

VOLUNTARY LABOR ARBITRATION TRIBUNAL

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In the Matter of Arbitration \*

Between \*

OPINION AND AWARD

OHIO CIVIL SERVICE \*

EMPLOYEES ASSOCIATION \*

Anna DuVal Smith, Arbitrator

LOCAL 11, AFSCME, AFL/CIO \*

Case No. 27-25-961016-1159-01-03

and \*

OHIO DEPARTMENT OF \*

Kathy Cottrell, Grievant

REHABILITATION & \*

Removal

CORRECTIONS \*

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Appearances

For the Ohio Civil Service Employees Association:

Don Sargent, Staff Representative  
Ohio Civil Service Employees Association

For the Ohio Department of Rehabilitation and Corrections:

David Burrus, Labor Relations Officer  
Ohio Department of Rehabilitation and Corrections

John McNally, Labor Relations Specialist  
Ohio Office of Collective Bargaining

### Issue

Was the grievant's removal for just cause?  
If not, what shall the remedy be?

### Statement of the Case

This case concerns the removal of a correction officer for an unauthorized relationship with an inmate of the Southern Ohio Correctional Facility (SOCF). At the time of her removal on September 30, 1996, the Grievant had been similarly employed for twenty months. She had received the Department's Standards of Employee Conduct, performed at or above expectations, and had one disciplinary action on her record, an oral reprimand for failure to follow post orders, administrative regulations, policies, procedures or directives.

The evidence against the Grievant consists of telephone records, recorded telephone conversations, and intercepted written messages and mail. John Ison, the investigator who handled the case through the pre-disciplinary hearing died thereafter. His report of August 12, 1996, states that while he was checking computer records from the TRACS system<sup>1</sup> for SOCF employee telephone numbers that were called from inmate phones, he discovered four calls that had been made on August 1, 1996, to the Grievant's phone number of record. The personal identification number (PIN) used to place the call was for Inmate Litteral. The TRACS system automatically records all conversations in digital format (Digital Voice Logger, aka DVL). The DVL recording of two of these calls and three later ones placed

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<sup>1</sup>The TRACS system is a sophisticated computer system that logs, monitors and records outgoing collect calls placed by inmates.

to a different number was played during the hearing, as was a copy in conventional cassette format. A DigitGrabber decoded the audible tones to a visual display of the numbers entered and dialed. Three copies of the DVL recording in conventional format were submitted as exhibits. The Arbitrator was thus visually able to verify that the tones on the recording match the computer log and aurally able to verify that the conventional recording matches that on the DVL tape. She later timed the phone calls and found their length also match the computer log, and listened to the recorded conversations on all three exhibits.

The male caller is the same on all phone calls. He identifies himself as "Lee." The State represents that the true caller was Inmate Lee Howe using the PIN of Inmate Litteral, who resided in the same housing unit as Inmate Howe. It is common practice for inmates to use each other's PINS. The female recipient of the three completed phone calls is the same, and she identifies herself as "Kathy" in the first conversation, which the computer logs show as having been placed to the Grievant's mother's phone, the number the Grievant had on file at SOCF. In this conversation, the inmate refers to mail he sent the female but that she had not yet picked up. The parties talk until they are cut off, then the inmate calls her back. During this second conversation, reference is made to the female's uncle, whom she had to transport for dialysis. The female provides the inmate with another phone number to use that evening. A log of calls to that number reports three calls placed during the time frame discussed in the morning calls, two lasting less than a minute, one of eleven minutes in duration. The tape recordings of these calls reflect two calls were refused and one was completed, lasting about eleven minutes. In the completed call, the inmate states that he tried to call her two or three times and that the party who answered did not know who she

was. He talks further about his letters to her, asking her if she had picked them up yet. He also tells about being angry with her "that night at the bar where she was working." The inmate's voice is readily understood throughout all tapes, but the female is barely audible in places because of a very quiet voice and, in places, background noise. There are gaps in the original and copies, which were explained as processing pauses. The conversations appear to pick up precisely where they are interrupted, even mid-sentence.

Investigator Ratcliffe of the Southeastern Correctional Institution who works with a similar system, Thomas Ruckhold of MCI, and Investigator David See of SOCI all testified about the integrity of the TRACS system. Ratcliffe said that he had testified about the system and the evidence it produces in 20-50 proceedings, and that all had resulted in convictions. He stated that the system can malfunction, but that this results in loss of data or audio, and the data that are collected are not erroneous. The system self-reports problems. To his knowledge, it was not possible to override the printout. Users at the institutions, such as himself, do not have the superuser password that might permit them to alter logs. He further testified that while it is possible to copy DVL tapes to conventional ones, it is not possible to do the reverse. Ruckhold confirmed that operators cannot enter data records on the system, they can only read them. In his opinion, if the system logs a phone call, the phone call happened. Investigator See, who took over the investigation after Ison died, testified that the only way he knew of for inmates to defeat the system was through three-way calling, but Ratcliffe said three-way calls could be detected by characteristic clicks and pauses as the go-between places the hand-off call and connects the three parties. See also testified that there was no question in his mind as to the validity

of the tape recording or the identity of the parties. In his opinion, the male is Inmate Howe, though he did not admit his guilt and whom See has not found to be credible; the female is the Grievant, though she, too, did not admit her guilt.

The Union submitted copies of the Grievant's mother's phone bills for the dates of July 15 through November 13, 1996. None of these bills shows collect calls from SOCF. Chief Steward Howard testified (without objection) that during mediation of the instant case, the parties telephoned GTE. GTE's representative reported that there was no record of collect calls to the Grievant's mother's phone on or around the pertinent date. A written statement from Charles R. Adams, Labor Relations Officer of the Department, who was also present at the mediation, confirms Howard's testimony. Mr. Ruckhold of MCI testified that there was a routing problem between MCI and GTE at the time that caused some local traffic to be misdirected to MCI rather than to the GTE operators. Thus, the calls were not billed by GTE. Moreover, MCI purges its records from time to time, and by July 1, 1997, was unable to retrieve information about the calls at issue. Letters from MCI and GTE to Investigator See explain the routing and billing problems, and also express confidence in the information provided by the TRACS system because that information is collected before the call traffic leaves the institution.

Regarding the calls placed to the second number, the Union submitted telephone directories to show that the number was listed in 1996 as belonging to Angela Cobern on Roy Rogers Drive. An affidavit from a Kenny Altman states that he received two collect phone calls at that number on August 1 at approximately 8:30 p.m. from a "Lee" for a "Cathy," but that he hung up the first one after telling the caller that he knew no Cathy and

hung up the second one before accepting the charges. The Grievant testified when she first heard the recording of the phone conversations, the man's denial of knowing a Cathy was on the tape, but it was never there after that.

CO Donald Evans testified by subpoena that on August 13, he observed his porter being passed a piece of paper, which the porter then voluntarily turned in. CO Evans reported the incident and passed the note along to his lieutenant. The note names "Kathy," refers to the Grievant's telephone number, directs an unnamed person to call her three-way, as this is safe, and asks this person to relay certain information. CO Evans also testified that he may have worked with the Grievant and that he believes her to be an excellent officer. In his opinion, whenever an inmate willingly gives up an officer, the motive is revenge.

On August 12, an investigatory interview was conducted and the Grievant was placed on administrative leave. Deputy Warden Hieneman testified he and Major Adkins were present when the Grievant refused Union representation. Correction Sgt/Counselor Minzelli, who was Union president at the time, testified he was available for and expecting to be called to the interview. He was surprised not to have been summoned because it is usual for a Union representative to be present at such interviews. CO Clagg, chief steward at the time, confirmed that Ison and Hieneman almost always had a Union representative present and thought it strange this was not the case here. Minzelli testified the Grievant later told him she was not offered representation, but that Ison disputed this. The Grievant testified that after Hieneman and Adkins left, Ison told her he suspected three other women and wanted her cooperation. When she refused, he threatened her with discipline for aiding

and abetting as she allowed another officer to use her phone. That was when she wanted a Union representative, she said.

CO William Haggy, the Grievant's partner with whom she worked on cell block L-3 during July and August of 1996, testified he never saw her around Inmate Howe's cell or noticed anything suspicious about her or her interactions with inmates. In his experience, she is a by-the-book professional officer. He further testified that they ran a tight ship on that cell block, which caused them to have problems with inmates trying to get rid of specific officers. CO Matt Hapney, the Grievant's fiancé, is also of the opinion that she is an excellent officer. He thinks she is aware of the games inmates play and not stupid enough to fall for them. He testified that the Grievant and he moved in together at an address in Waverly, Ohio at the end of July, that she had never worked in a bar, that she has no relatives on dialysis, and that he does not believe she is guilty. However, he never listened to the tape.

As for the Grievant, she denies she ever received phone calls from inmates. If she had done so, she would have reported it. Moreover, she knew from a prior case that inmate calls are recorded. She said she moved in with her boyfriend towards the end of July. The phone there was not turned on right away and, being placed on leave, she did not have the opportunity to file a change of address until she was asked for it. The Grievant said she still visits her mother, but was not there on August 1 because she was cleaning her new home. Her mother does not take collect calls, but there are other relatives around. The Grievant further testified about the training she underwent for her job and that she felt she was subjected to greater scrutiny than other COs because she is female. She said after she

received death threats on cell block L-3, she wanted to be moved out, but was told to stay to prove she's strong. She further testified she had written up L-3 inmates about four times for trying to start a relationship with her. The Grievant testified about problems she had in the past with Ison, including a 1970 platonic relationship her uncle had with Ison's wife that resulted in divorce. The Grievant denied ever working or even frequenting a bar and that anyone in her family has diabetes. She said she doesn't know where Roy Rogers Drive is and has never been there. She wanted the State to do a voice analysis and a polygraph, but was denied, so she had a polygraph (not admitted into evidence on objection of the State) done at her own expense and her attorney got a sworn affidavit from the inmate in which he denies ever having a relationship with her or phoning her.

According to Ison's report, the Grievant denied the charge during the investigative interview. She denied them again at the pre-disciplinary hearing that was conducted on August 26. Believing her guilty, Hieneman signed a removal order on August 30 for Acting Warden Terry Collins. This order, effective September 30, cites phone calls and written communications with the inmate in violation of Standards of Employee Conduct Rule 46a.

This action was grieved on October 7, 1996, and processed through the grievance steps without resolution. Hence it came to arbitration, where it presently resides, for final and binding decision, free of procedural defect.

### Arguments of the Parties

#### Argument of the Employer

The State first addresses the Union's argument that the case is fatally flawed by the State's denial of Union representation during the investigatory interview. The Union's claim



was not, in fact, established by its own witnesses, who could only testify that they were standing by and not called, though it was the usual practice to have them attend such interviews. Hieneman's testimony, corroborated by Adkins' statement, explains why they were not called: the Grievant was offered Union representation, but declined it for privacy reasons. The State contends the Union's failure to raise the argument at the pre-disciplinary hearing, where she was represented by the very individual who expected to be called to the investigatory interview, undermines the Grievant's claim that she requested and was denied this right.

On the merits, the State argues that testimony from Ratcliffe, See and Ruckhold establish the reliability and accuracy of the TRACS system. This system recorded two phone conversations between an inmate phone and a woman at 259-3327, which was the Grievant's number of record. The first of which was answered by "Kathy." A third conversation between the inmate and the same woman was recorded from a call placed to the phone number "Kathy" provided in the second conversation. The computer logs were supported by the DigitGrabber decoding of the audible tones. Although the phone calls were not billed, both GTE and MCI provided an explanation and asserted the reliability of the TRACS system. The State contends the female voice is that of the Grievant, and begs the Arbitrator to listen carefully to the tape and make her own determination from a comparison to what she heard during the hearing.

The State argues the only defense offered by the Grievant is her steadfast denial and claim that Ison, the original investigator, was out to get her. It says its refusal to provide a voice analysis is justified as that examination is unreliable and unnecessary, inasmuch as

a preponderance of the evidence is required to establish guilt. The State has met its burden of proof because the evidence establishes that it is more probable than not that the calls between the Grievant and an inmate took place.

The State finds it suspicious that the cohabitation defense was not raised earlier. The only support for the Grievant's claim that she was not residing with her mother at the time was the testimony of her fiancé. No utility bills, no signed lease, no change-of-address registration were offered, except the document the State submitted, which the Grievant did not fill out until August 22.

No evidence was brought to support the Grievant's claims that Ison had it in for her or that she was treated differently in her daily work than other correction officers either, asserts the State. Had the events alleged actually occurred, there would be a record in reports and grievances. The State contends these allegations were merely raised as a smokescreen.

The State argues the content of the conversations recorded shows a relationship between a female working at SOCF named "Kathy" and an inmate. This "Kathy" is the Grievant. No other Kathy working at SOCF has come forward. The relationship is clearly one that cannot be tolerated in a correctional environment because it threatens the security of the institution and the Department's ability to meet its charge. It asks that in light of this and the evidence and testimony presented, the State's decision to remove the grievant be upheld and the grievance denied in its entirety.

### Argument of the Union

The Union first argues that the discharge should be overturned on the grounds that the State refused the Grievant's request for Union representation at the investigatory interview in violation of Article 24.04. The Union says the testimony of Hieneman is key because he corroborated Union witnesses on what usual practice is. If it is mutually beneficial and normal practice to have a steward present, why was one denied in this instance, asks the Union. In its view, the reason is because the State wanted to bully her into resigning. The State's privacy excuse is false, says the Union, claiming management put the word out to embarrass and shame the Grievant.

If the Arbitrator reaches the merits of the case, the Union argues the State did not have just cause to remove the Grievant. To begin with, it violated its own disciplinary rule, which provides for suspension to removal for a first violation of Rule 46a and did not follow the principle of progressive discipline. The Grievant only had a written reprimand on her record, for a completely unrelated offense.

Second, the Union questions whether there has even been an offense committed. The State has no admission of guilt and none of the circumstances present in the parties' *McClendon* case are present. No separate line was installed and then removed, no calls appeared on the phone company bills, and there was no record of consistent contact. The Union attacks the quality of the State's evidence, saying the tapes have obviously been tampered with, having sections erased, blank or unclear. The State has tried to cover up by getting GTE and MCI to explain the lack of billing as a "procedural error." Which computer is flawed, asks the Union, the established billing automated GTE teller or the

new, unproven TRACS system being operated by untrained technicians? The DigitGrabber, too, is a last minute attempt to plug a hole. Might not this device have been preprogrammed to display for the Arbitrator what the State wanted her to see? In fact, says the Union, the State intercepted no mail from an inmate to the Grievant and has not even proven it was an inmate in the recorded conversations. As to the woman on the tape, she has obviously never worked at the institution because she did not know what the inmate slang expression, "checking in" means. The woman on the tape has an uncle in dialysis and worked in a bar. The Grievant has no relatives with diabetes and has never worked in a bar.

The State has also not conducted a fair investigation. It never had a voice analysis performed, nor did it polygraph the inmate, nor did it try to prove correspondence was sent by the inmate to the post office box in Lucasville. It also did not rebut testimony that the Grievant was cohabiting with her fiancé at the time or that the phone number was not hers, but her mother's. In addition, the death of the investigator hampered the Union because it was unable to cross-examine him.

The Union offers an alternative theory. It contends the inmate wanted a transfer to a less security-oriented institution closer to his home in Dayton. He spotted the Grievant as an easy mark because she was new to the institution and not well accepted. Suggestions of a relationship between a female officer and an inmate would be well-received by Department. It is obvious he looked up the numbers he needed in a phone book, which are readily accessible to anyone in the prison, because they are both found in the "C" section of the Portsmouth telephone book. The intercepted note is suspicious in light of the

testimony that inmates do not willingly give up an officer unless they have something to gain from it. The Union's theory is given credence, it says, by the fact that the inmate has been transferred to Warren Correctional Facility.

The Union argues the State must prove its case beyond a reasonable doubt because the Grievant's reputation and credibility are at stake. The State has not met its burden to show just cause for terminating the Grievant. The Union therefore asks that the grievance be sustained, the Grievant be returned to work with full back pay, no loss of seniority and longevity benefits, no loss of leave accruals, be allowed to buy back all leaves that were paid out to her, than unemployment benefits be paid back to OBES by the Department, that she be paid interest on lost wages and made whole.

#### Opinion of the Arbitrator

The case for the Union's procedural argument rests entirely on credibility, there being no waiver of union representation signed by the Grievant. The fact that it is the usual practice to have Union representation at investigatory interviews does not make it an absolute requirement or imply that the State necessarily refused a request. Employees are entitled to a steward, not required to have one. The statements of two management witnesses are that she was offered and refused. The Union officer's availability does not undermine this evidence any more than the employee's right to proceed on her own does. Indeed, it seems to me that since Minzelli expected to be summoned and was not, but then did represent her at the pre-disciplinary hearing, the issue would have been raised then and there if it were true. The fact that it did not come up until afterwards, even though the Grievant talked to the Union the same day as the interview creates the inference that she

proceeded on her own of her own free will and possibly later thought better of it. In any event, no evidence prejudicial to the Grievant such as a confession, was produced by that interview.

Turning now to the merits, there is no question that a relationship such as revealed in the alleged phone calls between a correction officer and a convicted felon incarcerated in an institution such as this one constitutes a perilous breach of security and, if true, justifies removal on a first offense. If the content of the tapes is to be believed, the inmate already had the female under his control. She was afraid, but she gave him another number to use when he begged to call again. It took very little begging at that. I therefore disagree with the Union that the State broke its own rule and did not use progressive discipline in violation of Article 24.02.

I also disagree with the Union that the criminal quantum of proof, beyond a reasonable doubt, is required. Employees fired for misconduct do not face the same limitations on their freedoms that those convicted of crimes do, and I see no reason why an employer should be held to the highest standard of proof when the evidence clearly and convincingly points to an employee's guilt, though there be some question about it. On the other hand, the damage to reputation and economic security that results from a disciplinary discharge demands more than the preponderance standard argued by the State. Yes, it is a matter of probabilities, as stated by Arbitrator Graham in the case cited by both parties, but the probability of guilt must be high enough to be convincing. So, finally we come to the central and most difficult question of this case: is the State's evidence persuasive?

I have spent a considerable amount of time studying the record of this case, struggling with the evidentiary problems it presents. The main evidence against the Grievant consists of computer logs and sound recordings of alleged telephone conversations. I am asked to believe, as the State does, that the recordings are authentic and correct, and that the speakers are an inmate and the Grievant. I am not persuaded by testimony of the system's use in other proceedings, for there is nothing in the record about how large a role the TRACS system played in their outcomes. Instead, I must look to the evidence presented in this arbitration and evaluate the system in light of the complete record. Ideally, there would be reliable evidence independent of that produced by the TRACS system unequivocally supporting or refuting the latter. Nelson, Dworkin and Graham all had at least grievant admissions, corroborating phone company records and the like. Not so here. There are no phone bills with the alleged calls on them. No mail was apparently intercepted between the inmate and the Grievant. There is the note turned in by the porter, but I give both it and all the correspondence in the discipline trail no weight, nor do I credit the inmate's written statement exonerating the Grievant, since the alleged authors are convicted felons and did not testify. I am left with electronic and circumstantial evidence on the one hand, Grievant and her fiancé's testimony on the other.

Because I, myself, listened to the original recording on the DVL as well as cassette reproductions, I do not have the problem of the reliability of the reproduction. One of the copies is of much poorer quality than the others, but the later copies adequately report the content of the original. The real problem is whether the original (DVL) recording is reliable. There are several ways to test it. One is through voice identification, another is

through circumstantial evidence, a third is through technical foundation. The State has elements of all three. Though each taken by itself does not convince me, taken collectively, they do.

Investigator See, whom the Grievant does not claim has a personal axe to grind with her and who has talked with both the Grievant and Inmate Howe, identified their voices. Although his experience with the Grievant is not extensive, he has heard her telephone voice. My own, necessarily limited observation, is that the female voice on the tape is not dissimilar to the Grievant's. A positive identification by a person very familiar with the Grievant would provide stronger evidence of identity, but the Grievant's fiancé, who of all the witnesses would be best able to authenticate her voice, did not listen to the recording. Truly reliable scientific evidence would also be helpful, but spectrographic voice print analysis does not rise to the level of general scientific acceptance. The Employer cannot be forced to submit unreliable evidence and I am unwilling to draw any inference from its unwillingness to do so voluntarily.

Circumstantial evidence supports the conclusion that the parties and their conversations are as represented by the State. The DigitGrabber unequivocally identified the numbers dialed and comported with the computer logs. The Union's suggestion that the DigitGrabber was reprogrammed to provide false information to the Arbitrator is pure speculation. Indeed, the Union's theory of the case amounts to a paramilitary-industrial conspiracy involving four organizations as well as inmates and the original investigator with an alleged ancient grudge against the Grievant's family. I agree that the lack of corroborating charges on the GTE phone bills and MCI records weakens the State's case,



but the explanation given was supported by testimony and documentation I have no reason to disbelieve, and there are other indices of reliability.

From the content of the conversations, it is clear that the originator of the call was inside a cellblock, an inmate, and speaking to someone employed at the institution in his area. This person identified herself as "Kathy," was living with her mother who does not accept collect calls, and had to pick up her mail as from a post office box. All of these circumstances match the Grievant's. The Grievant testified she was no longer living with her mother at the time, but she did not change her address until late August and her mother's phone bill does not reflect long-distance calls to Waverly until August 20. Thus, nothing she brought corroborates her testimony except that of her fiancé. Her alibi is not that she was working, which would have cleared her, but that she was cleaning the new home. I have similar problems with the uncle and bar. It seems to me from the context that the "bar" was a code word for a place inside the prison rather than a commercial establishment for the sale of liquor. But even if it were the latter, one has only the Grievant's and her fiancé's testimony that she never worked in one, uncorroborated by employment records. Neither did she offer medical records of relatives or tickets on inmates to support her claims that no uncle is on dialysis and that she is strict with inmates.

As for the technical reliability of the computer logs and DVL, the State sufficiently established the technical integrity of the TRACS system and the particular recording at issue through the testimony of its witnesses. Institutional operators, for example, have read-only abilities and are thus able only to query the data, not to modify it. I do accept the proposition that inmates will go to extreme lengths to break the system that controls them;

also that computer and telephone systems are not immune to being cracked by determined people with time and talent. That this particular system has been hacked at all or was defeated specifically for the purpose of setting up the Grievant is, again, speculative. No theory of how this was done was developed, only the idea that it was possible. If different numbers than those recorded on the DVL were dialed, how did the Grievant's come to replace the true ones? If none of these phone calls occurred, how were they placed on the DVL and the computer log? All evidence of falsification of the log and recording is either unreliable, inconclusive, or satisfactorily explained. Altman, who did not testify, gave a statement three months after the calls. It provides a time two hours later than the two calls were logged and the inmate said he made them. The GTE automated operator handles the transaction according to the tape, but the record does not disclose whether the handoff to MCI occurs before or after the recorded announcement. As discussed above, gaps in the DVL recording were explained as normal functioning not affecting the integrity of the data.

In sum, while the State's case is based on technological evidence girded by just enough foundation, identification and circumstantial evidence to make it convincing, the Union's case is based on uncorroborated testimony of the Grievant and her fiancé, both of whom have a high interest in the outcome, phone bills which were rebutted by the State, and unsupported speculation. The Grievant's removal was for just cause.

Award

The grievance is denied in its entirety.

*Anna DuVal Smith*

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Anna DuVal Smith, Ph.D.  
Arbitrator

Cuyahoga County, Ohio  
November 10, 1997