

#1481

ARBITRATION DECISION

April 9, 2001

In the Matter of:

State of Ohio, Department of)	
Rehabilitation and Correction ,)	
Lorain Correctional Institutional)	
)	Case No. 27-14-5-23-00-1062-01-03
and)	Andrea Dickerson, Grievant
)	
Ohio Civil Service Employees Association,)	
AFSCME, Local 11)	

APPEARANCES

For the State:

Rhonda Bell, Labor Relations Officer
Jeff Wilson, Office of Collective Bargaining
Christopher Monyak, Investigator, Lorain Correctional Institution
Gary Croft, Warden, Lorain Correctional Institution
Danny Burke, Correction Officer
Samantha Barkley, Correction Officer
John Arbogast, Assistant Chief Inspector, Department of Rehabilitation and Correction

For the Union:

Patricia Howell, Staff Representative
Robert White, Staff Representative
Andrea Dickerson, Grievant
Bob Powers, President, Chapter 4720
Jeff Gilpen, Chief Steward, Chapter 4720

Arbitrator:

Nels E. Nelson

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BACKGROUND

The grievant, Andrea Dickerson, was hired on December 13, 1996. She worked as a correction officer at the Lorain Correctional Institution. It serves as a reception center for prisoners ranging from minimum to maximum security levels. In addition to the inmates waiting to be sent to other institutions, the institution houses a cadre that consists of the prisoners who assist in the operation of the facility.

The dispute also involves Danny Burke. He was hired as a correction officer at the institution prior to the grievant. Burke became friendly with the grievant after her hire and lived with her for 1 1/2 years ending in February 1999. In fact, at one time they were engaged to be married.

The grievant and Burke appear to have had a stormy relationship. On September 16, 1998, Burke claimed that the grievant punched him and she was charged with domestic violence. On February 2, 1999, the grievant complained that Burke threatened her and he was charged with domestic violence. On July 2, 1999, Burke complained that the grievant hit him and she was charged with assault. On December 14, 1999, the grievant filed a complaint alleging that Burke had assaulted her and he was charged with domestic violence.

The events leading to the grievant's discharge began in June 1999. At that time, Burke found two letters from inmates in the grievant's apartment and turned them over to Christopher Monyak, the institutional investigator. One was a letter from Clifton Hill that indicated that he felt lucky to have met the grievant. He enclosed a poem he had written entitled "A Touch of Heaven." The other letter was from Dory Jenkins. It stated that he missed her and suggested that she write to him at his mother's address. Both

inmates had been assigned to her unit before they were transferred to the Southern Ohio Correctional Institution.

In September 1999, Burke turned in additional material to Monyak. One item was a letter from Jarell Calloway, a former inmate, who invited the grievant to contact him the next time she was in Columbus so he could show her around. The additional items were from inmate Richardson, a cadre, assigned to the grievant's housing unit. They included poems he had written titled "Insecurity of a Man" and "The Dance of a Relationship" and a note describing certain events at the institution.

The incident that triggered the grievant's discharge occurred on December 29, 1999. On that date Burke found a torn-up letter in the grievant's trash from inmate Phillip Kukla. He taped the letter together and discovered in it that Kukla expressed his fondness for the grievant.

Burke confronted the grievant when she arrived home. She told him that the letter belonged to her niece, Tamika Algood. When Burke refused to believe her, they went to Algood's residence. Burke testified that Algood indicated that she knew nothing about the letter. He claimed that the grievant eventually admitted that the letter was given to her by inmate Kukla. On December 30, 1999, Burke gave the letter to Jeff Bertram, an investigator, who gave the letter to Monyak.

The grievant has a different version of the events. She acknowledges receiving a letter from Kukla in the chow hall on December 29, 1999, but claims that she wrote an incident report about it and gave the incident report and the letter to Burke to submit to the shift captain. The grievant testified that the letter that Burke took from her trash

basket was a letter written to Algood. She claims that Burke failed to give the shift captain the letter she received from Kukla.

On January 7, 2000, Monyak sent a Notice of Alleged Misconduct to the grievant. It stated that letters from Hill, Jenkins, Calloway, and Richardson had been recovered from her apartment and that on December 30, 1999, Burke turned in a letter from Kukla which she admitted he had written to her. The notice indicated that on January 3 and 4, 1999, Kukla admitted that he had had a relationship with the grievant for three to four months and that he had given her the letter and a Christmas card. It charged that the grievant had violated Rule 45 (giving preferential treatment to an inmate) and Rule 46 (having an unauthorized relationship with an inmate) of the Standards of Employee Conduct. She was placed on administrative leave.

On February 24, 2000, a voice stress analysis was given to the grievant by John Arbogast, the Assistant Chief Inspector of the Department of Rehabilitation and Correction, and a certified voice stress analyst. He stated that during the pre-test interview a number of questions were developed to be used in the testing sequence. Arbogast stated that deception was indicated when the grievant stated that she wrote an incident report on Kukla and when she denied taking Kukla's letter from the institution.

A pre-disciplinary conference was held on April 26, 2000. The hearing officer, Pat Crouthers, concluded that the grievant received letters from at least four inmates and that she gave personal information to them. She concluded that the grievant violated Rule 46(a) which prohibits "the exchange of personal letters, pictures, phone calls or information with any individual under the supervision of the department." On May 9, 2000, the grievant was removed.

On May 23, 2000, a grievance was filed protesting the grievant's removal. It charged that she was unjustly removed and that the discipline was too severe. The grievance asked that the grievant be returned to her position and made whole.

On November 11, 2000, the grievance was appealed to arbitration. The hearing was held on February 7, 2001. The employer's post-hearing brief was received on February 15, 2001, and the union's brief arrived on February 28, 2001.

ISSUE

The parties agreed that the issue is:

Was the grievant, Andrea Dickerson, removed for just cause? If not, what shall be the remedy?

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.

* * *

24.02 - Progressive Discipline

The Employer will follow the principles of progressive discipline.

Disciplinary action shall be commensurate with the offense.

Disciplinary action shall include:

- A. one or more oral reprimand(s) (with appropriate notation in employee's file;
- B. one or more written reprimand(s);
- C. 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;
- D. one or more day(s) suspension(s);
- E. termination.

* * *

24.05 - Imposition of Discipline

* * *

Disciplinary measures imposed shall be reasonable and commensurate with the

EMPLOYER POSITION

The employer argues that the grievant had an inappropriate relationship with Kukla. It points out that Burke testified that he became suspicious of her when he started hearing rumors about her being inappropriate with different inmates. The employer notes that Burke indicated that he felt that he could not marry the grievant without putting his suspicions to rest and for that reason turned over the letters he found to Monyak.

The employer contends that Monyak talked to everyone involved in the incident. It reports that the grievant admitted to him that she received the letter from Kukla in the dining hall but claimed that she gave the letter and an incident report to Burke to give to the shift captain. The employer observes that the grievant knew the proper procedure because the same day she wrote an incident report on Inmate Shaken and took it to the shift captain.

The employer also relied on Monyak's videotape of Kukla. It claims that Kukla's responses on the tape were "in direct correlation" with the testimony of its witnesses at the arbitration hearing. The employer observes that Kukla was able to tell where the letter was found, who found it, and the date it was found. It adds that he was able to give an address where the grievant could get mail.

The employer indicates that Kukla testified about how his relationship with the grievant began. It points out that he stated that he took the grievant's order at the Officers' Dining Room and gave her free food. The employer notes that he revealed that

he would talk to the grievant at the dining room and when the grievant's unit went to recreation.

The employer reports that Monyak also spoke to Algood and Correction Officer Samantha Barkley. It observes that Algood told him that the letter in question did not belong to her but that she knew the letter was found in the grievant's trashcan. The employer reports that Barkley claimed that the grievant asked her about various inmates and that on at least one occasion made an inappropriate remark about an inmate.

The employer relies on the testimony of Arbogast. It points out that he testified that in the pre-test interview the grievant did not contest his statement that Kukla's letter was the one Burke found in her apartment and did not claim that it belonged to Algood. The employer notes that Arbogast stated that when the grievant said that she never removed Kukla's letter from the institution, the voice stress analysis revealed that she was being untruthful.

The employer denies that there were any procedural errors. It acknowledges that Burke took the letter from the grievant's apartment without permission but indicates that he had permission to be in her apartment and was not restricted to any area of it. The employer stresses that when the grievant returned to her apartment, she and Burke argued about the letter and that Burke told her he was going to take it to the institution. It asserts that his actions did not constitute theft.

The employer questions why the grievant would trust Burke to turn over the letter and incident report to the shift captain. It observes that she testified that she and Burke were having problems in December 1999 and that she filed a domestic violence complaint against him on December 14, 1999. The employer notes that the grievant

indicated that he did not want her to work at the institution and that he had tried to set her up.

The employer rejects the union's claim that there were two letters. It points out that Algood's statement does not indicate that the letter was from Kukla. The employer stresses that to date no one has seen the alleged second letter except Algood and the grievant.

The employer challenges the grievant's claim that Burke wants her back, that he is a drug addict, and that he has been harassing her. It contends that the union presented no evidence or testimony to support these allegations. The employer dismisses them as self-serving and a last-minute attempt by the grievant to divert attention from herself.

The employer argues that the grievant's decision-making ability was tainted when it came to Kukla. It contends that she received a letter from him and removed it from the institution. The employer maintains that the grievant failed to report it to the shift captain so that Kukla was not put in segregation.

The employer charges that the grievant's behavior jeopardizes the security of the institution and warrants removal. It cites State of Ohio, Department of Rehabilitation and Corrections, Mansfield Correctional Institution and OCSEA, Local 11, AFSCME, AFL/CIO, Grievance No. 27-20-980906-3551-01-03, Frank A. Keenan, September 21, 1999; State of Ohio, Department of Rehabilitation and Correction and Ohio Health Care Employees Union, District 1199, WV/KY/OH, National Union of Hospital and Health Care Employees, SEIU, AFL-CIO, Grievance No. 27-26-(2/27/90)-076-02-12, Jerru A. Fullmer, July 8, 1991; and State of Ohio, Department of Rehabilitation and Correction and Ohio Civil Service Employees Association, AFSCME, Local 11, Grievance No. 27-

33-980713-0500-01-03-T, Nels E. Nelson, February 22, 1999; and State of Ohio, Department of Mental Health, Northwest Psychiatric Hospital Forensic Unit at Oakwood and Ohio Civil Service Employees Association, Local 11, AFSCME, Grievance No. 23-05-95-07-01-09, David M. Pincus, June 2, 1996, in support of this point.

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

UNION POSITION

The union argues that the grievant was removed without just cause. It states that Kukla gave her a letter as she was exiting the chow hall. The union indicates that when she opened it, she recognized that the note contained inappropriate statements. The union stresses that the grievant did not initiate the action.

The union complains that the employer failed to call Kukla to testify against the grievant. It contends that the grievant had a right to face her accuser and cites McCormick on Evidence, Fourth Edition, Chapter 4, Section 19. The union asserts that all arbitrators and courts apply this rule. It claims that none of the exceptions to the rule apply in the instant case.

The union protests that it had no access to Kukla. It indicates that the employer has always held that it would have access to inmates only at an arbitration hearing. The union observes that in the instant case the employer excluded Kukla from the arbitration hearing as well. It states that it “has therefore depended on the expand rights which arbitration hold as ‘good order’ rule/doctrine.” (Union Brief, page 3.)

The union maintains that the employer’s use of Kukla’s written statement and the videotape of him is hearsay and cites McCormick on Evidence, Fourth Edition, Chapter 24, Section 245. It points out that it could not have Kukla clarify or elaborate on his

testimony or ask about inconsistencies. The union claims that this is a major violation of due process.

The union contends that the best evidence rule required the employer to produce Kukla to testify at the arbitration hearing. It rejects the employer's defense that Kukla also refused to talk to Rhonda Bell, the employer's advocate. The union states that the employer was not precluded from "presenting the inmate and using a subpoena for compliance." (Union Brief, page 3.)

The union accuses the employer of knowingly using evidence that was illegally obtained. It claims that Burke searched the grievant's apartment and found a number of letters that he turned in to the institution. The union indicates that he was not given permission to remove the letters and that the grievant did not know he had them.

The union maintains that Monyak knew from the start that the letters were illegally obtained. It suggests that he violated public policy as well as the department's rules. The union indicates that he should have advised Burke that he was committing a crime and that he should not continue his criminal acts.

The union charges that the employer willingly became an accomplice to theft and cites the doctrine of "Fruit from the Poisonous Tree Doctrine" (McCormick on Evidence, Fourth Edition, Chapter 15, Section 165.) It argues that the employer "does not have the luxury to use the rule that the evidence obtained was from an independent source and therefore an exception to the Fruit of the Poisonous Tree Doctrine." (Union Brief, page 4.)

The union contends that it could argue that Burke was an agent for the employer. It maintains that Burke was so instrumental in the investigation that he was not directed

to write a report on the matter until his part was concluded. The union states that Burke reported to Monyak and Bertram who are not in his chain of command.

The union argues that the exception to the rule of search and seizure does not apply in the instant case. It states that the exception allows “the search of company lockers, buildings, employees, employee vehicles, and employee property at the job.” (Union Brief, page 5.) The union stresses that the grievant did not give up her Fourth Amendment rights to work for the State of Ohio and had a right to expect her home to be free from search and seizure without a warrant.

The union objects to the admission of the results of computerized voice stress analysis. It states that it requested discovery on the analysis and graphics but was informed by the employer that none was available. The union indicates that according to McCormick on Evidence, Fourth Edition, Chapter 20, Section 206, CVSA is not accepted as reliable in any court and is considered inadmissible. It acknowledges that the grievant signed a waiver for CVSA to be administered but maintains that since she did not agree to the use of the findings, the employer cannot use them in its case.

The union challenges the use of Arbogast as a witness. It points out that the “accurate interpretation of the test graphics depends upon the training, experience, professional capabilities and skill of the examiner.” (Truth Verification and Voice Stress Analysis, <http://www.garybaker.com/garyhtml/vsa.htm>.) The union asserts that Arbogast does not meet the “Frye Test Standard of expert” and his testimony should not stand as expert testimony. (McCormick on Evidence, Fourth Edition, Chapter 7, Section 69.)

The union argues that the fact that it was precluded from the CVSA is unacceptable. It insists that the employer knew that the grievant had the right to union

representation. The union maintains that because of the employer's flagrant disregard for the grievant's rights, the CVSA findings and references to them should be stricken from the record.

The union rejects the argument that the incident reports submitted by the employer are evidence of a personal relationship between Kukla and the grievant. It contends that the incident reports filed by Correction Officers David Meeker and Barkley do not reference observing Kukla and the grievant in a relationship. The union maintains that Correction Officer W.D. Miller's report refers to a poem that he wrote and gave to the grievant. It asserts that Correction Officer James Patton's two incident reports do not indicate that he witnessed any act or conversation between Kukla and the grievant.

The union acknowledges that Correction Officer Gary Jackson's report states that he saw the grievant talking to Kukla at the recreation center. It points out, however, that it was not filled out at the time of the incident and does not indicate that he observed the grievant speak to Kukla at the recreation center more than once. The union observes that Jackson's report does not say that the conversation was inappropriate or suggest that the grievant and Kukla were alone. It admits that the report states that Kukla gave out extra food but notes that it does not say that he gave it to the grievant.

The union dismisses Correction Officer Deon Curry's incident reports. It states that his January 3, 2000 report speculates that Kukla was in route to speak to the grievant but does not indicate that he saw them talking. The union notes that Curry's January 10, 2000, report states that he saw the grievant search Shaken's cell for contraband but does not indicate that he saw the grievant write an incident report or give anything to Burke.

The union argues that Kukla's letter is not evidence that he had a personal

relationship with the grievant. It describes the letter as follows:

The letter from inmate Kukla is a love letter to Officer Dickerson. The State asserts that this letter is evidence of an established personal relationship between inmate Kukla and Officer Dickerson. Though the letter professes a love for Officer Dickerson, there is a conspicuous lack of intimate or personal detail. Most references made by inmate Kukla are comparable to reading a horoscope (nonspecific, generalities). However one paragraph speaks to Officer Dickerson, as having no one whom wanted to marry her. It is notable that inmate Kukla states that he is trying to "pop up" and hang around her. Never a reference to a mutual arrangement to meet or talk. The one reference to an actual conversation is a conversation with inmate Kukla, Officer Dickerson and Ice (inmate Lewis). The subject matter was not intimate. To make inferences about an established relationship has shortcomings. Inmate Kukla writes that he would "... love to be that special person ..." in Officer Dickerson's life. Inmate Kukla also writes that Officer Dickerson needs to know that he "... love a pretty Black woman and you are my top pick because everything is in place." These remarks and some others do not indicate a deep personal relationship. The first paragraph of inmate Kukla's letter is indicative that this is the first time he has dared to say what he feels. After reading the last paragraph, one expects to see the junior high colloquialism - do you like me? Check yes or no. A better explanation of this letter is that it is a letter of unrequited love. (Union Brief, page 7.)

The union contends that the receipt of a note from an inmate does not intrinsically violate Rule 46(a). It points out that Monyak acknowledges that the receipt of a document does not violate the rule but it depends on the actions of the recipient. The union claims that "this is a may charge practice by Monyak and entirely dependent upon opinion." (Union Brief, page 8.)

The union asserts that when Monyak received the first three letters, he faced exactly the same circumstance as when he was given Kukla's letter but he failed to take action. It indicates that a charge of failure to follow post orders, policies, and procedures was warranted. The union states:

Perhaps the conclusion is that the rule is unclear to Management. If this be so, Just Cause says that Officer Dickerson cannot be held accountable to the rule. The State was without question punitive in the instant case. Herein lies a

disregard for Public Policy. Moreover the Union cannot be held to a subjective rule under Just Cause. (Union Brief, page 9.)

The union concludes that there was not just cause to remove the grievant. It points out that Article 24, Section 24.02 requires the use of progressive discipline and Section 24.05 states that discipline must be reasonable and commensurate with the offense and not used solely for punishment. The union asks that the grievant be reinstated with all leave accruals and seniority and be reimbursed for lost wages, including overtime, holiday pay, and roll call pay, and that the employer portions of her PERS and health insurance contributions be restored.

ANALYSIS

The grievant was removed for violating Rule 46(a) of the Standards of Employee Conduct. It prohibits "the exchange of personal letters, pictures, phone calls, or information" with inmates. The penalty specified for a first offense ranges from a one-day suspension to removal.

The Notice of Disciplinary Action sets forth the specific allegations against the grievant. They are:

On December 27, 1999, Officer Burke (Dickerson's ex-boyfriend) was visiting her at home, when he discovered a card to her from inmate Kukla #311-828. Later Officer Burke discovered a letter of four (4) pages to Officer Dickerson from the same inmate. Several staff members wrote reports that inmate Kukla and Officer Dickerson had some type of inappropriate relationship. On March 3, 2000 a voice stress analysis, given to Dickerson determined that Officer Dickerson was not truthful when asked about her involvement with inmate Kukla.

At the arbitration hearing, the employer focused on Kukla's four-page letter to the grievant. It contends that Burke found the letter in the grievant's apartment and turned it over to the institution. The grievant acknowledges getting Kukla's letter but claims that

she never took it from the institution. She claims that she gave it to Burke to give to the shift captain along with an incident report she wrote about it.

The Arbitrator must reject the grievant's testimony that she gave the letter and incident report to Burke to give to the shift captain. If she had given the material to Burke, he would not have failed to deliver it because the grievant could have asked the shift captain or another supervisor about the disposition of the letter and incident report. Furthermore, the grievant's claim implies that Burke was plotting to get her in serious trouble at the institution. This is not consistent with the fact that he and the grievant were still involved in a relationship at the time of the incident.

The Arbitrator must also reject the union's contention that Burke was seeking revenge against the grievant for her filing domestic violence charges against him on December 14, 1999. The record reveals that the grievant and Burke had charged each other with domestic violence on several occasions prior to that date and despite those charges continued their relationship. In fact, the record reveals that Burke and the grievant spent the Christmas holidays together.

The Arbitrator's rejection of the grievant's testimony regarding Kukla's letter is not based on the results of the voice stress analysis. The union is correct that many Arbitrators refuse to accept such evidence and that some of those who admit it attach little or no weight to it. Furthermore, in the instant case the union raised a number of issues relating to the circumstances under which the test was administered and Arborgast's qualifications.

The Arbitrator also attached no weight to Kukla's statement and videotaped testimony. Inmates are subject to many influences and motivations which raises

questions about the value of their testimony. This problem was compounded by the fact that the union never had an opportunity to cross-examine Kukla. The employer could have produced him at the hearing or perhaps arranged to have him examined and cross-examined on videotape.

The Arbitrator must reject the union's claim that Kukla's letter was not evidence of an inappropriate relationship. Even a casual reading of the letter indicates that there was an improper relationship and that Kukla was worried that inmates and staff were aware of it. In fact, the primary purpose of the letter appears to be to tell the grievant that despite his feelings for her, he was going to request to be moved to another institution.

The Arbitrator must reject the union's argument that Kukla's letter was illegally obtained. Burke had permission to be in the grievant's apartment. He testified that he drank a beer while waiting for her to come home and discovered Kukla's letter in the trash when he threw out an empty beer can. When the grievant returned home, they argued about the letter. Given the contents of the letter, Burke was duty-bound to turn it over to Monyak.

The employer raised a number of other issues relating to correspondence from other inmates to the grievant and incident reports submitted by correction officers dealing with their observations of the grievant and Kukla. It contends that the letters from the other inmates reflect inappropriate relationships. The employer maintains that incident reports confirm the improper relationship between the grievant and Kukla.

The Arbitrator will not examine these issues. The notice of removal does not refer to the correspondence from the other inmates. It does reference the incidence reports written by several staff members but the reports only establish that the grievant

spoke to Kukla and that she may have inquired about inmates's offenses and sentences.

The Arbitrator must conclude that the grievant violated Rule 46(a). She received a letter from Kukla that clearly indicated that they had exchanged personal information. Furthermore, the grievant acknowledged that she knew that she was required to turn the letter in to the shift captain and write an incident report but she failed to do so.

The remaining issue is the proper remedy. Rule 46(a) prohibits the exchange of personal letters and information with inmates. When the grievant received Kukla's letter, she was required to immediately submit it and an incident report regarding it to the shift captain. Instead, the grievant ripped up the letter and threw it in the trash.

Any violation of the rule against unauthorized relationships is a serious matter. The danger of inmate relationships was recognized by this Arbitrator in State of Ohio, Department of Rehabilitation and Correction and Ohio Civil Service Employees Association, AFSCME Local 11, Grievance No. 27-33-980713-0050-01-03-T, February 22, 1999, where he stated:

Any relationship between a correction officer and a person under the supervision of the department can put the correction officer in a position where he can be manipulated. The threat that this creates to the security and safety of employees and inmates justifies strict rules and harsh penalties for the violation of the rules. (Page 9).

Rule 46(a), however, specifies penalties ranging from a one-day suspension to removal. While there is no doubt that the grievant violated the rule, her conduct was significantly less severe than the conduct of the grievants in the cases cited by the employer where removals were upheld by Arbitrators. In the Arbitrator's decision cited immediately above, the grievant violated Rule 46(e) by having sexual relations with a former inmate whose brother and uncle were in the grievant's unit at Trumbull

Correctional Institution. The grievant in State of Ohio, Department of Rehabilitation and Correction and Health Care Employees Union, District 1199, Grievance No. 27-26-(2/27/90)-076-02-12, Jerry A. Fullmer, July 8, 1991, gave a gold necklace to an inmate and wrote at least six letter to him expressing her desire to engage in physical contact with him and indicating that physical contact had occurred in the institution. In State of Ohio, Department of Rehabilitation and Correction, Mansfield Correctional Institution and Ohio Civil Service Employees Association, Local 11, AFSCME, Grievance No. 27-20-980906-3551-01-03, Frank A. Keenan, September 21, 1999, the grievant was charged with giving preferential treatment to an inmate in violation of rule 45(a) when he took an inmate's medical records and offered to seek out an attorney for him in connection with a lawsuit against the institution and the state. The grievant in State of Ohio, Department of Mental Health, Northwest Psychiatric Hospital Forensic Unit at Oakwood and Ohio Civil Service Employees Association, Local 11, AFSCME, Grievance No. 23-05-95-07-01-09, David M. Pincus, June 2, 1996, had a "meaningful and prolonged relationship" with an inmate including at least eight telephone calls.

The union submitted a case where a removal was reduced to a one-year suspension. In Ohio Department of Rehabilitation and Correction, Northeast Pre-Release Center and OCSEA, AFSCME, Local 11, Grievance No. 27-17-(5-30-98)-820-01-03, February 23, 2001, Arbitrator Robert Brookins held that the grievant violated Rule 46(a) by mailing three greeting cards to an inmate. He indicated that because there were no strong aggravating or mitigating factors, progressive discipline had to be followed. Arbitrator Brookins returned the grievant to work with back pay less a one-year suspension.

The Arbitrator believes that the grievant's misconduct is more akin to the case offered by the union than the cases cited by the employer. In the instant case there are no allegations that the grievant had physical contact with Kukla or that she corresponded with him. Her offenses were limited to exchanging personal information with Kukla and failing to report the correspondence she received from him.

The Arbitrator believes that the proper remedy is reinstatement without back pay which results in a suspension of approximately one year. The grievant's reinstatement is based on the range of penalties specified in Rule 46(a) and the decisions of the Arbitrators in cases cited by the employer and the union. It also reflects the fact that in June 1999 and September 1999, after Burke gave Monyak personal letters that four inmates had written to the grievant, the grievant continued to work and was not disciplined or even notified that her conduct was inappropriate. The significant loss of pay reflects the potential seriousness of any violation of Rule 46 and is further justified by the grievant's dishonesty that prolonged the resolution of the dispute.

AWARD

The grievant is to be returned to work without back pay but with no loss in seniority.

Nels E. Nelson
Arbitrator

April 9, 2001
Russell Township
Geauga County, Ohio

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