

#1256

ARBITRATION DECISION

February 6, 1998

In the Matter of :

State of Ohio, Department of Youth)	
Services, Circleville Youth Center)	
)	Case No. 35-18-(12-20-96)-65-01-05
and)	Donna Randolph, Grievant
)	
Ohio Civil Service Employees Association,)	
AFSCME Local 11)	

APPEARANCES

For the State:

Shirley Turrell, Advocate, Office of Collective Bargaining
Pat Mogan, Second Chair, Office of Collective Bargaining
Aisha Saunders, Labor Relations Officer, Circleville Youth Center
Barry Braverman, Labor Relations Officer
Donald Whipple Jr., State Trooper
Jody Hamlett, Witness
Rebecca Martin, Assistant Chief Inspector, Department of Youth Services
Michael Logan, Deputy Superintendent
Mary Sherrill, Cook

For the Union:

David Justice, Advocate
Herman S. Whitter, Head, Dispute Resolution Department
Donna M. Randolph, Grievant
Joanna Tinney, Witness
Sandra A. Fletcher, Witness
Alvena Hamlet, Witness
Martha Rose Harmon, Witness
John Tetzloff, Witness

Arbitrator:

Nels E. Nelson

BACKGROUND

The grievant, Donna Randolph, was employed by the Department of Youth Services at the Circleville Youth Center. The department is responsible for housing and rehabilitating youth felony offenders. Its Circleville Youth Center houses young male offenders convicted of serious crimes including assault, murder, rape, and robbery.

The grievant was hired in April 1995 as a food service worker. She was employed on an interim basis until July 23, 1995 when she became a permanent employee. The grievant's duties as a food service worker included serving meals, washing dishes, and keeping the kitchen area clean. She also supervised a number of inmates in the cadre program who worked in the kitchen. The cadre program included a dozen or so individuals. They enjoyed trustee status at the facility and seemed to move about the facility as they wished.

The events giving rise to the grievant's removal began in early May 1996. The state contends that at that time the grievant attempted to have sexual intercourse with Jody Hamlett, a member of the cadre, in a restroom in the kitchen. It maintains that the episode ended when a staff member approached the area. The union does not dispute that Hamlett attempted to have sexual intercourse with the grievant but claims that she was coerced into participating by Hamlett.

A second incident occurred in mid-May 1996. The state charges that at that time the grievant and Hamlett had sexual intercourse in a restroom in the kitchen area. The union questions whether sexual penetration took place and again claims that the grievant was not a willing participant.

These incidents came to light as a result of an event that took place in the food service area on May 31 or June 1, 1996. The union charges that at that time Hamlett became angry at the grievant, threw her up against a cooler, and picked her up off the floor by the chin. When the incident was reported by the grievant, an investigation was conducted by Aisha Saunders, a labor relations officer at CYC. When she uncovered

rumors about a sexual relationship between Hamlett and the grievant, she informed Donald Feldkamp, the superintendent, that a more experienced investigator was needed. On July 12, 1996 Feldkamp contacted the Ohio Highway Patrol and the office of the chief inspector of the Department of Youth Services.

The Highway Patrol investigation was conducted by Trooper Donald W. Whipple. His charge was to investigate the allegation that the grievant was sexually involved with Hamlett which would constitute sexual battery by the grievant under the Ohio Revised Code. On July 15, 1996 Whipple took statements from Mary Sherrill, a Cook 2, who worked with the grievant and sometimes served as her supervisor, and Neil McNeil and Brian Lewis, two cadre who worked in the kitchen. The next day he obtained statements from the grievant and Hamlett, who had been released on July 7, 1996. Whipple's report and the statements he took were forwarded to the Pickaway County Prosecutor's Office which subsequently declined to prosecute the case.

The Department of Youth Services investigation was done by Rebecca Martin, the assistant chief inspector in DYS. She was assigned to investigate the allegation that the grievant had sexual contact with Hamlett. Martin interviewed a number of employees including Sherrill and took statements from the grievant. She also obtained statements from Hamlett and Jeffrey Radachy, a cadre who had been released in November 1995. On August 27, 1996 she reported that the grievant admitted having sexual contact with Hamlett on at least two separate occasions and recommended that appropriate administrative action be taken against the grievant.

After being interviewed by Martin and Whipple on July 16, 1996, the grievant became very upset. Her sister, Martha Harmon, the supervisor of data entry and records at CYC, took her to her home. The next morning Harmon took the grievant to Harding Hospital where she was admitted. The diagnosis was major depression, acute stress disorder, and suicidal ideation. She remained hospitalized until July 25, 1996.

When the grievant was released, she was referred to Dr. Kevin Ware, a psychiatrist at Harding Hospital. He examined her on August 2, 1996. In completing the physician's portion of the grievant's application for disability leave benefits, he indicated that the grievant was suffering from a "major depression - single episode [with] severe psychotic and psychotic features [and] post traumatic stress disorder." Dr. Ware reported that he expected the grievant's disability to last longer than twelve months and further stated that he "expect[ed] that patient will be unable to return to the Circleville Youth Center."

The CYC decided to take disciplinary action against the grievant. A pre-disciplinary meeting was scheduled for October 3, 1996 but it was postponed when Dr. Ware reported that the grievant "was under a large amount of stress" and that attending the meeting "would be detrimental to her condition." He indicated that the pre-disciplinary meeting should not be rescheduled for at least six months. Despite his recommendation a meeting was scheduled for November 14, 1996 and went forward without the grievant being present.

On December 13, 1996 the grievant was removed. Her removal was based on her alleged violation of Work Rules #29 and #43 of the Department of Youth Services Directive B-19. Rule #29 prohibits:

having contact with or visiting a youth, except as part of the employee's job responsibility for official work purposes, unless authorized to do so by the appropriate Deputy or Director.

Rule #43 bars:

engaging in sexual contact/activity or allowing the youth entrusted to the custody of DYS to engage in sexual contact/activity.

The penalty for the first offense under rule #29 is suspension and the penalty under rule #43 is termination.

A grievance was filed on December 27, 1996. It charges that the disciplinary action was imposed without just cause. The grievance requests that the grievant be made whole in all ways.

The grievance was heard at step three on February 19, 1997. The grievance response is dated April 29, 1997. It concludes that the grievant had sexual contact with Hamlett and that the sexual encounters were consensual. The grievance was denied in its entirety.

The grievance was appealed to arbitration on July 16, 1997. The hearing was held on November 21, 1997 and December 10, 1997. Written closing statements were received on January 14, 1998.

On January 29, 1998 the Arbitrator received a "Motion to Strike Elements of the Union's Brief." The state objected to the union's reference to Union Exhibit 9 -- the grievant's release report from Harding Hospital -- which was excluded from the record by the Arbitrator based on the state's objection that it had not seen it prior to the hearing. It also asserted that the statements from the American Medical Association and MS. Magazine which the union attached to its written closing statement constituted new evidence which should not be considered by the Arbitrator. The state also complained about the union's contention in its written closing statement that the grievant's failure to immediately report the alleged attack by Hamlett should not be viewed as diminishing her credibility. It indicated that it was a new argument and should not be taken into account by the Arbitrator.

The Arbitrator responded to the state's motion in a conference call on February 2, 1998. He indicated that he would not consider Union Exhibit 9 or the attachments to the union's written closing statement. The Arbitrator stated that he would take into account the union's argument regarding the grievant's delay in reporting the alleged attacks by Hamlett because the grievant had testified at the hearing regarding the reasons she did not report the alleged attacks.

ISSUE

The issue as agreed to by the parties is as follows:

Was the termination of the grievant for just cause? If not, what shall the remedy be?

RELEVANT CONTRACT PROVISIONS

Article 24 - Discipline

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.

STATE POSITION

The state argues that there is just cause for the grievant's removal. It contends that the grievant's admissions in the highway patrol and internal investigations prove the operant facts in the charges against her. The state maintains that a prima facie case for just cause was made well in advance of the arbitration hearing and "should be dispositive of the issue framed upon 'just cause'." (State Written Closing Statement, page 6).

The state asserts that while just cause is not defined in the collective bargaining agreement, the seven elements of just cause described by Arbitrator Carroll Dougherty in Grief Bros., 42 LA 555 (1964) are met in the instant case. First, it points out that the grievant had adequate forewarning of consequences of sexual contact with inmates. The state notes that Saunders testified that the grievant received a copy of the work rules and that the union was informed of the rules prior to their adoption. It stresses that there is no dispute as to the grievant's receipt of the work rules.

Second, the state contends that the rule against sexual contact with inmates is related to orderly, efficient, and safe operations. It maintains that it is "intuitively obvious"

that a correctional facility cannot permit or condone sexual relationships between employees and incarcerated offenders.

Third, the state reports that it investigated prior to imposing discipline. It points out that when Saunders heard rumors of a sexual relationship between the grievant and Hamlett, the investigation was turned over to Martin. The state notes that she obtained statements from Hamlett and Radachy confirming that they had sexual encounters with the grievant as well as the grievant's statement where she admitted to engaging in sexual activity with Hamlett. It stresses that it was Martin's professional assessment that the grievant's claim of forced sex was not credible.

The state observes that an independent investigation was conducted by Whipple. It indicates that he testified that based on his investigative training and experience he did not find the grievant's claim of forced sex to be credible. The state reports that Whipple stated that his examination of the restroom where the sexual activities occurred did not reveal any sign of a struggle which would have supported the grievant's claims.

Fourth, the state contends that its investigation was conducted fairly. It points out that the grievant was advised of the charges against her, offered union representation, and afforded all of the due process required by the collective bargaining agreement and the law. The state notes that two disinterested, experienced investigators independently reached the conclusion that she engaged in consensual sexual activity with an inmate.

Fifth, the state contends that its investigation and the grievant's admissions provide substantial evidence of the grievant's guilt.

Sixth, the state argues that discipline was applied even-handedly. It claims that throughout the Ohio corrections system employees who engage in similar sexual relationships with inmates are terminated for the first offense. The state further indicates that the union has the burden to establish disparate treatment but that it failed to raise it as an issue.

Seventh, the state maintains that the level of discipline was appropriate. It indicates that under its work rules termination is the penalty for the first offense for the kind of conduct engaged in by the grievant.

The state argues that even if the grievant changed her mind about having sexual intercourse with Hamlett, she had sexual contact with him which violated work rule #43 which bars sexual contact of any kind. It points out that Mary Sherrill, a Cook 2 who served as the grievant's lead worker, testified that the grievant routinely chose Hamlett to accompany her on cleaning tasks and characterized her as having a reputation for being "hot." The state claims that the grievant "admitted sexual conversation, admitted entering the restroom with Mr. Hamlett, admitted making herself available." (State Written Closing Statement, page 11). It indicates that work rule #43 prohibits any form of sexual contact including kissing, fondling, or embracing.

The state maintains that the union failed to meet its burden to establish that the grievant was forced to engage in sexual activity. It states that in support of this claim the union offered only the "grudging" testimony of Dr. Ware. The state indicates that the union did not produce any medical evidence of forced sexual activity such as hospital treatment or any evidence that any charge was filed in any venue regarding sexual assault. It notes that no other female kitchen workers made any allegations of any sexual assault.

The state charges that the grievant's allegation of rape or sexual assault is beyond the scope of the arbitral proceeding. It contends that "questions of third party criminal conduct, raised as a defense, constitutionally may be decided only by a jury in a court proceeding governed by formal rules of discovery, evidence, procedure, and a standard of proof not present in the arbitral format." (State Written Closing Statement, page 13). It maintains that asking an Arbitrator to stigmatize the conduct of a third party is asking an Arbitrator to act in a manner potentially beyond the immunity conferred by the Ohio Revised Code.

The state argues that the grievant lacks credibility. It claims that her versions of the truth started with vague protestations that she was coerced into having sex through fear of losing her job due to the "influence" of Hamlett and progressed to charges of rape in the workplace. The state notes, however, that when Hamlett testified at the arbitration hearing, the grievant appeared to have her terror under control because she sat doodling.

The state contends that the grievant had a medical condition which can produce symptoms of "frequent sexual indiscretions." It points out that the grievant's former physician stated in a April 30, 1996 certification for sick leave that the grievant had "depression, hypothyroidism" with an onset in 1994. The state asserts that pages 172 and 173 of the Diagnostic and Statistical Manual of Mental Disorders indicates that "hypothyroidism can be of the 'disinhibited type' which can produce symptoms of 'frequent sexual indiscretions'." (State Written Closing Statement, page 14). It states that the grievant withheld information about this condition from Dr. Ware.

The state questions the union's purpose in calling the grievant's boyfriend as a witness. It claims that his presence offered another motive for her to fabricate an "assault" to excuse her sexual activities with Hamlett. The state reports that the grievant's boyfriend testified that he had no knowledge of her visits to "black bars" or her "sexual embraces" with a married co-worker.

The state challenged the testimony of Dr. Ware. It points out that he testified that the grievant was raped at the workplace but he could not provide specific details. The state notes that Dr. Ware based his diagnosis on only two interviews and that he administered no psychological tests. It observes that he is relatively new to the practice of psychiatry, having graduated from medical school in 1991 and completed his residency in psychiatry in 1994.

The state charges that the "validity and reliability" of Dr. Ware's diagnosis was compromised by the grievant's failure to disclose significant medical and psychological history to him. It reports that he was surprised to learn that another doctor had

characterized the grievant as suffering from chronic depression and hypothyroidism. The state observes that Dr. Ware agreed that these factors should be considered in making a diagnosis.

The state questioned Dr. Ware's post-traumatic stress diagnosis. It points out that he acknowledged that the incidence of this condition is only 1% to 14% of the general population. The state claims that Dr. Ware was unable to fit the time frames of the onset of the grievant's symptoms to the time frames required by the Diagnostic and Statistical Manual of Mental Disorders. It asserts that the grievant's sudden onset of major depression and suicidal thoughts on July 17, 1996 might have been due to questioning by Martin and Whipple.

The state rejects the union's attempt to discredit the testimony of Sherrill. It complains that "with the permission of the arbitrator, the Union enjoyed the luxury of presenting its case two weeks after Management's presentation of its witnesses." (State Written Closing Statement, page 20). The state charges that the union used the time to orchestrate and rehearse efforts to overcome Sherrill's testimony. It indicated that it would "not dignify the effort by rebuttal." (State Written Closing Statement, page 20).

The state questions the value of Harmon's testimony. It points out that she had no first-hand knowledge of anything at issue. The state notes that despite her testimony that the grievant "always" brought her problems to her for help, she never shared her fears over the sexual "assaults" with her which suggests that they never occurred. It claims that Harmon initially lied about completing the paperwork for the grievant's disability application and reading a report regarding the grievant's choking allegation.

The state challenges the testimony of Joanna Tinney, a former co-worker of the grievant. It charges that she lied regarding a corrective notice advising her to refrain from relationships. The state asserts that Tinney's statements showed that the work rules prohibiting relationships were evenly enforced and that there was an investigation of the

grievant's claim that Hamlett threw her against a cooler and picked her off the floor by the chin.

The state argues that any remedy is limited by the grievant's assertion of her inability to work. It observes that the grievant submitted disability application forms indicating that she would be unable to return to work for at least twelve months from the initiation of psychiatric treatment in August 1996. The state submits that on that basis the grievant is ineligible for any back pay for an equivalent period of time.

The state asks the Arbitrator to deny the grievance in its entirety.

UNION POSITION

The union argues that the grievant was assaulted on three separate occasions by Hamlett. It contends that on the first occasion he attempted to rape her in a staff restroom and stopped only when he heard a knock on the restroom door. The union maintains that two weeks later Hamlett forced the grievant into another restroom where he did rape her.

The union claims that the grievant did not report these attacks because she feared that Hamlett would retaliate. It states that he told her that the other cadre write anything he said and that he would go to Donna Carpenter, a manager, who would tell Sherrill and that it would be bad for her. The union asserts that Hamlett and the other cadre told the grievant that officials would believe them rather than her because they wanted the cadre program to succeed.

The union charges that Hamlett attacked the grievant again in late May or early June. It reports that he pushed her against a cooler and lifted her off the floor by her blouse and throat. The union observes that Douglas Smith, a supervisor who witnessed the incident, accepted Hamlett's explanation that it was horseplay and failed to report it even though horseplay violates CYC rules. It indicates that the grievant did not report the

incident because she was starting her annual vacation and because she felt that since there were witnesses to the assault, the administration would rectify the situation.

The union indicates that the incident was reported to Carpenter by Tinney on June 4, 1996. It maintains that Carpenter refused to act unless the grievant reported the attack. The union claims that at that point the grievant could see no end to her torment and began contemplating suicide. It contends that tragedy was avoided when Tinney told Harmon who insisted that the grievant report the incident. The union stresses, however, that when the investigation began and Hamlett alleged that the grievant had a consensual sexual relationship with him, the investigation refocused on the grievant rather than Hamlett.

The union argues that the state did not produce sufficient evidence to establish that it was more probable than not that the grievant engaged in consensual sexual relations with Hamlett, let alone meet its burden of clearly and convincingly establishing that the alleged misconduct took place. It points out that although the state charged that the grievant behaved improperly, there is no record of a reprimand in her file. The union further notes that Tinney, Alvena Hamlet, the grievant's supervisor, and Sandra Fletcher, a co-worker, stated that they never saw the grievant act improperly during her employment and that they were discouraged by Carpenter from reporting wrongdoing by the cadre.

The union claims that because there were no witnesses to the first two attacks on the grievant, it is the grievant's word against that of Hamlett. It contends that even if the claims that the grievant joked with the cadre are found to be credible, those claims do not make it any less likely that she was the victim of a sexual assault. The union asserts that on both occasions it was proven that the grievant told Hamlett "no." It maintains that "even within the confines of a juvenile facility, the word 'no' still means 'no'." (Union Written Closing Statement, page 7).

The union argues that the grievant's credibility should not be viewed adversely simply because she did not report the attacks immediately after they took place. It asserts that it is difficult for rape victims to report the offenses. The union contends that it was

even more difficult for the grievant to come forward because she knew Hamlett had killed before and because she believed that he could kill again.

The union claims that the testimony of Hamlett is not as credible as the testimony of the grievant. It points out that Hamlett is a convicted murderer and that he admits that he violated CYC rules by engaging in sexual activity with the grievant. The union notes that there was no evidence to corroborate Hamlett's claim that the sexual relations were consensual.

The union argues that "it is inconceivable as to how CYC could give the testimony of [the grievant's] attacker greater weight than [the grievant's] testimony." (Union Written Closing Statement, page 10). It indicates that Hamlett had more to lose than the grievant since if CYC were informed of his actions, he would have lost his freedom. The union further observes that Hamlett was promised a job at CYC after his release.

The union accuses the state of failing to conduct a fair and proper investigation to determine whether the grievant had consented to any sexual activity. It maintains that a glance through the highway patrol report indicates that the state made very little, if any, effort to seek out witnesses who may have given statements favorable to the grievant. The union notes that it obtained statements from Hamlet, Tinney, and Fletcher indicating that the grievant was professional and dependable.

The union complains that the statements taken by the highway patrol do not focus on the credibility of Hamlett. It points out that the statements of Sherrill and the cadre focus on the behavior of the grievant in the workplace. The union notes that Sherrill "adopted" Hamlett as her "grandson." It reports that she and other employees gave Hamlett and other cadre gifts in violation of CYC rules but were never disciplined.

The union contends that because of the state's one-sided investigation the grievant's removal should be reduced. It observes that in converting a removal to a 30-day suspension in Ohio Bureau of Workers' Compensation v. OCSEA, AFSCME, Local 11, case no. 34-18-(95-12-06)-0235-01-09, Arbitrator Anna DuVal Smith stated:

Although the investigation was lengthy and produced a substantial accumulation of circumstantial evidence -- even strong circumstantial evidence -- it was neither full nor fair for it only looked at one side of the case. As such, while it seems more likely than not that the grievant is guilty, it is not clear that he is.

The union charges that the state waited four weeks to report to the highway patrol that the grievant was choked or assaulted by Hamlett. It states that Whipple first found out about the assault while interviewing the grievant. The union indicates that even then he neglected to investigate the incident. It stresses that the delay in reporting the assault was very important to Hamlett because he was released during the delay.

The union relies on the expert testimony of Dr. Ware. It points out that he stated that when he first met the grievant on August 2, 1996, she was suffering flashbacks due to being attacked by a youth at work. The union notes that Dr. Ware suggested that the grievant may have delayed reporting the attempted rape and rape because she did not recall the entire event at the time the report was given. It observes that he rejected the state's assertion that hypothyroidism caused the grievant's post-traumatic stress or major depression.

The union concludes that the state failed to establish that there was just cause to discipline the grievant. It asks the Arbitrator to place the grievant back to work with no loss in seniority, full back pay including overtime she would have earned, and compensation for "any medical and dental bills incurred as a result of any physical and emotional damage that she suffered as a result of the assaults at CYC." (Union Written Closing Statement, page 13).

ANALYSIS

The grievant was charged with violating rule #29 and rule #43 of DYS Directive B-19. Rule #29 bars "contact with ... a youth except as part of the employee's job responsibility for official work purposes." Rule #43 prohibits an employee from "engaging

in sexual contact/activity [with a] youth entrusted to the custody of DYS." The penalty for a first offense under rule #29 is a suspension while the first violation of rule #43 calls for removal.

More specifically, the grievant's removal notice indicates that she was being removed because "on several occasions you have had sexual contact with two youths." The two youths are Jody Hamlett and Jeff Radachy. Both were members of the cadre program and worked in the kitchen with the grievant. Radachy was released in November 1995. Hamlett was released on July 7, 1996.

The status of the allegations relating to Radachy are not entirely clear. The state's step three grievance answer indicates that the grievant was charged with "sexual contact with two (2) youths" but the discussion refers to "the youth" and the findings states that the "Grievant did in fact have sexual contact with the youth." Martin's report indicated that she was investigating an allegation that the grievant was having "sexual contact with youth Jody Hamlett." Whipple reported that he was faced with an allegation that the grievant was "sexually involved with one of the inmates ... Jody Hamlett." While the arbitration hearing and the written closing statements included the charges that the grievant had sexual contact with two inmates, the focus of the proceeding was on the allegations relating to Hamlett.

In any event the state did not meet its burden of establishing that the grievant had sexual contact with Radachy. The state submitted the statements that Radachy gave to Martin and Whipple where he claimed that he kissed the grievant six or seven times during the two or three months prior to his release in November 1995. Simply submitting these statements and the testimony of Martin and Whipple who took the statements, falls short of sustaining the serious charges against the grievant.

The remaining charge against the grievant is that on two occasions she engaged in sexual activity with Hamlett. The state contends that in early May 1996 the grievant and Hamlett attempted to have sexual intercourse and that they did so in late May. The union

acknowledges that these incidents occurred but maintains that the grievant was forced to participate by Hamlett.

The transcript of Martin's interview of the grievant on July 17, 1996 summarizes the grievant's position regarding the two incidents. The transcript states:

RM OK. Tell me about the first contact you had, how it happened, where you were at the time, that kind of thing.

DR Well, Jody had been threatening me and pushing me and shoving me and stuff and he told me that ah, that I didn't know what he was dealing with him. Any way, the first one was a bathroom out front. I went in ...

RM Out front of ...

DR The cafeteria.

RM OK.

DR I put away mops and stuff like that and I went into the bathroom and he came right in right after me.

RM OK. What happened then?

DR Well. He scared me and then he locked the door and he says you're going to do what you're told. I was scared so he pulled my pants down then he tried to but he couldn't do anything.

RM OK. Did he make any threats to you?

DR Yes, he did.

RM What did he say?

DR He told me that if I didn't do what he wanted, that he could have my job, that he was a main cadre and that this place didn't want the cadre program to fail and if I didn't cooperate, he would have his cats, the other cadre to write up allegations about me and that ah anything he told them to write up, that they would.

RM OK.

DR And said "who do you think they'd believe, all those cadres against one food service worker".

RM Are you telling me that he raped you?

DR He scared me into do ... doing it, yes.

RM But you did it willingly at that point.

DR I was scared, and I didn't know what else to do.

RM So how long after the first time did the second time happen?

DR I can't remember, I was trying to put it out of mind.

RM Two weeks, three weeks.

DR It was three weeks be ... it was back approximately about three weeks before he choked me.

RM OK. And what happened? Where was it at?

DR I went in the back bathroom in Gibson.

RM OK.

DR An he said that I was gonna do what I was supposed to.

RM OK.

DR That I was gonna suck it or bear the consequences.

RM OK.

DR and ah, he ah, he pushed me back into the ah, he pushed me back in the ah bathroom. He pushed me against the sink and my head hit the window.

RM OK.

DR Mirror. And ah he pulled my pants down my knees and I was shaking, I was telling him no, ah, Jody why are you doing this and stuff, what have I done to you. He says "I can do anything I want. I can get by with

anything". He says "I'm the main cat around here". He says "I run this place".

RM Did he threaten your life in any way?

DR Yeah.

RM What did he say?

DR He said that I just got a few months, ah, and he says when I get out there, he says, it wouldn't take me long to find ... and he says I could find your address and this and that. He says I can take care of you one way or the other.

In many instances the testimony of a grievant who denies wrongdoing is considered suspect. The rationale is that an employee has an incentive to report events in a manner to avoid discipline. At the same time a co-worker or supervisor with no interests at stake is considered to be more credible.

In the instant case the grievant has a strong incentive to deny the charges against her. The conduct with which she is charged is a violation of CYC rules and very clearly a basis for removal. Furthermore, if the grievant engaged in consensual sexual relations with Hamlett, she would have committed a third degree felony and would face the threat of incarceration.

The testimony of Hamlett, however, is even more suspect. First, his character does not support his credibility. As a 17-year-old he was convicted of aggravated murder and at the time of the incidents in question he had spent approximately three years in the custody of the state. The state recognizes the problems with the testimony of such individuals and does not normally rely upon their testimony in arbitration.

Second, Hamlett had a very strong motive to deny the grievant's version of the events. At the time he gave his statement, he had just been released from CYC. If he had acknowledged forcing the grievant to engage in sex with him, he would have been arrested and charged with a crime. On this basis Hamlett's testimony has very little value.

The Arbitrator must reject the state's attempt to bolster Hamlett's testimony through the testimony of several other cadre. First, their testimony did not relate to the question of whether the sexual activity between Hamlett and the grievant was consensual but focused on allegations about the grievant's behavior in general. Second, all of the cadre were friends with Hamlett who was acknowledged to be the leader of the group. They surely realized that if he had coerced the grievant into a sexual relationship, he would be in very serious trouble.

The grievant's testimony that she was forced by Hamlett to engage in sex was very strongly supported by the testimony of Dr. Ware. He testified that the grievant suffered from post-traumatic stress syndrome as a result of being attacked at CYC. When pressed on cross-examination by the state, he stated that he was "absolutely certain" that the grievant had been raped.

The state challenged the testimony of Dr. Ware. It suggested that he lacked the experience to diagnose the grievant's symptoms and claimed that her symptoms may have been due to hypothyroidism. The state also complained that Dr. Ware did not give the grievant any psychological tests and could not state conclusively that he was aware of the grievant's general medical condition at the time of his diagnosis.

The state's attempt to undermine Dr. Ware's testimony was unsuccessful. While he did not get his MD until 1991 and did not complete his residency in psychiatry until 1994, he received his MD from the Medical College of Ohio in Toledo and did his residency in psychiatry at Harding Hospital. Furthermore, the state's attempt to challenge his expert testimony through questions based on a standard psychiatry reference book was doomed to fail. It is widely recognized that the testimony of a medical expert generally can be rebutted only by the testimony of another medical expert.

The Arbitrator is aware that two experienced investigators -- Martin and Whipple -- rejected the grievant's claim that she was forced to engage in sex and accepted Hamlett's assertion that the sexual activity was consensual. It appears that

there are several reasons why they reached a different conclusion than the Arbitrator. First, Martin and Whipple approached the case from a different perspective than the Arbitrator. They were called to investigate an allegation that the grievant was having sexual contact with Hamlett. The Arbitrator was charged with weighing competing versions of the incidents. Second, Martin and Whipple interviewed Sherrill, Radachy, and several cadre. They did not interview Fletcher, Hamlet, or Harmon who supported the union's position and who testified at the arbitration hearing. Third, Martin and Whipple did not have the benefit of the testimony of Dr. Ware. In fact, there is no indication in either of their reports that they were aware of the grievant's hospitalization.

The state's claim that the grievant had a poor reputation and behaved improperly does not establish that the sexual encounter between the grievant and Hamlett was consensual. First, the testimony of the state's witnesses was suspect. As indicated above, the cadre were friendly with Hamlett and would be expected to support his claims regarding the grievant's behavior. Sherrill appeared to have a close relationship with Hamlett who she referred to as her "grandson." Second, the state's charge that the grievant behaved inappropriately with cadre and male employees was rebutted by the testimony of Fletcher, Hamlet, and Tinney. Third, despite the allegations about the grievant's behavior, she received no counseling or discipline until June 12, 1996 when Carpenter observed Frank Pignatone, a food service employee, and the grievant hugging and "talked very direct to them." The grievant, however, stated it was an innocent gesture. Finally, the reputation and prior behavior of the grievant does not establish that the sexual contact between the grievant and Hamlett on the two dates in question was consensual. Even if the grievant was guilty of suggestive or improper behavior, it does not justify being forced to submit to Hamlett's sexual advances.

The Arbitrator must reject the state's contention that the failure of the grievant to report the alleged assaults by Hamlett indicates that the sexual activity was consensual. The grievant testified that she did not report the incidents because she felt embarrassed

and ashamed and because she was convinced that management would not believe her but would accept the word of Hamlett and the other cadre. She further stated that she was afraid that Hamlett might harm her or her son.


Based on the above analysis the grievance must be granted. The Arbitrator cannot accept the testimony of Hamlett, a convicted murderer, who would have been charged with a serious crime had he not claimed that the sexual activity with the grievant was consensual. Furthermore, he cannot reject the expert medical testimony of the grievant's psychiatrist that she had been raped where there is no contrary expert testimony.

The remaining issue is the proper remedy. The union asked that the grievant be reinstated with full back pay (including overtime) and that "she be compensated for any medical and dental bills that she has incurred as a result of any physical and emotional damage that she suffered as a result of the assaults at CYC." (Union Written Closing Statement, page 13). The state argued that since the grievant submitted a disability application indicating that she would be unable to return to work for at least 12 months from the initiation of psychiatric treatment in August 1996, she is ineligible for back pay for an equivalent period of time. The Arbitrator would note that if the state is correct that the grievant was unable to return to work until August 1997 or later, she would have been eligible for additional disability payments.

The fact is that the Arbitrator does not have sufficient information to determine the amount of back pay or the reimbursement for dental and medical expenses that the grievant is entitled to receive. He, therefore, will direct the state to return the grievant to her position at CYC but will leave the issue of back pay and reimbursement for dental and medical expenses to the parties. The Arbitrator will retain jurisdiction for 60 days to resolve any issues regarding the terms of the reinstatement that cannot be settled by the parties.

AWARD

The grievant is to be reinstated to her position at Circleville Youth Center. The parties are to determine the amount of back pay and the reimbursement for dental and medical expenses that the grievant is entitled to receive. The Arbitrator will retain jurisdiction for 60 days from the date of this award to resolve any issues regarding the terms of the reinstatement that cannot be settled by the parties.


Nels E. Nelson
Arbitrator

February 6, 1998
Russell Township
Geauga County, Ohio