He gained release from lock-down confinement. He was allowed to keep gifts and money Grievant allegedly gave him though they were contraband and ordinarily would have been seized. The Agency transferred him to the Grafton Correctional Institute. The transfer might have been for his protection, but there is a suggestion that a stint at Grafton is easier time than at Marion. Whatever the reason for the transfer, Management delayed it one day because KB demanded an extra day to say goodbye to Grievant.

To set aside any justifiable doubts these facts might cause, the Agency produced a significant volume of supporting evidence. KB kept a diary of his contacts with Grievant. It itemized each sexual contact, its kind and "quality." It even kept track of Grievant's menstrual cycles. Also there was the post office box, the uniform trousers (which a BCI scientist tested and found positive for semen), KB's proven knowledge of

particulars of the Employee's home, marriage, and family. The inmate produced other records as well: eleven photographs of Grievant and her husband on vacation and several personal notes. BCI fingerprint and handwriting analysts irrefutably tied them all to the Employee.

Finally, there was an envelope with a $40 money order and a package containing sneakers, cassette player with headphones, two t-shirts, and two pairs of shorts. The inmate had received these items through the mail. Though both bore Marion postmarks, the return addresses and the signature on the money order indicated they came from KB's father in Cleveland. The Highway Patrol went to Cleveland, interviewed the father, and found that he knew nothing about the "gifts." Further handwriting and latent fingerprint examinations by BCI confirmed that the father's signature on the money order was forged by Grievant -- that she had sent KB both mailings.

* * *

In its concluding statement, the Employer contended that there could be no progressive discipline for Grievant. The Employee's cavalier and repeated disregard for her most fundamental employment obligations placed her beyond any possibility of correction or redemption. Even without the lascivious side

of Grievant's behavior, the misconduct still would have justified removal according to the Employer. The State Advocate argued:

> . . .[Grievant] repeatedly placed herself in life threatening situations. She jeopardized not only her own safety, but that of her spouse, who was also a second shift officer, and the safety of all of her co-workers. [Grievant's] behavior was unprofessional, unwarranted, and offensive. By engaging in this course of conduct, [Grievant] has shown that she is not capable of carrying out her basic duties: supervising inmates and maintaining security.

THE OCSEA DEFENSE OF GRIEVANT

The Union's case was severely handicapped by Grievant's refusal to attend the arbitration. She also had declined to appear at her predisciplinary hearing. Her reason, as related by the OCSEA Advocate, was that she did not want to face the embarrassment of answering KB's absurd and malignant charges a second time. The first time was in criminal court. The investigation leading to the removal also resulted in indictments on five counts of sexual battery and forgery.[2] The jury acquit-

[2] Under Ohio law, it is a third-degree felony for a person to engage in sexual conduct with one who is in custody where the offender has supervisory or disciplinary authority over the victim. That was the source of the sexual-battery counts. The forgery charge pertained to KB's father's signature on the money order.

ted Grievant, and she felt one trial and acquittal should have been enough.

Any sensitive human being would appreciate and sympathize with the Employee's withdrawal. Whether or not the charges are true, the humiliation of them must be mortifying. Regardless, arbitration was the Union's only resource for saving Grievant's job. Without her, there was no direct witness to refute the inmate's charges and insinuations.

Though critically hampered, the Union and its Advocate did an outstanding job of marshalling persuasive defenses. The approach was to challenge KB's assertions with irrefutable facts; much creditable research went into securing those facts.

By comparing Grievant's schedule to KB's diary, the Union proved that the diary was glaringly inaccurate. What seemed a painstakingly detailed account of a love affair turned out to be an absurdity. It listed days of alleged sexual contact when the Employee had scheduled days off, was on vacation, leave, or away from her unit for inservice training.

Likewise, KB's statements were in marked conflict with documented facts. He testified under oath that he and Grievant met for undetected sex several times a day, as long as a half-hour each time. The OCSEA Advocate introduced diagrams of E-Dorm and the Employer's own records showing that normal inmate

movements for meals, breaks, recreation, pill calls, and the like made that impossible. Furthermore, Grievant could not have carried out her routine duties -- locking and unlocking doors, escorting inmates -- if she had spent that much time in intimacy with KB. Second shift, Grievant's assigned tour, has the highest inmate activity. Movement occurs continually, and second-shift Corrections Officers have to lock and unlock doors incessantly.

There were still questions for which the Union's evidence did not provide answers. How had KB accumulated so much personal knowledge of Grievant's home, life, and family? How did he get the eleven vacation pictures? How did he know about the altered uniform trousers? The Union argued, however, that its inability to answer these questions did not mean that the Agency's answers should be uncritically accepted. There were other possibilities. As dorm clerk, KB had access to the utility closet where Grievant stored some of her belongings while on-shift. The inmate had opportunities to rifle through her things. Also, he was often in a position to eavesdrop on her telephone conversations. According to the Union, it is possible that he gained information, photos, and such through those resources. Regarding the uniform trousers, the Union emphasizes that BCI blood analyses could not identify KB as the donor

of the semen stains. The inmate is one of a small percentage of "non-secreters" in the general population. That means he does not secrete his blood type in body fluids. As a result, the best BCI could come up with from matching blood types to the stains was that the tests did not exclude the inmate.

The alternate possibilities are important in the Union's judgment, because they lead to reasonable doubts. Citing text-books on arbitration, the Union urges that Management should be held to the highest burden of proof here -- proof beyond a reasonable doubt. Until this inmate accused her of vile acts, Grievant was a respected Corrections Officer who did her job and maintained an unblemished work record. Her career must not be destroyed by a convict's lies and innuendos. "Beyond a reasonable doubt" means that even if the Arbitrator believes the case against Grievant, he must find her innocent if he entertains a doubt and it is reasonable. The Union argues that many doubts persist here and, therefore, the grievance should be sustained.

OPINION

The Union directed the Arbitrator's attention to stark inconsistencies between the inmate's assertions and facts. That was the best defense the OCSEA advocate could present in

Grievant's absence, and it was very effective. There were other discrepancies as well. KB did not tell the same story in arbitration as he told the Trooper and the Unit 4 Secretary. While it is unnecessary to burden this decision by reciting all the differences, it should be noted that they were many. While some were minor, all of them taken together cast serious doubt on the inmate's respect for and adherence to truth.

Briefly stated, the Union's case shot KB's testimony full of holes. It is apparent that when there was a choice between telling the truth and promoting his own self-aggrandizement, the inmate chose the latter. If his testimony had been the whole sum and substance of the Agency's case against Grievant, the State's chance for prevailing would have been uncertain. But the Employer had a great deal more in its arsenal than the inmate's testimony. It had documentation, investigation reports and conclusive scientific evidence. KB was the weakest link. Many of his statements fell to the Union's evidence and logic. When the smoke cleared, the State's case had holes, but its infrastructure stood intact. The only way the Arbitrator could disregard it would be through conjecture. Facts may engender reasonable doubts, but conjecture cannot.

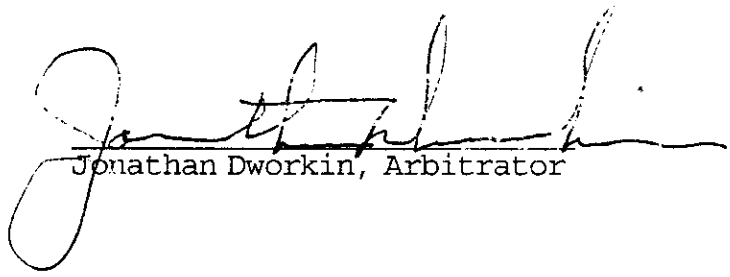
Accordingly, the Arbitrator finds that Grievant committed the misconduct charged, or at least most of it. This means the

grievance will be denied. The Employee's repeated violations were so flagrant and appalling as to leave no room for corrective discipline. Grievant voluntarily severed the trust that cemented her relationship to the Employer. The removal notice was simply the Employer's confirmation of the severance that had already taken place.

AWARD

The grievance is denied.

Decision issued at Lorain County, Ohio, April 27, 1996.



Jonathan Dworkin, Arbitrator