

FACTUAL BACKGROUND

This is a case concerning the termination of the Grievant, Carl Green, for violation of two rules included in the Department's Standards of Employee Conduct. To analyze the termination case, it must first be placed in the context of the Grievant's demotion and the relationship of his immediate supervisor, Deputy Warden Eleby, to that demotion.

A) Grievant's Demotion

The Department first hired the Grievant as a Correction Program Specialist on August 11, 1997. The Grievant received an evaluation on December 7, 1997 in which the Rater commented, "Mr. Green is doing an excellent job." Green was promoted to the position of Recovery Services Supervisor effective January 4, 1998, and supervised a department of four persons.

During the next six months, he received negative evaluations on April 24, 1998, and January 2, 1999. In addition, he received a one-day fine for violation of the rule prohibiting disobedience of a direct order and the rule prohibiting inattention to duty. A central person in the two negative evaluations and in his discipline was his immediate supervisor, Will Eleby.

Eleby prepared the performance review dated March 24, 1998 for the rating period of December 21, 1997 to March 20, 1998. Green received a total of 67 points out of 100 points in the performance review summary. Eleby concluded the written review with the following comment: "Mr. Green needs to make rapid improvement as

the Recovery Services Supervisor." There then followed discipline of Green by Eleby constituting a one-day fine for sleeping on duty and failing to comply with Eleby's direct order to work on a fixed time schedule.

The Grievant's final evaluation as a supervisor was completed by Eleby on June 2, 1998. Again, Green achieved a low score in the numerical counting for eight aspects of his performance as a supervisor. Eleby had this final comment as Green's Rater, "Mr. Green has failed in his attempt to be retained as the Recovery Services Supervisor. Recommend demotion." On the same day, the warden of this facility, Marion Correctional Institution, notified Green that he had been demoted from Social Work Supervisor and returned to his original position as Correction Program Specialist. The demotion was effective June 7, 1998.

Green filed two unsuccessful appeals to the Personnel Officer and warden of the Marion Correctional Institution concerning his demotion. The parties stipulated that both appeals had been denied and that there is no further appeal avenue available to the Grievant concerning the demotion. Accordingly, the matter of the Grievant's demotion is not an issue for review in this arbitration.

The circumstances surrounding the Grievant's demotion are, however, necessary background to understand the events that led to Green's being placed on leave pending an investigation on June 12, 1998--just five days after the effective date of his demotion. These events ultimately led to his termination on August 27, 1998.

B) Grievant's Termination

The factual basis for the Department's allegations against the Grievant occurred shortly after the Grievant's demotion on June 7, 1998. The Department asserted the following facts: 1) Green sought out inmate Bruce Brown on June 10 and 11, 1998; 2) Green knew that Brown had been an attorney prior to his imprisonment in 1996; 3) Green asked and received from Brown strategies and names of persons to support Green's plan to file an E.E.O. suit against the Department for his demotion.

The Department alleged that Green lied during the course of an investigation when he denied the above three facts. This constitutes a violation of Rule 1 of the Standards of Employee Conduct that proscribe dishonesty.

The Department also charged that Green had exchanged personal information about supervisor, Will Eleby, with inmate Bruce Brown. Factually, the Department asserted that Green had given the inmate Eleby's social security number and date of birth to cause an investigation into Eleby's criminal history, if any. The Department further asserted that these facts constitute violation of Rule 46a of the Standards that prohibits the exchange of personal information to an inmate.

The Department claimed that it learned of the exchange of this information by Green to the inmate on June 12, 1998. It was on that date that the Warden of the Marion Correctional Institution placed Green on leave pending an investigation, and charged the

Department Investigator, Tom Divon, to commence an investigation. During the investigation, Divon conducted two investigatory interviews of Carl Green; one on June 12, and the second on June 26, 1998. Divon recorded the questions and Green's answers, and this record constitutes the Department's allegation that Green lied three times during the investigation.

STIPULATED ISSUE:

Was Grievant Carl Green's termination for the violation of the Standards of Employee Conduct Rules 46A (Unauthorized Relationships (a) The exchange of personal . . . information with any individual under the supervision of the Department . . . without express authorization of the Department) and Rule 1 (Dishonesty) for just cause? If not, what shall the remedy be?

RELEVANT RULES IN STANDARDS OF EMPLOYEE CONDUCT:

STANDARDS OF EMPLOYEE CONDUCT

RULE VIOLATIONS AND PENALTIES

Steps in Progressive Discipline:

- | | |
|---------|--|
| - OR | - Oral Reprimand |
| - WR | - Written Reprimand |
| - FINES | - IN AN AMOUNT NOT TO EXCEED FIVE (5) DAYS PAY FOR ANY FORM OF DISCIPLINE UP TO A FIVE (5) DAY SUSPENSION; TO BE IMPLEMENTED ONLY AFTER APPROVAL FROM CENTRAL OFFICE LABOR RELATIONS AND OCB |
| - 1-3 | - 1- to 3-day suspension |
| - 3-5 | - 3- to 5-day suspension |
| - 5-10 | - 5- to 10-day suspension |
| - R | - Removal |

* DENOTES RULE VIOLATION FOR ON OR OFF DUTY CONDUCT. OFF DUTY CONDUCT REQUIRES JOB NEXUS.

	Offenses				
	1st	2nd	3rd	4th	5th
1. Any violation of ORC 124.34- . . . and for . . . dishonesty, . . .	OR/R	WR-3/R	5-10/R	R	
*46. Unauthorized relationships					
a. The exchange of personal . . . information with any individual under the supervision of the Department or friends or family of same without express authoriza- tion of the Department.	1-5/R	5-10/R	R		

POSITIONS OF THE PARTIES:

A) Department's Position

The Department acknowledged that Green had the right to file and E.E.O. case against the Department. Consequently, if Green sought advice of inmate Brown on the E.E.O. suit, this does not constitute a violation of Rule 46a which prohibits the exchange of personal information with an inmate. However, this would constitute a violation of Rule 1 (dishonesty) because Green stated that his conversation with Brown on June 10 and 11 concerned Brown's interest in obtaining a clerk's position; therefore, this answer was a lie.

The proof that Green lied during the course of the investigation is not based only upon testimony of inmate Brown. Green's daybook is an independent corroboration of Brown's testimony of the content of his conversation with Green on June 10-11. The conversation centered upon strategies for Green's E.E.O.

suit against the Department. In addition, Green lied when he answered questions concerning his knowledge of Brown's previous profession as an attorney. He gave completely inconsistent answers to this subject during the investigation.

Lastly, Green lied during the course of the investigation in that he repeatedly stated that Brown was trying to contact him during June 10 and 11. Testimony by other officers corroborates Brown's testimony that Green was trying to contact him (inmate Brown) on the two days in question.

Lastly, Brown did have in his possession Eleby's social security number and date of birth. He gave both to Eleby on June 12 in a meeting with other officers--a meeting that Brown sought through the intervention of his case manager. Brown testified that he received the social security number and the date of birth of Eleby from Green on June 10 or 11. Brown's testimony is to be believed because there was no other way in which Brown could have obtained this information. Finally, a polygraph test was administered by an independent polygraph consulting firm, and the examiner's opinion was that Brown was answering questions truthfully.

B) Union's Position

According to the Union the core of the case is essentially a contest between Green's word versus the word of inmate Bruce Brown who was sentenced to forty-six years of prison without parole for felonies including uttering a forgery and tampering with records.

With respect to the exchange of personal information to inmate Brown, Green was unable by written memorandum to Personnel to obtain time records of Eleby. Yet, the Department asserts that Green was able to obtain from Personnel Eleby's social security number and date of birth. The Department questioned all persons in the Personnel Department and all persons denied giving such information to Green.

With respect to the charge about dishonesty, again, it is a matter of judging the word of Green against that of inmate Brown. The central independent evidence relied upon by the State--Green's daybook--was kept in a location to which many other people had access. This independent evidence is therefore tainted, and, again, the case is reduced to the word of a corrections officer against that of a convicted felon.

OPINION:

A. Rule 1 (Dishonesty)

The record shows that Green was dishonest in three ways during the course of the investigation. First he was dishonest about his knowledge of inmate Brown's professional status prior to his imprisonment. In an investigatory interview on June 12, 1998, Green said that he knew that Brown's profession had been that of an attorney. Two weeks later in the second investigatory interview Green stated that he did not know of Brown's profession. Evidence of this dishonesty is not based upon inmate Brown's testimony, but

the inconsistency in the statements by Green to the Department investigator.

The second instance of dishonesty deals with Green's assertion that inmate Brown had been attempting to contact Green on June 10 and 11. Brown testified to the contrary and even noted that he sought to evade Green. Brown's testimony was corroborated by the testimony of two corrections officers, Rob Bayles and Alan Ritzert. Bayles testified that Brown was an inmate in Unit 5--a unit under the jurisdiction of Bayles. On June 10--the date in question--Green had not been assigned as a supervisor to Unit 5. On the other hand, Green appeared in Bayles' office. Bayles used his key to open Unit 5 for Green and Green asked Bayles for the location of Brown's cell.

Ritzert testified that on June 10 Green telephoned Ritzert at Unit 5 asking for Bayles at 4:30 p.m. and again at 5:40 p.m. Thereafter, Green appeared at Ritzert's office asking where Brown was located. The combination of Bayles' and Ritzert's testimony is independent evidence that corroborates Brown's assertion that Green had repeatedly sought to contact inmate Brown on June 10.

The third and most damaging instance of dishonesty by Green concerns the subject matter of the conversation between Brown and Green once Green was successful in contacting Brown. During the course of the investigation, Green asserted that Brown contacted him in order to seek advice on obtaining a clerk's position. Brown denies this, and other facts tend to indicate that Brown's denial

is to be believed. These facts concern Brown's status as an inmate on June 10-12, 1998. The other fact is the contents of Brown's daybook.

Brown testified that he was aware on June 10 and 11 of the possibility of a judicial release; that is, early release ordered by the judge who had chosen to sentence Brown to forty-six years in prison without parole. Brown explained the content of his conversations with Green on June 10 and 11 made him very apprehensive because he did not wish to jeopardize the judicial release. Brown had been first imprisoned in 1996 for forty-six years without parole and was now aware of a possibility of an early release decision of the sentencing judge in June of 1998.

Brown's expectation of a judicial release from prison remarkably came true on June 12, 1998--the same day that Green was placed on administrative leave pending an investigation. All of these facts concerning Brown's status as an inmate on June 10-12, 1998 make Green's assertion of their (Brown and Green) conversations on the same dates not believable. Green asserted that conversations centered on Brown's seeking a job as a clerk--a highly improbable subject of conversation as Brown was expecting a judicial release from prison.

Green's dishonesty about the subject of Green's conversations with Brown on June 10-11 is not based upon mere probabilities. Brown testified that their conversation centered on the elements of a lawsuit under Title VII and strategies for bringing the suit

including a contact with the executive director of the Ohio Civil Rights Commission--a person known to Brown. Brown also testified that they both discussed two other officers who had been disciplined.

In the written investigatory report, Green asserted that the subject of their conversations (Brown and Green) on June 10 and 11 concerned Brown's interest in a clerkship. Indeed, at the arbitration hearing, Green testified that he never sought Brown's advice regarding a lawsuit. Green testified that Brown had heard a conversation between Green and another officer named DuVroe. Brown interrupted the conversation and offered the name of the person who was the executive director of the Ohio Civil Rights Commission. Green testified that he told Brown to leave.

Green was dishonest about his conversation with Brown on June 10-11. Brown's account of subject matter of their conversation is to be believed not merely because Brown so testified. Green's daybook contains entries that constitute independent evidence corroborating Brown's testimony.

Green's daybook is not tainted by the fact that his daybook was kept in an office to which others had access. Green was shown that portion of the daybook relevant in this case and acknowledged that this exhibit was entirely in his own handwriting.

Green's daybook contained three elements that corroborate Brown's version of their discussion. Title VII is mentioned under the underlined phrase "Cause of Action." A further note states

"Disparate Tx," and Green testified that "Tx" means "treatment." This first element that appears in Green's daybook written by Green refers to the elements of a Title VII claim--consistent with Brown's testimony.

The second element concerns the strategy to be used in pursuing the claim. Brown's daybook includes the name of the executive director of the Ohio Civil Rights Commission, telephone number, and the church over which this person presides as pastor. It ends with this phrase: "Calling at the suggestion of B. B." While denied by Green, it is noted that the inmate's name was Bruce Brown. Therefore, the second element contained in Green's daybook in Green's handwriting concerns the strategy for filing a Title VII cause of action. The notes by Green are entirely consistent with Brown's testimony.

The third and final element present in Green's daybook concerns the names of two other officers who had been disciplined. Brown testified that they had spoken about officers Morgan and Griffin and the form of discipline of both. Again, the third element appears in Green's daybook with the names of both officers.

The Department sustained its burden of showing that Green was dishonest on three occasions during the course of an investigation. The dishonesty of Green is not based upon a mere match of testimony between officer Green and inmate Brown. The dishonesty is shown by reliable, credible, independent evidence that corroborates Brown's testimony.

B) Rule 46a. Exchanging Personal Information
With an Inmate

The three instances of Green's dishonesty occurred during the course an investigation triggered by a meeting on June 12, 1998. At the request of Brown, Brown's case manager arranged a meeting with a deputy warden and Eleby. At the meeting, Brown wrote out a date and a set of numbers and gave them to Eleby. It was a stunning event for Eleby because the numbers set forth his date of birth and his social security number. Eleby was deeply concerned for his personal and financial security. Brown stated that he received the date of birth and social security numbers from Green who wanted Brown to arrange a check on Eleby's criminal history, if any.

As noted above, Green was immediately placed upon administrative leave pending an investigation. Later that same day the judicial release for Brown arrived at the Marion Correctional Center, and Brown was immediately escorted to a county jail in Cleveland pending his release from prison. While at the county jail, the Department arranged for a private polygraph consulting firm to conduct a polygraph test on the truthfulness of Brown's assertions of Green as the source of the social security number and date of birth.

The Department's case against Green based upon Rule 46a. stands on a considerably different foundation than the Department's case against Green based upon Rule 1. Dishonesty. The Department

was able to show three instances of Green's dishonesty in the course of the investigation based upon independent, credible evidence that corroborated the testimony of inmate Brown. On the other hand, none of the independent evidence used to show dishonesty by Green--Green's daybook and the testimony of fellow officers concerned the transfer of personal information about Eleby to inmate Brown. The Department's case against Green for giving inmate Brown Eleby's social security number and date of birth is based, as argued by the Union, essentially on the testimony of Brown. But there is a bit more.

The Department argues that why and how could Brown obtain this data except from Green. On the other hand, Green as a source of the data cannot be inferred simply because Brown possessed the data. The Department then turns to the results of the polygraph test administered to Brown to show that Brown was truthful when claimed that Green was the source of the data. While some arbitrators do admit polygraph tests for purposes of corroborating testimony, the trend is toward giving such evidence relatively little weight and toward criticizing the lack of reliability of such tests.^{1/}

^{1/} Flagler, Shamanism and Other Folderol--The Search for Certainty, Proceedings of the 39th Annual Meeting of the National Academy of Arbitrators, 187 (1987); see also M. Hill and A. Sinicropi, Evidence in Arbitration 227 (2nd ed. BNA 1987).

It is true that the findings concerning Green's dishonesty during the investigation should bleed into this analysis of Green's alleged transfer of personal information to inmate Brown. The findings of dishonesty are in fact included in this analysis as an element weighing the credibility of Green when Green denied during the investigation that he gave social security numbers and date of birth to inmate Brown.

There are, however, countervailing elements in the record that enhance Green's position. First, it was undisputed that Green by memorandum sought the time records of Eleby from the personnel department of the Marion Correctional Institution. Green wanted to show that Eleby acted as his supervisor during only four days of the period covered by the first evaluation by Eleby. Green was unsuccessful. These objective facts created a negative inference that he could so easily obtain from the same personnel department the social security number and date of birth of Eleby.

The second objective fact is that the department investigator questioned persons in the personnel department and all denied providing Green with the personal data on Eleby. This runs counter to Brown's testimony that he overheard a telephone conversation between Eleby and the personnel department during which a person in this department supplied personal data on Eleby.

The final element in this analysis concerns the professional life of Green as a counselor. He is a licensed chemical counselor and has a master's degree in counseling. Before his employment in August of 1997 by the Department, he had spent eight to ten years

as a marriage counselor and one and a half years in a chemical treatment center. During these years he dealt with a substantial amount of confidential information, and his undisputed testimony was that this case concerned the first challenge to his handling confidential information.

The Department had the burden of showing that the Grievant, Carl Green, had supplied the date of birth and social security number of Eleby to inmate Brown. The evidence in this record is equivocal on this factual point, and the Department did not sustain its burden of showing a violation of Rule 46 a. by Green.

C) Appropriateness of Discharge

The final and the most important question in this case is whether discharge of the Grievant is appropriate given the Department's proof of three instances of dishonesty by the Grievant in the investigation and the Department's failure to prove the Grievant's transfer of personal information to inmate Brown. It is true that Rule 1 of the Standards of Employee Conduct set forth a wide spectrum of possible punishments for the first offense. The Department can choose between an oral reprimand or a removal where an employee has been found to be dishonest. Removal, or discharge, of Carl Green was reasonable under the circumstances of this case.

First, Carl Green was only an employee for ten months prior to his being placed on administrative leave pending an investigation. His seniority is barely beyond that of a probationary employee. There is, however, a second and more important consideration. The Grievant was employed as part of a work force that deals directly

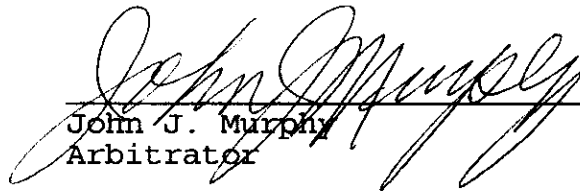
with inmates in a large correctional institution. He has been found to have lied not only once but three times concerning his personal conduct with an inmate. The Department has a high interest in honesty by its work force, especially in the direct contact by the work force with the inmates.

The Standards for Employee Conduct expressly provides "removal" as one of the possible sanctions to be applied by the Department in the case of a first offense of dishonesty by an employee. Consequently, the choice by the Department of removal in this case was not sua sponte, that is, spontaneously by the employer without the benefit of a pre-existing guideline. In addition, the record shows two written acknowledgments signed by Carl Green that he had received the standards containing Rule 1. Based on the record in this case, the sanction of discharge is appropriate for the Grievant on the finding of three instances of dishonesty by the Grievant.

AWARD:

For the reasons stated above, the grievance is denied.

Date: September 29, 1999



John J. Murphy
Arbitrator

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