

#1575

IN THE MATTER OF ARBITRATION

BETWEEN

OEA/SCOPE

AND

THE STATE OF OHIO/DRC

Before: Robert G. Stein

Direct Appointment

Case # 27-30-010808-1265-06-10

Principal Advocate for the UNION:

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INTRODUCTION

A hearing on the above referenced matter was held on March 13, 2002, in Columbus, Ohio. The Department of Corrections ("Employer" or "Department") raised the issue of procedural arbitrability. During the hearing the parties were given a full opportunity to present evidence and testimony on behalf of their positions on arbitrability and the merits of this case. The parties submitted closing arguments in lieu of filing briefs. The hearing was closed on April 20, 2002. The Arbitrator's decision is to be issued within forty-five (45) days.

ISSUE

The parties agreed upon the following definition of the issues:

Is the grievance arbitrable?

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

RELEVANT CONTRACT LANGUAGE/

ARTICLE 5 Grievance Procedure

ARTICLE 13 Progressive Discipline

See Agreement for specific language (Joint Exhibit 1)

BACKGROUND

The Grievant in this matter is Vera Sampson, who prior to her removal from the Department, held the position of Librarian at the North Central Correctional Institution ("NCCI") for approximately four (4) years. Ms. Sampson was removed (terminated) from her position on July 30, 2001 for violating Department Rule 46a and 46b. Rule 46a addresses unauthorized relationships, the exchange of personal letters, pictures, phone calls, or information with any individual under the supervision of the Department. Rule 46b speaks to the act(s) of engaging in any other unauthorized personal or business relationship with any current or former individual under the supervision of the Department.

The Employer removed the Grievant from her position for having a personal and romantic relationship with an inmate. She was accused of writing letters to Inmate Taylor after he was transferred to Madison Correctional Institution. The Department concluded that the letter was evidence of a personal and romantic relationship. She admitted to writing three (3) letters, but argued that she did not have a personal or romantic relationship with Inmate Taylor. The Department also accused the Grievant of having a

personal relationship with an Inmate Holley, who assisted her in surreptitiously forwarding her letters to Inmate Taylor. When he was housed at NCCI, Inmate Taylor worked for the Grievant in the Institution's library. Both inmates are convicted rapists. Inmate Holley testified in support of the Employer's case. Inmate Taylor did not appear as a witness. Ms. Sampson admitted to writing the letters and to having exercised poor judgment in this matter. However, she did not believe she had acted in a manner that justifies termination from employment. With the aid of the Association ("Union") she filed a grievance following her removal.

EMPLOYER'S POSITION

Procedural arbitrability

The Employer argues the Grievant filed her grievance at Step 3 of the grievance procedure after the ten (10) day time limit contained in Article 5.08, Section C 1. It reads in pertinent part:

C. Procedure

"An employee with a discipline or an authorized Association representative shall file a grievance under the procedures listed below unless mutually agreed otherwise."

1. Step Three (3)

"An employee or an authorized Association representative may file a grievance directly to the Agency Head/Director or designee of the employing agency at Step Three (3) either within ten (10) days of the effective date of the action or within ten (10) days after receipt of the notice as to the action, whichever is later...transmittal of grievance appeals...shall be made by U. S. mail. The grievance may be submitted by serving written notice (including a copy of the grievance) presented to the Agency Head/Director or designee."

The Employer argues that it received the Grievant's appeal of her termination on August 23, 2001, some twenty-two (22) days after the Grievant was terminated. The

Employer acknowledges the fact that on August 8, 2001, the grievance was assigned a tracking number. However, the Employer cites Article 5.02 Section F. that states:

"Grievance numbers shall be assigned by the Agency designee at the level it is originally filed. The assignment of a number is merely for tracking purposes and shall not be construed as a recognition that it is a valid grievance."

The Employer rejects the Union's argument that Union Representative, Ryan Bacon, filed the grievance in a timely manner. It contends that Mr. Bacon could not produce any evidence of his acting in a timely fashion. The Employer also argues that although it did not raise the issue of timeliness until arbitration, there is nothing in the Collective Bargaining Agreement ("CBA") that prohibits the issue from being raised for the first time in arbitration.

Merits

The Employer contends that the Grievant engaged in two unauthorized relationships with two different inmates. The Employer points out that the Grievant admitted to writing letters to Inmate Taylor and to surreptitiously conveying the letters with the help of another inmate. The Employer rejects the Grievant's rationale that she wrote the letters with purely the motivation of being concerned about him regarding his release on parole. It argues that the letters submitted into evidence do not support this assertion by the Grievant, and instead support the contention that she had a personal relationship with Inmate Taylor. The Employer also contends that during the hearing the Grievant provided contradictory rationale for writing the letters.

The Employer points to the content of the letters to support its allegations of a personal and romantic relationship. It argues the letters contain personal descriptions of her daughter's behavior, and referred to her daughter by use of nicknames "*Beast*" and

"Lil Sis." In general, the letters contain prose that is of a personal nature and not by any means formal or professional as claimed by the Grievant, argues the Employer.

Based upon the above, the Employer requests that the grievance be denied.

UNION'S POSITION

Procedural Arbitrability

The Union asserts that the grievance was timely filed. The Union first argues that the Employer never raised the issue of arbitrability at Step 3 or during mediation prior to the arbitration hearing. The Union asserts that the Employer has waived any argument of timeliness at this juncture. The Union asserts that the evidence and testimony demonstrate the Employer was made aware of the grievance no later than August 8th, when the grievance was assigned a processing number. The Union also cites Article 5.02 (f) and states; *"It should be noted that Section 5.02F of the contract provides that the grievance numbers are to be assigned by the Agency designee at the level where the document was originally filed."* The Union argues that the Department processed the grievance and advanced it in accordance with the grievance procedure to the appropriate hearing levels and ultimately to arbitration.

The Employer also argues that the State offered no testimony from anyone as to who placed the time-stamp on the grievance and whether the date of August 23, 2001 was the first time the first copy was received by the Department. The Union asserts that the copy time-stamped August 23, 2001 may have simply been another copy received by Central Office Labor Relations. The Union indicates that it is a distinct possibility that a copy of the grievance submitted to The NCCI Labor Relations on August 8, 2001 was

forwarded to Central Office Labor Relations prior to the copy time-stamped August 23, 2001. The Union also points out that the Employer proceeded to Step 3 and mediation without claiming the grievance was procedurally defective.

Merits

The Union's central argument in this case is that termination is too severe a punishment for the actions of the Grievant, and it is contrary to the expressed contractual commitment of the parties to apply progressive discipline (Article 13.04). The Grievant admits she made an error in judgment when she relied upon the advice of Inmate Holley in her written communication with Inmate Taylor. However, she insists that her intentions in this matter were simply to encourage Inmate Taylor to stay out of trouble in order that he may be granted parole. The Union rejects the Employer's conclusion that Ms. Sampson and Inmate Taylor had any type of romantic involvement. It contends the Department placed the worst possible interpretation on Ms. Sampson's communication with Inmate Taylor and relied on the speculation of Inmate Holly in drawing its conclusions.

The Union also points out that Ms. Sampson was unaware of the Department's investigation of her relationship with Inmate Taylor until June 19, 2001. Prior to that date, Ms. Sampson ceased corresponding with Inmate Taylor, argues the Union. The Union contends that Ms. Sampson's actions demonstrate that she was aware of the impropriety of her actions and that she has expressed remorse over this matter. This Grievant's realization that she was acting inappropriately demonstrates her potential to positively respond to correction action short of termination, argues the Union.

Based upon the above, the Union asked that the grievance be sustained.

DISCUSSION

Procedural Arbitrability

The parties have clearly and unequivocally stated in Section 5.04, "*Should the Grievant fail to comply with the time limits specified herein, that grievance shall be terminated and considered resolved in favor of the Employer.*" The parties have also negotiated a specific section of the grievance procedure (Article 5.08) to address disciplinary grievances. This is a separate procedure that is to be followed in place of Article 5.05, "...*unless mutually agreed otherwise*" (Article 5.08 C.). Step 1. States in pertinent part:

An employee or an authorized Association representative may file a grievance directly to the Agency Head/Director or designee of the employing agency at Step Three (3) either within ten (10) days of the effective date of the action or within ten (10) days after receipt of the notice as to the action, whichever is later."

In the instant matter the Grievant's representative submitted the grievance to NCCI Labor Relations on August 8, 2001. This actions is within the ten-day time limit because Ms. Sampson was terminated on July 30, 2001. However, did such actions comport with the requirements that the parties have imposed upon themselves? Article C. 1. Step 3 goes on to state:

"The grievance may be submitted by serving written notice (including a copy of the grievance) presenting to the Agency Head/Director or designee. The mailing of the grievance appeal shall constitute a timely appeal, if it is postmarked within the appeal period. Envelopes lacking a legible postmark shall be assumed to be mailed three (3) days prior to their receipt.

Upon receipt of the grievance, the Agency Head/Director or designee shall Schedule a meeting to be held with fifteen (15) days unless the parties mutually Agree otherwise."

A further reading of this Article and of Article C. 2. Step 4 demonstrate that the parties have carefully established deadlines for responses by the Employer (including the involvement of the Office of Collective Bargaining) and for the appeal of grievances and the procedures to deliver them. This amount of precision and careful crafting of language may be difficult to follow for someone new to the process, yet it is what the parties have agreed upon.

In Article 5.02 F. the parties also have taken the extra step of clarifying the meaning of having a number assigned to a grievance by an Agency designee. It states:

"Grievance numbers shall be assigned by the Agency designee at the level it is originally filed. The assignment of a number is merely for tracking purposes and shall not be construed as a recognition that it is a valid grievance."

The Union points out that this section indicates that when Site Representative Ryan Bacon submitted the grievance to NCCI Labor Relations on August 8, 2001, it was filing its grievance with the Department by operation of the first sentence in Article 5.01 F. This argument would have been more persuasive if Mr. Bacon would have simply filed the grievance at the NCCI office. However, several facts undermine this argument.

First, it is clear from viewing Article 5 as a whole that a Step 3 filing is to be made with the Department's Central Office Labor Relations Section. Article 5.05 C., Employing Agency Director, is similarly worded (sometimes with the exact same phraseology) to Article 5.08 C. 1. Step 3. In Article 5.05 C, if a grievance is not resolved at the first two steps of the grievance procedure it may be appealed (by mail) to Central Officer Labor Relations, and not to NCCI Labor Relations. It is reasonable to assume that the parties' intended Step 3 of Article 5.08 C. to work in a similar fashion as it does

in Section 5.05 C. There was also no evidence presented to indicate that the requirements of 5.08 C. are new or untested.

Mr. Bacon testified that although he submitted the instant grievance to NCCI Labor Relations on August 8, 2001, he also mailed a copy to Central Officer Labor Relations. Under direct and cross-examination Mr. Bacon stated that he spoke to OEA Representative, Henry Stevens, who instructed him to submit the grievance to the NCCI Labor Relations Officer and to send a copy to a specific Labor Relations Officer (name not given) at the Department's Central Office. Mr. Bacon testified that he sent a copy to Henry Stevens and to the Department's Central Office the Monday following July 30, 2001. He said he *"received a green card back to get reimbursed."* Mr. Bacon also testified that he had never filed a grievance before the instant grievance.

Mr. Bacon did not have the *"green card"* or receipt from the certified mailing, and there was no expense form or reimbursement documentation submitted into evidence to verify the date of the mailing. The only documentation that the Employer has is an envelope postmarked August 21, 2001. It was sent first class, not certified, and was received by Central Office Labor Relations on August 23, 2001. Although Mr. Bacon was apparently a new representative, his credibility in this matter is important. More importantly he did not testify that he made a mistake. He stated he followed Mr. Steven's directive to the letter and mailed the grievance in a timely fashion. It would seem reasonable that if Mr. Bacon was reimbursed for the certified mailing of the grievance, there would be a receipt and a Union accounting paper trail for this reimbursement. With such documentation the Union's case is strengthened, without it Mr. Bacon's veracity comes into question.

The Union made the argument that the Employer never raised the issue of arbitrability prior to the arbitration. The Employer admits to this fact but argues that it is not precluded from raising this issue at the arbitration hearing. Although some arbitrators have held that an employer waives its rights to raise an issue of arbitrability if it fails to do so at earlier steps in the grievance procedure, each case must be evaluated on its own merits. The parties to this dispute have a mature collective bargaining relationship. They formed the rules over this period of time by which they conduct business and they have agreed upon the penalties for not following those rules. The rules are replete with time limits and procedures for mailing. There was no evidence presented to demonstrate that the parties have been liberal on the time limits or have failed to follow their own procedural guidelines.

In spite of the above emphasis on timelines and processing, a waiver or satisfactory compliance with negotiated procedures are possible (See Article 5.98 C. Procedure). However, such a claim must be supported by clear and convincing evidence and not implication (See *Ravenna Arsenal*, 70-2 8325 (Dworkin, 1970) and *Mosaic Tile Co.*, 13 LA 949, 950 (Cornsweet, 1950). In this particular matter, I find such evidence does exist. The Employer, in its Step 3 response, agreed with the Union that the grievance had no procedural defects. Mr. Weimer and Ms. Decker signed the 3rd Step response that contained the definitive statement: *"To the question of procedural objections, the Union/Management had none and the hearing was considered properly constituted"* (See Jx 2).

These individuals represent the Department's Central Officer Labor Relations function. This is the level at which a discharge grievance is to be first filed in accordance

with Article 5.08 C. 1. They affirmatively stated that they found no procedural faults with the grievance. Furthermore, in a subsequent mediation that involved another state agency DAS (OCB), the issue of procedural arbitrability was not raised. I find this to be clear and convincing evidence that the parties and particularly the Employer considered the grievance to be properly filed. This was in spite of the fact that there was evidence to suggest that Mr. Bacon had submitted the grievance to NCCI Labor Relations in a timely fashion, but had not mailed it to Central Officer Labor relations until August 21, 2001. The Employer precluded itself from raising the issue of timeliness.

Merits

The overwhelming weight of the evidence supports the Employer's actions to discharge the Grievant. I find the letter that the Grievant admits sending is clear and convincing evidence of a personal relationship with Inmate Taylor. The phrases "*Miss you, miss you, miss you*" and "*Think about you everyday*" strongly support this conclusion. This was far more than a letter showing concern for the welfare of a former library worker. Furthermore, the use of personal nicknames for her daughter and the knowledge shared about her daughter with Inmate Taylor are additional evidence of the nature of this relationship. The manner in which the Grievant surreptitiously sent the letters simply reinforces the fact that she felt a need to conceal this relationship. Inmate Holley's letter of May 22, 2001 to Inmate Taylor provides further corroborative evidence of the personal relationship between Ms. Sampson and Inmate Taylor.

Correctional institutions have "security" as their central mission. Rules 46A and B are reasonable rules given this mission and there is a need for employees to be aware of the importance of maintaining an "arm's length" professional relationship with inmates.

Although Ms. Sampson stopped writing to Inmate Taylor, I am not convinced that progressive discipline would be adequate to address Ms. Sampson's situation. The main issue appears to be that of trustworthiness. An employee who allows herself to be compromised to the extent that she see engages in covert behavior (that she knew to be against Department rules) because of her personal feelings toward an inmate cannot be trusted to work in a security conscious environment.

AWARD

The grievance is procedurally arbitrable, but is denied on the merits.

Respectfully submitted to the parties this 3rd day of June, 2002.

A handwritten signature in black ink, appearing to read 'R. Stein', written over a horizontal line.

Robert G. Stein, Arbitrator