IN THE MATTER OF ARBITRATION

BETWEEN

STATE OF OHIO – OFFICE OF COLLECTIVE BARGAINING

AND

OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION AFSCME LOCAL 11, AFL-CIO

Grievant: Cary Todd Goldman

Case No. 35-23-010101-0014-01-03

Date of Hearing: April 24, 2002

Place of Hearing: DYS Delaware, Ohio

APPEARANCES:

For the Employer:

Advocate: Jillian Froment

Witnesses and Representatives:

Jason Barnett – EEO Manager

Mike Gordon – Deputy Superintendent

Tami Null – Juvenile Corrections Officer

Marcella Sutherland - Superintendent

For the Union:

Advocate: Victor Dandridge

Witnesses and Representatives:

C. Todd Goldman - Grievant

ARBITRATOR: Dwight A. Washington, Esq.

Date of Award: May 23, 2002

INTRODUCTION

This matter arises from the removal of Cary Todd Goldman ("Grievant"), a Juvenile Corrections Officer ("JCO") for the Ohio Department of Youth Services ("DYS"). On August 30, 2001 a pre-disciplinary meeting occurred and the Grievant was charged with the following rules violations for making inappropriate physical contact with a co-worker: Rule 1 – Neglect of Duty; Rule 6 – Insubordination; Rule 9 – Sexual Harassment; and Rule 41 – Ohio Revised Code §124.34. The removal of the Grievant was approved by Superintendent, Marcella L. Sutherland ("Sutherland") on October 1, 2001.

The Grievant appealed his removal pursuant to Article 24 of the Collective Bargaining Agreement ("CBA"), effective March 1, 2001 through February 28, 2003 between the parties.

The issue before the Arbitrator is whether just cause existed to remove the Grievant as a JCO for Rules violations 1,6,9 and 41. The hearing occurred on April 24, 2002 and each party had the opportunity to present evidence in the form of witnesses or written documents.

BACKGROUND

The Grievant worked over four (4) years as a JCO for the Department of Youth Services ("DYS") at its Riverview Juvenile Correctional Facility ("Riverview"). Riverview is a maximum security facility for youth from ages twelve (12) thru twenty-one (21). In December 2000 multiple complaints from female co-workers were lodged against the Grievant for inappropriate contact. The complaints alleged the Grievant without consent hugged female co-workers; telephoned a co-worker on her private cell phone; put his arm around an employee; and requested hug(s). An investigation was undertaken by the employer and written statements from

Tami Null ("Null"), Becky Kyle ("Kyle") and Rebecca Bateman ("Bateman") were provided to Jason Barnett ("Barnett"), who conducted the initial investigation in this matter. The essence of the statements involved the Grievant in actual or attempted physical contact with female co-workers, as well as contact with co-workers at their homes. In 2000 the personal telephone numbers of all JCO's were kept in a Rolodex in the control room, in the event business needs required contact during their off-hours. The Rolodex in the control room was accessible by any JCO and at no time were JCO's allowed to use confidential business records for personal reasons. Null informed investigator Barnett that she had previously told the Grievant not to touch her and was concerned over receiving a telephone call and a Christmas card at her house from the Grievant in December 2000.

As a follow up to Barnett's investigation on December 21, 2000 Mike Gordon ("Gordon"), Grievant's supervisor, had a conference to discuss the complaints. The Grievant agreed to stop certain behavior including touching/hugging other employees and using confidential employee information. Gordon had prepared a list and read each item detailing specific conduct that the Grievant was not to engage in the future. The Grievant signed the supervisory conference document (Ex.5). At this stage no discipline was issued by the employer.

On January 12, 2001 Valerie Jackson ("Jackson") JCO, was off work on sick leave and received a telephone call from the Grievant at her residence inquiring about her health. Jackson denies giving her home telephone number to the Grievant and was concerned that he had her number. Jackson provided a written statement to the employer. (Ex. 6 A) The Grievant maintained that Jackson gave him the number and denied any inappropriate conduct regarding Jackson. Another investigation occurred and on March 9, 2001 the Grievant received a written reprimand for violation of Rules 1 (Neglect) and 5 (Improper use of State Telephones).

On August 3, 2001 Sutherland distributed a written reminder to all staff at Riverview that a "zero-tolerance" would occur for incidents involving hostile or offensive work environment. (Ex. 8-D) The Grievant admitted receiving this written reminder at roll call in early August 2001.

On August 11, 2001 in the presence of JCO Shannon Sheridan ("Sheridan"), the Grievant walked up to Null and started rubbing her back where upon she immediately jumped out of her chair and told him to keep his hands off of her. Sheridan's statement (Ex. 8-C) verified that the Grievant touched Null. In fact in the investigatory process the Grievant replied as follows:

"Q. In the past have you been directed to refrain from touching JCO Null?

A. Yes, I just forgot....." (Ex. 8-F p.2)

The Grievant contends that he was only joking and that Null had placed her hands on his arms and hugged him from time to time. Null denies ever initiating any physical contact with the Grievant. With respect to specific prior warnings of physical contact with female co-workers, the Grievant alleges that the conference of December 21, 2000 with Gordon was only advisory and not intended as an official order or directive. In other words, the employer had not officially put the Grievant on notice regarding what specific conduct was prohibitive.

On August 20, 2001 the employer concluded its investigation regarding the August 11, 2001 incident and determined that sufficient evidence existed that the Grievant inappropriately touched JCO Null on her back/shoulder area after having been previously advised to cease this behavior in December 2000 (supervisory conference), March 2001 (written warning) and August 2001 (Sutherland August 3rd memo). Thereafter, DYS removed the Grievant as a JCO and this matter is properly before this Arbitrator for resolution.

POSITION OF THE PARTIES

Position of the Union

The Union contends that DYS failed to establish just cause to remove the Grievant, in that a thorough investigation was lacking and the principle of progressive discipline was not followed.

Regarding the investigation, the Grievant's conduct was not neglect of duty (Rule 1) or insubordination (Rule 6). No proof was offered to establish that the Grievant failed to perform his duties or that he disregarded a direct order. Furthermore, the only direct order given to the Grievant was on August 16, 2001, which occurred after the August 11, 2001 Null incident (Ex. 8-D) therefore, no conduct of the Grievant was insubordinate.

With respect to the inappropriate touching of co-workers, the union maintains the severity of the conduct and the actual harm done must be considered in order for progressive not punitive discipline to govern. Also, employee Null was somewhat combative and would use obscene language from time to time. Finally, the supervisory conference of December 21, 2000 was advisory only and not considered discipline by DYS.

Position of the Employer

The DYS expects all employees to follow its policy regarding sexual harassment to ensure all employees are able to work in an environment free of hostility. Whether an employee intends to harm a co-worker is immaterial, it's the impact upon the co-worker that's important regarding sexual harassment. The Grievant was aware of DYS policy regarding sexual harassment, which allows for corrective action up to and including dismissal.

The Grievant in December 2000 was specifically informed of his inappropriate behavior and failure to abide by the prohibitions, i.e., hugging/touching, using confidential information, would result in disciplinary action. Moreover, the Grievant was specifically advised by Gordon not to attempt to hug co-worker Null at any time in the future.

Nevertheless, the Grievant in January 2001 telephoned a co-worker at her home and in August 2001 engaged in inappropriate touching of Null in the control room in front of a witness.

DYS conducted three (3) separate investigations regarding the December 2000, January 2001 and August 2001 incidents and due to the severity of the Grievant's conduct, removal was appropriate. In short, despite the sexual harassment policy; supervisor counseling session; co-worker Null's request; roll call notice of August 3, 2001; and the written reprimand – the Grievant just didn't get it!

BURDEN OF PROOF

It is well settled in discharge matters, the employer bears the evidentiary burden of proof and due to the seriousness of this case and the "just cause" requirement of Article 24 of the CBA, the evidence must be sufficient to convince this arbitrator of guilt by the Grievant. See, I.R. Simple Co. and Teamsters Local 670, 130 LA 865 (Tilbury, 1984)

DISCUSSION AND CONCLUSION

After careful consideration of the evidence in this matter, I find that the grievance must be denied. My reasons are as follows:

It is the position of the employer that the Grievant's removal was based upon just cause for violating Rules 1(a) (Neglect of Duty), 6 (Insubordination), 9 (Sexual Harassment) and 41 (Ohio Revised Code §123.43) relating to conduct on August 11, 2001 with employee, Null.

The employer's evidence established that the Grievant in December 2000 had complaints from several female employees, including Null, concerning the Grievant's behavior towards female co-workers. Allegations included hugging and using confidential employee personal data, i.e., home telephone numbers, inappropriately. The December incidents culimated in a supervisory conference between the Grievant and Gordon. In that conference, according to Gordon, the Grievant was informed that his behavior was unacceptable and the touching of other employees was to stop. Gordon credibly testified that he had an amicable working relationship with the Grievant and in the conference he read from the prepared written memorandum what conduct was unacceptable. The supervisory conference was memorialized and signed by Gordon and the Grievant. (Ex. 8-D) Whether the Grievant considered the supervisory conference as advisory as oppose to a directive, is not instructive to this arbitrator. The Grievant admitted upon cross-examination that he understood the December 21, 2000 memorandum prevented him from touching co-workers or using confidential information. Therefore, any analysis of the Grievant's conduct post December 21, 2000 is based upon his own acknowledgment that he was aware that physical contact or telephone calls to females homes was in appropriate.

Clearly by January 2001 the Grievant was aware that several female co-workers had complained that certain conduct was considered sexual harassment under DYS Directive B-41. Sexual harassment includes behavior that's unwelcome including unwanted attention, unwanted gifts and unwelcome physical contact. Specifically, the Grievant was aware that employee Null did not want him to hug or touch her thru Gordon's meeting in December 2000. Null considered

the Grievant's contact with her as offensive and unwelcome and the evidence indicates that the Grievant knew this in December 2000.

Approximately three (3) weeks after December 21, 2000 another female JCO (Jackson) complained that the Grievant called her home inquiring about her health. Jackson was surprised and does not recall giving her home number to the Grievant. The Grievant contends Jackson gave him her home number. A written reprimand was given to the Grievant regarding the Jackson incident; for violating work Rules 1(a) and 5 after another investigation regarding the Jackson incident occurred. Clearly the employer could have implemented harsher corrective discipline but for whatever reason(s) decided not to – at this stage.

The August 11, 2001 Null incident resulted in the determination that the Grievant inappropriately touched Null. The Grievant did not deny touching Null on August 11, 2002. Whether he rubbed his crouch area on her arm or rubbed her shoulders with his hands, he engaged in prohibited conduct with Null again. Based upon the prior warnings to the Grievant and specifically regarding employee Null, no excuse was offered or under the circumstances could be rationally advanced to justify the August 11, 2001 conduct.

However, an analysis of the Grievant's conduct must also include the conduct of those around him. In other words, if "undertones" of mutual playfulness is present by both males and females, to ignore evidence of consensual conduct would ignore facts to guide an arbitrator's determination of whether the conduct being complained of is punishable as sexual harassment. See, National Beef Packing Co. and Food & Commercial Workers Local 340 103 LA 1004 (Levy 1994) With regard to the atmosphere, no evidence was presented to conclude that any of the Grievant's behavior in December 2000, January 2001 or August 2001 regarding his female co-workers was mutual and/or consensual office playfulness. The suggestion that the use of

obscene language by a female, i.e., Null, served as a conduit for the Grievant's behavior, is untenable.

The employers' application of its sexual harassment policy due to the societal recognition of male/female work relationships requires consistency and firmness. No evidence suggests that the application of the policy to the Grievant was arbitrary or inconsistent. The Grievant's own admission that he was previously warned not to touch Null but he did it anyway, makes the denial of this grievance all the more compelling. The Order of Removal will be upheld based upon violation of Rule 9 standing alone.

Due to the conclusion reached above, it's unnecessary to analyze in depth the effect of Rules 1 (Neglect), 6 (Insubordination) or 41 (Ohio Revised Code §124.34) upon the Grievant's removal. Based upon the above findings and conclusions violations of Rules 1 and 6 occurred, and arguably ORC §124.34 as well. Finally, on account of the compelling evidence of the Grievant's refusal to abide by any of the warnings and his own admission(s), no mitigating circumstances exist to alter the Grievant's removal.

AWARD

Grievance denied.

Respectfully submitted this 23rd day of May 2002.

Dwight A. Washington, Arbitrator