

**THE STATE OF OHIO, OHIO DEPARTMENT OF REHABILITATION
AND CORRECTION AND DISTRICT 1199/SEIU
LABOR ARBITRATION PROCEEDING**

IN THE MATTER OF THE ARBITRATION BETWEEN:

**THE STATE OF OHIO, OHIO DEPARTMENT OF
REHABILITATION AND CORRECTION, ADULT
PAROLE AUTHORITY**

-AND-

DISTRICT 1199/SEIU

**GRIEVANT: KRISTINA ELMLINGER
GRIEVANCE NO.: 28-02-00014-78-02-12**

**ARBITRATOR'S OPINION AND AWARD
ARBITRATOR: DAVID M. PINCUS
DATE: MARCH 21, 2001**

APPEARANCES

For the Employer

Ray Mussio	Coordinator Audits & Investigation
Gary Madden	Parole Services Supervisor
Mike Hennessey	Parole Services Coordinator
Brian Sweeney	Parole Officer
Michael Duco	OCB, Manager Dispute Resolution, Second Chair
Tina Krueger	Legal Counsel and Advocate

For the Union

Kristine Elmlinger	Grievant
Matt Mahoney	Organizer and Advocate

INTRODUCTION

This is a proceeding under the auspices of Article 7 – Grievance Procedure, Section 7.06 – Grievance Steps of the Agreement between the State of Ohio, Department of Rehabilitation and Correction, Adult Parole Authority (hereinafter referred to as the “Employer”) and District 1199/SEIU (hereinafter referred to as the “Union” for the period August 3, 1997 to May 31, 2000 (Joint Exhibit 1).

An arbitration hearing was held on February 2, 2001, at the Department of Rehabilitation and Correction's Central Office, Columbus, Ohio. The parties had selected David M. Pincus as the Arbitrator. At the hearing, the parties were allowed to present and introduce documents, testimony and evidence. They were, moreover, allowed to examine and cross-examine witnesses. At the conclusion of the hearing, the parties were asked if they wished to provide post-hearing briefs. Both parties declined to submit briefs, while agreeing to provide verbal closing statements.

PERTINENT CONTRACT PROVISIONS

ARTICLE 8 – DISCIPLINE

8.01 Standard

Disciplinary action may be imposed upon an employee only for just cause.

8.02 Progressive Discipline

The principles of progressive discipline shall be followed. These principles usually include:

- A. Verbal Reprimand
- B. Written Reprimand
- C. A fine in an amount not to exceed five (5) days pay
- D. Suspension
- E. Removal

The application of these steps is contingent upon the type and occurrence of various disciplinary offenses.

(Joint Exhibit 1, Pgs. 22-23)

JOINT STIPULATIONS

1. Faxed copies of notarized statements by witnesses are true and accurate copies of notarized documents.
2. The parties do not claim procedural error and state they are properly before the Arbitrator today.
3. Neither party had a Step 3 Response available on the date of the hearing. Also, the Union's request for arbitration was proper, but not submitted at the arbitration hearing.

ISSUE

Was the Grievant removed for just cause? If not, what shall the remedy be?

CASE HISTORY

Kristine Elmlinger, the Grievant, has served as a Parole Officer for approximately five years with the Adult Parole Authority. At the time of her removal, the Grievant was working for Cincinnati Unit 6. This unit deals with the apprehension of parole violators at large.

The facts, for the most part, are in dispute. The version of events which follows predominantly reflects the Employer's perceptions. It should in no way be assumed that this review reflects any predisposition. This Arbitrator's analysis and findings are framed by the record in its entirety.

During June of 1999, Gary Madden, the Unit's Supervisor, allegedly heard a series of complaints concerning the Grievant's work habits. These complaints were initiated by the Grievant's co-workers, who alleged the Grievant was not working the required forty hours per week. Madden testified he was equally suspicious, but decided to see if the situation improved.

The complaints continued during the intervening period. Madden met with Evelyn J. Watson, Cincinnati Regional Administrator, on or about July 21, 1999. He reviewed the following concerns regarding the Grievant's performance: falsifying contact sheets, and giving false information as to her whereabouts during working hours. Madden asked Watson for permission to initiate surveillance on the Grievant's residence. Watson authorized surveillance, which began on July 22, 1999.

Madden started surveillance using a vacant parking lot, along with regular drive-bys of the Grievant's residence. Eventually, Madden moved his surveillance to the upstairs of a building located across from the residence in question. Madden's surveillance was supplemented by drive-bys engaged in by Mike Hennessey, a Parole Services Coordinator.

Surveillance took place for six intermittent days from July 22, 1999 to August 18, 1999. Observations were then compared against contact sheet entries, expense and mileage vouchers and interviews with alleged contacts.

This data indicated that the Grievant engaged in misconduct requiring disciplinary action. The Grievant was removed for the following rule violations of the Standards of Employee Conduct:

Rule #1. Any violation of ORC 124.34: ...and for incompetency, inefficiency, dishonesty, drunkenness, immoral conduct, insubordination, discourteous treatment of public, neglect of duty, violation of such sections of the rules of the Director of Administrative Services or the Commission, or any other failure of good behavior, or any other acts of misfeasance, malfeasance, or nonfeasance in office.

Rule #14. Theft

Rule #22. Falsifying, altering, or removing any official document.

On December 30, 1999, the Grievant formally contested the Employer's action. She filed a grievance, which questioned the just cause of the termination (Joint Exhibit 3).

The parties were unable to settle the disputed matter in subsequent stages of the grievance procedure. Neither party raised substantive nor procedural arbitrability issues. As such, the grievance is properly before the Arbitrator.

THE MERITS OF THE CASE

The Employer's Position

The Employer opined it had just cause to remove the Grievant. The Employer argued the Grievant was dishonest, falsified her time sheets, her offender contact sheets and mileage sheets. She, moreover, committed theft because she claimed she was working when she was not engaged in work-related activities.

The Grievant's working at home justification lacked credibility. The record indicates she never requested permission to work at home. If she was working at home, then she should not have claimed that she was engaged in surveillance. The Grievant could not be engaging in both efforts simultaneously. Also, the Grievant failed to produce any phone records in support of her working at home hypothesis. Also, none of the submitted contact sheets specified she was working at home. Other bargaining unit members testified they would enter working at home on their contact sheets; the Grievant failed to make similar entries.

The record strongly supports the notion of theft. Madden, on a number of occasions, conversed with the Grievant and her partner, Kevin Sweeney, during the surveillance period. Each time she or her partner identified a location and contact

person, Madden followed up by interviewing these individuals. He determined she had never contacted, nor seen these various individuals.

Madden's testimony and submitted documentation (Joint Exhibit 2), were corroborated by a series of witness statements (Joint Exhibit 4A and B). These statements clearly substantiated his version of the events regarding the Grievant's falsification efforts. None of the individuals authoring these statements had any reason to lie about the Grievant's whereabouts on the days in question.

Equally perplexing, and unpersuasive, is the Grievant's testimony regarding the use of her father's automobile. She alleged that on some of the days in question she used her father's car, and left her car at her father's house. If so, the Grievant had to be home when Madden observed her vehicle. If she was home, she could not have engaged in the surveillance or other field activities. The Grievant, moreover, should not have claimed mileage reimbursement on those occasions she did not drive in the field.

The Grievant failed to properly support the use of her father's vehicle. She admitted she used the vehicle because her vehicle was damaged in a car accident, and that her father performed general maintenance on the vehicle. Proof that her vehicle was damaged was never submitted into the record. Although her father attended the arbitration hearing, he never testified in support of his daughter's various car-related justifications.

The Union's attempt to taint Madden's investigation by claiming some form of animus is totally unjustified. The record fails to reflect any documented EEOC complaint against Madden. None of the witnesses supported the Grievant's assertions that Madden, nor anyone else, uttered any sexually explicit jokes regarding the

Grievant. Additionally, Madden never initiated the investigation based on some form of vendetta or pretext. Complaints raised by other bargaining unit members served as the triggering events for the investigation. Madden, more specifically, never held any particular animus toward the Grievant. He merely wanted to determine whether she was doing her job.

Neither Sweeney's nor the Grievant's testimony should be given any particular weight because of credibility concerns. Their testimony was laden with inconsistencies and general evasive tendencies. The Employer's witnesses, on the other hand, provided consistent and forthright testimony corroborated by related documents.

The Union's Position

The Union argued the Employer did not have just cause to terminate the Grievant. This conclusion was based on certain policy concerns, investigation and related due process concerns, and lack of any evidence that the Grievant intentionally engaged in theft in office.

The Employer was unable to establish any written policy regarding certain aspects dealing with contact sheet and mileage reimbursement form submissions. Several witnesses thought employees had to submit contact sheets every two weeks. The Grievant and another co-worker, however, had submitted them on a monthly basis without realizing any disciplinary outcome. Nothing in the record supported the view concerning a working at home policy. The Grievant was never told she had to have a supervisor's prior approval, nor was she told her contact sheets had to reflect such an alternative. Similar issues were raised dealing with the use of multiple vehicles while conducting legitimate work-related activities. Again, the Grievant was never advised

that she needed to notify her supervisor when she used some vehicle other than her own personal vehicle. Bargaining unit members were never formally advised that odometer readings, on related reimbursement forms, required specificity regarding personal versus non-personal vehicle usage.

For a number of reasons, Madden's investigation was tainted. Madden had always responded negatively to having females within his unit. As such, the Grievant became his target upon her arrival. Sweeney testified the Grievant was the victim of needless joking within the unit. Madden was aware of it, yet did nothing to discourage this childish activity. The Grievant had considered filing an EEOC complaint, but decided to wait pending a potential transfer out of the unit. She did, however, feel so strongly about her tenuous situation that she met with the Employer's EEOC officer.

The onerous relationship between the Grievant and Madden tainted the investigation and potential findings. The investigation should never have been assigned to Madden. Some more neutral investigator should have been selected for this critical purpose.

Reliance on the witness statements (Joint Exhibit 4A and B) by the Employer was also misplaced. These statements were authored one month after the Grievant's alleged transgressions. Obviously, a witness's recollections are inordinately harmed when asked to recount what specifically transpired on any particular day one month in the past.

The Grievant admitted some entries in the contested contact sheets might have been inaccurate. Once Madden asked her for these sheets, she was forced to reproduce her activities for the prior month in one day. These inaccuracies do not

support the notion that the Grievant intentionally falsified documents or engaged in activities resulting in theft in office. Partial blame should be placed on the Grievant. The system, itself, with unarticulated policies and informal guidelines was also equally at fault for any inaccuracies that might have ensued.

Progressive discipline principles should have been enacted prior to termination. If sufficient proof of misconduct is established by the record, then something other than termination appears to be in order. The proven offenses are of a variety requiring progression rather than immediate termination.

THE ARBITRATOR'S OPINION AND AWARD

From the evidence and testimony adduced at the hearing, and an impartial review of the record, including pertinent contract provisions, it is this Arbitrator's opinion that the Employer did have just cause to terminate the Grievant. The record supports violation of the following Standards of Employee Conduct Rules: Rule #1 – Dishonesty and neglect of duty; Rule #14 – Theft; and Rule #22 – Falsifying, altering, or removing any official document.

The offenses the Grievant was charged with, in my view, fall within the malum in se category of offenses. These are extremely serious offenses, which usually justify summary discharge without the necessity of prior warnings or attempts at corrective discipline. When these types of obviously unacceptable offenses are proven, the employee-employer relationship cannot be repaired. Within the context of the VAL Unit, theft, falsification and dishonesty cannot be condoned. Unit members are given a great deal of latitude regarding their daily activities and need to be trusted by their Employer and co-workers. They must engage in activities, which further the goals of the Unit.

Stealing time by engaging in falsifications, and not performing the work required of other unit members, blatantly destroy the public trust and the very mission of the Unit.

Anti-grievant animus arguments raised by the Union fail to discredit Madden's investigation. Granted, there were numerous complaints raised by co-workers regarding the Grievant's work habits; some of which might have been communicated in a joking manner. Neither Sweeney nor any other witness testified that Madden initiated or condoned any joke, sexual or otherwise, directed at the Grievant. An official EEOC complaint was never initiated by the Grievant against Madden. Without any formal or informal documentation or testimony regarding this alleged complaint, animus, on this basis, is virtually impossible to substantiate. Allegations regarding Madden's views regarding females in his unit were merely articulated without any support.

Evidence and testimony clearly established the Grievant was predominantly driving her own vehicle on the disputed dates. The Grievant attempted to counter Madden's surveillance findings by alleging she was driving her father's vehicle on those days when he observed her personal vehicle near her residence. This justification, however, does not comport with other admissions articulated at the hearing. The following testimony provided by the Grievant clearly established the dubious nature of her allegation:

Q: When you would borrow his car, how would you get his car?

A: I would get it the night before

Q: And do what?

A: Bring it home

If the Grievant was borrowing her father's car, then her personal vehicle would not have been parked near her home, but at her father's house. No other plausible conclusion can be reached.

The Grievant, moreover, attempted to rebut Madden's findings by alleging her car had been damaged in an accident. She desired to raise an inference that this condition justified the use of an alternative vehicle. Again, testimony provided at the hearing pierced the legitimacy of this proposition:

Q: What was wrong with your car?

A: A lady rear ended me

Q: So was the damage noticeable?

A: Not really, not obviously, my car was still drivable.

Q: Did you have to take it to a body shop for repairs?

A: Yes

Q: So on the dates your car was observed on the street, it wasn't at the body shop. Correct?

A: Right

Q: It wasn't with your father doing maintenance. Correct?

A: No, those weren't the only reasons I drove his car, though.

Again, she could have driven the damaged vehicle, and if observed at her residence it could not have been at the body shop.

Odometer readings specified on the Grievant's Travel Expense Reports (Joint Exhibit 2) further contradict the alternative vehicle defense. A review of these documents indicate a sequential series of odometer readings, which indicate the Grievant was driving the same vehicle during the contested period. This Arbitrator

must, therefore, conclude, based on these readings, that she was driving her own vehicle. As such, when Madden observed her vehicle at home, she was at home rather than engaging in field work or surveillance as noted on her contact sheets (Joint Exhibit 2).

Entries made by the Grievant on the contact sheets are viewed by the Arbitrator as intentional attempts to falsify data, rather than inaccuracies caused by memory lapses. The Grievant was well aware of her documentation responsibilities. She noted that one of the topics frequently discussed in staff meetings was the filling out of contact sheets. When asked during direct examination about contact sheets, she answered:

Q: In your job as a Parole Officer, how often would you do these?

A: Daily

Based on this response, the Arbitrator wonders why the Grievant had to complete one month's worth of contact sheets in one day? The record fails to provide any plausible alternative explanation.

Even if she had to re-create her activities during the contested period, only one of the contact sheets would have been approximately one month old. The remaining contact sheets were reasonably ripe, allowing for accurate disclosures if the documented activities had, indeed, taken place. The record, as described below, adequately supports the premise that many of the Grievant's documented activities never took place. Rather, they represent a clear and calculated attempt to fabricate a series of events to deprive the Employer of a fair day's work.

The previously articulated findings clearly support Madden's findings and conclusions. Madden's investigation (Joint Exhibit 4) surfaced many intentional acts of dishonesty and falsification.¹

On July 22, 1999, the Grievant was observed by Madden leaving her house at approximately 8:40 a.m. She eventually arrived at the Adult Parole Authority (APA) office at approximately 8:45 a.m. Her contact sheet (Joint Exhibit 2, Attachment 1) specified an arrival time of 8:30 a.m. and a departure of 8:45 a.m.

On July 26, 1999, the Grievant was observed at her residence from 9:00 a.m. to 10:40 a.m. Sweeney, the Grievant's partner, conversed with Madden and indicated the Grievant had notified him she was not feeling well and going to see her doctor. Her contact sheet (Joint Exhibit 2, Attachment 2) indicated she was in the field from 8:00 a.m. to 12:15 p.m. Also her expense report (Joint Exhibit 2, Attachment VII) for the day in question claimed mileage for the period 8:00 a.m. to 12:15 p.m.

On July 29, 1999, the Grievant's contact sheet (Joint Exhibit 2, Attachment 3) indicated field work from 8:00 a.m. to 11:30 a.m. Her expense reimbursement for (Joint Exhibit 2, Attachment 7) also specified mileage for the same period. Yet, surveillance of the Grievant's home by Senior Officer Hennessey and Madden observed the Grievant's car at her residence from 8:00 a.m. to 9:45 a.m.

On August 2, 1999, Hennessey and Madden observed the Grievant's car at her home from 9:00 a.m. to 10:30 a.m. At approximately 9:00 a.m., the Grievant notified

¹ Some of the Grievant's falsification efforts were supported by interviews conducted by Madden of alleged contacts made by the Grievant. These interviews were in close proximity of the actual dates in dispute, and were subsequently written (Joint Exhibit 4A) and notarized (Joint Exhibit 4B) to their authenticity. The initial interviews, and related transgressions, were consistently documented in the written statements. The Arbitrator views them as highly credible reviews of various circumstances surrounding the disputed dates. The time lag between the verbal and written statements in no way diminishes their veracity and importance.

Madden that she was meeting Counselor Jerry Pettigrew at the Hamilton County Justice Center. Pettigrew was interviewed by Madden and stated he never saw the Grievant on August 2, 1999 (Joint Exhibit 4A).

On August 9, 1999, while under surveillance, the Grievant's car was observed at her residence from 8:00 a.m. until 11:00 a.m. Yet, her contact sheet (Joint Exhibit 2, Attachment 5) noted field work from 9:00 a.m. to 11:00 a.m. At approximately 11:15 a.m., Madden asked her to review her activities. She remarked she had gone to the Talbert House Spring Grove Facility, the Volunteers of America and the Bureau of Identification. Not only were the times specified in conflict with the Grievant's actual activities, the activities themselves were highly suspect. Phone conversations between Sweeney and Madden indicated the Grievant gave Sweeney varying versions regarding her activity at Talbert House. On one occasion, she told him she was on the way back to the office, and on a second she told him she was on the way back to the office. Madden interviewed a Case Manager at the Talbert House. He indicated the Grievant was not at Talbert House on August 9, 1999 (Joint Exhibit 4B).

Similar inconsistencies arose on August 11, 1999. The Grievant's car was sighted at her apartment from 7:40 a.m. until she was seen leaving her apartment at 12:40 p.m. Her contact sheet (Joint Exhibit 2) indicated she began field work at 8:20 a.m. and ended her field work at 12:00 p.m. She disclosed she was in the office from 12:00 p.m. until 4:45 p.m. (Joint Exhibit 2, Attachment 6). Upon attempting to clarify the Grievant's whereabouts, Madden phoned the Grievant at 11:40 a.m. She maintained she engaged in surveillance for approximately two hours, went to Mt. Airy Shelter and eventually went home to let her dog out. Interviews of Mt. Airy Shelter's personnel

(Joint Exhibit 4B) failed to support her presence. They noted the Grievant was not there on the date in question, but remembered conversing with her on the phone on some prior date.

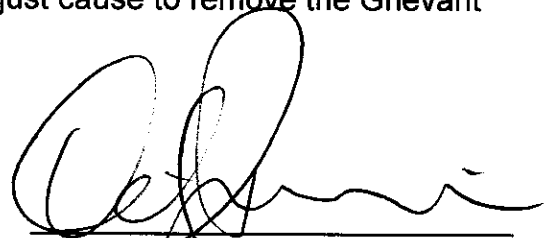
The Grievant alleged a number of activities for August 18, 1999. She contacted Hennessey and told him she was going to the Elmwood Police Department, St. Bernard Police Department, and then to Tender Mercies. The Grievant contacted Madden at approximately noon, and indicated she had twisted her ankle around Tender Mercies. She had, moreover, spoken with John Dietz, an Outreach Worker, while at Tender Mercies. Surveillance of her home indicated she was present from 8:25 a.m. until noon, while her contact sheet (Joint Exhibit 2, Attachment 9) indicated field work from 8:00 a.m. until 1:00 p.m. Dietz was interviewed (Joint Exhibit 4B) and stated he never saw the Grievant on the date in question.

This review discloses, in clear and unambiguous terms, the degree and depth of the Grievant's deceit, falsification and dishonesty. Any number of these indiscretions would have resulted in termination. Such behavior cannot be condoned in any setting, let alone one involved in the apprehension of parolees at large.

AWARD

The grievance is denied. The Employer had just cause to remove the Grievant for the specified charges.

March 21, 2001
Moreland Hills, Ohio



Dr. David M. Pincus
Arbitrator