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**State of Ohio and State Council
of Professional Educators
Voluntary Arbitration Proceeding**

In the Matter of the Arbitration Between:

The State of Ohio, Ohio Department of Rehabilitation and Correction
(Chillicothe Correctional Institute)

-and-

State Council of Professional Educators

Grievant: James Matthews
Grievance No.: 27-03-(1-13-97) 684-06-10

**Arbitrator's Opinion and Award
Arbitrator: David M. Pincus
Date: March 28, 1998**

Appearances

For the Employer

Robert E. Race
Fred T. McAninch
John P. Branham
Dorcas R. Mendenhall
John S. Jagers
Barbara Denton
Pat Mogan
David Burrus

Vocational Director
Retired Warden
Institution Investigator
Executive Secretary
Investigator
LRO
Second Chair
Advocate

For the Association

James Matthews
Henry L. Stevens
Brent Carney
Sandra L. Montgomery
Sheri Johnson
Elbert N. Binegar
Ron Snyder

Grievant
Labor Relations Consultant
Vice President
Business Administrator III
Witness
Correction Officer
Advocate

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INTRODUCTION

This is a proceeding under Article 6 entitled Arbitration of the Agreement between the State of Ohio, Ohio Department of Rehabilitation and Correction, Chillicothe Correctional Institution (CCI), hereinafter referred to as the Employer; and the State Council of Professional Educators, Ohio Education Association (OEA) and the National Education Association (NEA), hereinafter referred to as the Association or Union, for the period July 1, 1994 to June 30, 1997. (Joint Exhibit 1).

The arbitration hearing was held on December 2, 1997 at the Corrections Reception Center (CRC), in Orient, Ohio. The parties had selected David M. Pincus as the Arbitrator.

At the hearing, the parties were given the opportunity to present their respective positions on the grievance, to offer evidence, to present witnesses and to cross-examine witnesses. At the conclusion of the hearing, the parties were asked by the Arbitrator if they planned to submit post hearing briefs. Both parties submitted briefs in accordance with the guidelines established at the hearing.

STIPULATED ISSUE

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

STIPULATED FACTS

1. The Grievant began employment with DR & C March 24, 1986, as a Vocational upholstery teacher.
2. The Grievant acknowledged receipt of the Standards of Employee Conduct.

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3. The Grievant had no prior discipline on record.
4. The Grievant's Notice of Disciplinary Action was amended to remove Standard of Employee Conduct Rule #9.

PERTINENT CONTRACT PROVISIONS

ARTICLE 13 - PROGRESSIVE DISCIPLINE

13.01 Standard

Employees shall only be disciplined for just cause.

(Joint Exhibit 1, Pg. 46)

13.04 Progressive Discipline

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

1. oral reprimand (with appropriate notation in the employee's official personnel file);
2. written reprimand;
3. a fine in an amount not to exceed two (2) days pay for discipline related to attendance only; to be implemented only after approval from OCB;
4. suspension without pay;
5. demotion or discharge.

Disciplinary action shall be commensurate with the offense. The deduction of fines from an employee's wages shall not require the employee's authorization for the withholding of fines from the employee's wages.

(Joint Exhibit 1, Pg. 48)

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CASE HISTORY

James Matthews, the Grievant, was employed as a Vocational Upholstery Teacher at the Chillicothe Correctional Institution (CCI). His tenure at the facility began on March 24, 1986. In this capacity, he provided instruction to inmates in the area of vehicle and furniture upholstery. Between 1990 and 1994, Inmate Daniel K. Ferry was incarcerated at the facility, and was assigned to the upholstery school. Inmate Ferry completed the course and served his apprenticeship which required approximately 6,000 hours of instruction. The Grievant served as his instructor during the previously mentioned period.

Inmate Ferry was paroled in July of 1995. Upon his release, he moved in with his fiancée, Sharon Brim, in the Lucasville area. Brim's allegations of misconduct caused the Employer to investigate a potential unauthorized relationship between Ferry and the Grievant.

It was determined the Grievant had engaged in an unauthorized relationship, which lasted a considerable period of time, involving a series of transgressions. Some of these transgressions dealt with helping Ferry establish an upholstery business soon after his release, lending all-ready owned and/or refurbished salvaged institution equipment, and engaging in a business relationship by paying the Grievant for services rendered.

On December 30, 1996, the Grievant was removed from the position of Vocational Teacher effective January 3, 1997. He was removed for the following infractions:

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It is known that you had an unauthorized business relationship with an ex-inmate from approximately 7/95 to 5/96. You also removed property from CCI which was later found in your residence and the business you were operating with the ex-inmate. You also leased/rented a portion of a building you purchased to the same ex-inmate with whom you were operating a business.

Your actions constitute a violation of Rules 1, 16, 46a, 46b, of the Employee Standards of Conduct. Accordingly, you are being removed.

(Joint Exhibit 3)

On January 7, 1997, the Grievant protested his removal. The grievance noted as an explanation "Removal without just cause" **(Joint Exhibit 3)**.

Neither party raised substantive nor procedural arbitrability concerns. As such, the grievance is properly before the Arbitrator.

THE MERITS OF THE CASE

The Employer's Position

The Employer opined that it had just cause to remove the Grievant. The focus for the removal decision was based on violations of the Employee Standards of Conduct Rules 16, 46a, and 46b.

The Rule 16 violation is based on the Grievant's removal of sewing machines from the facility. Sandy Montgomery, a Business Administrative III, acknowledged the Grievant had asked permission to remove "junk" sewing machines from the institution. This request was based on certain facts provided by the Grievant regarding the condition of these machines. More specifically, Montgomery was told that the sewing machines in question had no resale value; and had been robbed of parts to keep other

machines operating. Permission to remove these machines was based on these declarations.

Although removal of the machines was indeed granted, the Employer opined the Grievant used his position to misrepresent the condition of the equipment and declare it worthless. Montgomery and the facility relied on the Grievant's honesty and integrity in rendering an accurate evaluation regarding the worthiness of the equipment. He was the sole professional in the facility that could provide an honest appraisal.

Montgomery acknowledged that if the Grievant had provided full disclosure, she would not have authorized any release of equipment knowing that he was going to give it to an ex-inmate. The deception was viewed as especially egregious since Ferry eventually leased this equipment and paid for its use.

The Employer opined the Grievant was less than honest regarding his business relationship with Farrell. Fred McAninch, the Warden at the time of the dispute, acknowledged requesting an exception to Rule 46b based on assertions made by the Grievant. These assertions were contained in a memo authored by the Grievant on March 6, 1996. The memo contained the following information:

* * *

On February 13, 1996, I purchased a building for use by myself after I retire. It has two stories and they were rented when I bought the building; I did not know who the lessee of the bottom floor was when I bought the facility. The top floor was rented to an auction business.

One day I visited the site to introduce myself to the people and I discovered that the lessee on the bottom floor is an ex-inmate who is

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apparently still on parole. His business was established in December 1995 and is well-established through local advertising.

After purchasing the building and discovering the one business was operated by an ex-inmate, I felt that I should talk to you as I am aware of the Department policy about having contact with an inmate that is still on paper. I called your office on the 19th and was informed that you were on vacation until the 4th of March. On March 4th is when you and I had this conversation. The only contact that I will be having with Mr. Ferry will be in a business-like matter only.

Based on McAninch's belief in the Grievant's assertion, and expressed concerns regarding his dilemma, Eric Dahlberg, the South Regional Director approved the exception with one condition. The Grievant's relationship could not "extend beyond (the) normal course of business between a tenant and landlord."

The Grievant's admissions regarding his purchase of the building only served as a ruse to conceal the true depth of his business relationship with Ferry. None of which was condoned or implicitly granted by the exception approved by McAninch and Dahlberg.

His unauthorized relationship had several illegal components. Shortly after Ferry's release, he contacted the Grievant on several occasions for advice regarding certain upholstery projects. Advice was subsequently followed with hands on delivery of paid for services. The Grievant also provided sewing equipment he personally owned, and other revamped sewing equipment previously salvaged from the institution. The equipment was leased by the Grievant as evidenced by xeroxed checks introduced at the hearing.

Granted, the Grievant did report that some relationship existed, but it went

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well-beyond the authorized relationship declared in the Standard of Conduct Rule 46b and the exception granted by Dahlberg. A business relationship did, in fact, exist. Prior to the eventual purchase of the property in Portsmouth, Ohio, the Grievant told Ferry about a building he could rent for expansion purposes. This was the very same building the Grievant eventually purchased. He also sold Ferry's girlfriend a vehicle for a substantial price, continued to lease his equipment and got paid for services rendered.

The Grievant was clearly aware that what he was engaged in was an unauthorized relationship involving a business relationship with an ex-inmate. He admitted at the hearing that the relationship made him somewhat anxious. He knew about the prohibition since he came forth and admitted to Warden McAninch about his relationship with Ferry. During cross-examination of the Grievant, he acknowledged attending preservice training at the Corrections Training Academy, where he received instruction about inappropriate relationships with inmates/parolees. He admitted it was "something you shouldn't do."

Robert Race, Director of Vocation Education for the Department, rebutted the Grievant's assertions regarding the appropriate nature of his conduct. Race noted that unless authorized, vocational teachers are not expected to engage with follow-up visits with employees once they have completed their respective programs. In fact, any contact with inmates and/or parolees would serve as a violation of the Standards of Employee Conduct, unless previously authorized.

The Union's animus hypothesis seemed unpersuasive. Ferry's motivation for

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cooperating in the investigation did not impact the removal decision. Nothing in the record support revenge as the motivating factor for Ferry's cooperation. The Union failed to link the revocation of Ferry's parole with any perceived notion dealing with the Grievant's involvement in this decision.

The Union's Position

The Union opined that the Employer was removed from employment without just cause. Several procedural and due process issues were raised to challenge the administered penalty. Also, the Union argued that the Employer failed to prove certain charges because it failed to produce credible and sufficient evidence to support the specified allegations.

The Employer violated Section 13.01 and 13.04 when it removed the Grievant. These two provisions deal with the principles of just cause and progressive discipline.

Section 13.04 identifies various levels of progression, and requires the Employer to follow the principles of progressive discipline. The Standards of Employee Conduct reflect this principle since all the rule violations cited by the Employer in support of removal provide discipline options short of removal.

Here, removal is not justified nor is it a reasonable option. After the Grievant's meeting with the Warden, he ceased all contact with Ferry other than renting him space and equipment. The Grievant's actions simply reflected a landlord tenant relationship. Three months after the meeting, moreover, he completely severed his relationship with Ferry by evicting him from the premises.

Unlike other similar cases arbitrated by the State, there are no aggravating

circumstances present in this case. Also, the Employer offered no evidence that returning the Grievant to work would threaten the security and mission of the institution. The record fails to support removal based on a first offense by an award winning teacher with no prior discipline.

Problems involving the investigation caused certain due process defects. The investigators knew Ferry was angry because of the eviction and the Grievant's perceived role in his probation violation. Yet, the investigators failed to verify a number of Ferry's and the Grievant's accusations. Ferry alleged he had taken all of the Grievant's auto dealership accounts. Ferry, unlike the Grievant, never mentioned that he was evicted because he broke in Clayton Allen's premises and stole some money. Even though the Grievant told the investigators about his conversation with the Warden and the number of memos he authored, they never spoke with the Warden.

Several other facets of the Employee's case in chief raise notice and specificity defects. The Grievant was not provided any notice that certain misrepresentations regarding the "salvaged" equipment was the basis for the disciplinary action. This misrepresentation theory was not mentioned in either the Notice of Disciplinary Action or the Step 3 response. Later, it was referenced for the first time at the Arbitration hearing, and therefore, cannot serve as a valid basis in support of any disciplinary action.

In a similar fashion, the pickup truck transaction cannot serve as the basis for any disciplinary action. This matter was not specified in the Notice of Disciplinary Action. Nothing in the record indicates any connection between the sale of the truck to the Grievant's girlfriend and the landlord-tenant relationship.

The produced evidence failed to support a Rule 16 violation. The Grievant never misrepresented the machines as worthless. Rather, he stated the machines were robbed of parts and were not in working condition. Montgomery corroborated the Grievant's version, she assumed the machines would be of some value to the Grievant. She admitted that she had given similar permission to other employees. Only after the presently disputed matter, did the Department change its policy by instructing her not to permit any removal of the Department's property from the facility.

The Union asserted that the removal was unreasonable and not justified by the evidence. The Grievant acknowledged he was aware of some restrictions involving inmate contact. And yet, he was a teacher and not a correctional officer. He felt some obligation to a former student who was attempting to use vocational skills in a legitimate way. Clearly, the Grievant's conduct must be viewed in light of these conflicting obligations.

The Grievant brought the matter, voluntarily, to the Employer's attention. He admitted to the Warden that he had contact with Ferry prior to purchasing the building; knew Ferry was a tenant when he purchased the building; and helped Ferry with projects.

In the Union's opinion, the Employer granted its permission for the relationship, and therefore, waived any right to discipline the Grievant. This conclusion may be inferred from the meeting held between the Grievant and the Warden. Dorcas Mendenhall and the Grievant testified the Grievant authored several versions of the March 8, 1996, memo requesting a certain exception to Rule 46b. All of the revisions were at the Warden's request. The first version contained an admission that Ferry was a tenant prior to the Grievant's purchase of the building. This memo, as well as the second, were requested by the Warden. The third, and accepted draft, stated: "I did not know who the lessee of the bottom floor was when I bought the building."

The Grievant testified he had certain misgivings about the accuracy of the accepted version. That is why he asked Mendenhall for the first two drafts. These circumstances clearly evidence that the Grievant never intended to mislead the Warden.

A further related inference can be drawn when analyzing the Warden's memo to Dahlberg. In the memo the Warden states: ". . .this was not a good situation, but since he had no previous incidents and that his story was verified, I would try to do what I could for him. He is an excellent employee and vocational instructor. I am satisfied he is telling the truth and there is no additional relationship." The references to "it was not a good situation", and the lack of prior discipline indicate the Warden was aware of prior contact prior to the purchase of the building.

The Union asserted that there was no partnership relationship. Nothing in the record stated the existence of a legally documented partnership or corporation.

Reliance on a newspaper add and business card which referenced the Grievant fail to support this theory. The Grievant maintained he never authorized these items, and told Ferry to stop once he became aware of their existence.

THE ARBITRATOR'S OPINION AND AWARD

From the evidence and testimony introduced at the hearing, a full and complete review of the record including pertinent contract provisions, it is this Arbitrator's opinion that the Employer had just cause to discipline the Grievant. The decision to remove the Grievant, however, is not supported by the record; a lesser penalty is in order.

The Rule 16 violation is not supported by the record. The record indicates that the Grievant never provided Montgomery with any misrepresentations regarding the sewing machines. At the time the machines were removed, they had no resale value because they had been robbed of parts to refurbish other sewing machines. None of the machines were in working order when they were removed from the facility. Montgomery, however, realized that these machines had some value to the Grievant, otherwise he had no reason to ask for their removal. As such, there was no formal misrepresentation.

The application of this particular rule in support of the removal decision appears to be misplaced for a few other reasons. Under the existing policy, he was granted permission to remove the sewing machine, with the inferred realization that he would use it for some form of personal gain. The Notice of Disciplinary Action fails to identify any misrepresentation charge involving the removal of equipment from the

facility. It charges him with the removal of property, but the removal was permitted and authorized. This conclusion solely deals with the sewing machine issue. The analysis dealing with the relationship matter follows.

Granted, the Grievant is not a correctional officer. He, however, works in a facility, which does not have separate work rules for vocational teachers as opposed to members in other bargaining units. These work rules are legitimate, reasonable and need to be consistently applied throughout the facility. Whether one works in a classroom, workshop, or cell block, the dangers and consequences associated with unauthorized inmate relationships need to be acknowledged.

Here, the Grievant clearly violated Rules 46a and 46b. The Grievant acknowledged he exchanged phone calls with Ferry after his release involving business related matters. These often included questions regarding projects Ferry had problems with. None of these conversations were brought to the Employer's attention, and obviously they were never expressly authorized. If the Grievant was so concerned about his obligations to a former pupil; he should have felt an equal obligation to inform the Employer and ask for authorization. Dealing with former inmates, in any fashion, can result in tenuous outcomes as evidenced by the Grievant's need to eventually evict Ferry.

The record clearly exposes repeated and excessive violations of Rule 46b. Whether the Warden knew, or was told, that the Grievant knew that Ferry was housed in the building that he eventually purchased, is totally irrelevant. I am convinced that the Grievant engaged in an unauthorized business relationship prior to

and after his meeting with the Warden. In no way, moreover, did the exception granted by Dahlberg serve as a waiver of past or future misconduct, as long as the conduct exceeded the tenant-landlord relationship. His conduct clearly violated the exception; conduct which was not brought to the Warden's attention.

Interestingly, the Union and the Grievant placed a great deal of impact on the multiple memos authored and submitted by the Grievant. He, in fact, wished to retain several versions because he felt the final memo did not totally reflect his prior knowledge of Ferry's residence. But, none of the memos, nor the Grievant's testimony, support full disclosure during his discussion with the Warden. He never disclosed a number of circumstances which clearly exceeded the exception granted by Dahlberg and the ongoing unauthorized personal or business relationship with Ferry.

The Grievant admitted he supplied the Grievant with salvaged-revamped sewing equipment and his own personal machines which he eventually leased. This initially took place while Ferry worked out of his basement, and continued when he moved to the building in Portsmouth, Ohio. The building was brought to Ferry's attention by the Grievant. This building was eventually purchased by the Grievant.

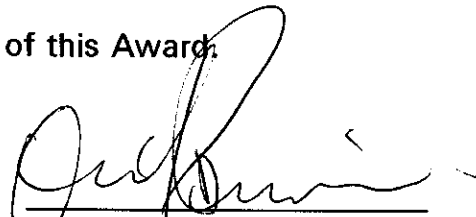
Clearly, providing equipment and leasing equipment involve unambiguous unauthorized elements of a business relationship. Also, the Grievant admitted he provided services which he was paid to perform. A landlord-tenant relationship, involving the rental of space, does not envision these other extra-curricular activities.

Legal compacts, moreover, are not required to establish an illegal business relationship.

THE ARBITRATOR'S AWARD

The grievance is denied in part and sustained in part. The Grievant shall be reinstated to his former position without back pay, minus any interim earnings, as of the date of this opinion. His benefit banks and seniority shall be reconstituted. The removal shall be rescinded to reflect a time served suspension. The Arbitrator shall retain jurisdiction for thirty (30) days from the date of the Award to resolve any controversies that may arise over implementation of this Award.

Dated: March 28, 1998
Moreland Hills, Ohio


Dr. David M. Pincus
Arbitrator