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#1679

IN THE MATTER OF ARBITRATION

BETWEEN

STATE OF OHIO – DEPARTMENT OF REHABILITATION/CORRECTION

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

Grievant: Kimberly Gordon

Case No. 27-20 (20020924) 5646-01-03

Date of Hearing: April 24, 2003

Place of Hearing: Mansfield, Ohio

APPEARANCES:

For the Union:

Advocate: Patricia Howell
2nd Chair: Mick Bradshaw

Witnesses:

Kimberly Gordon
Mick Bradshaw

For the Employer:

Advocate: Ray Mussio
2nd Chair: Rick Corbin

Witnesses:

David Blake

ARBITRATOR: Dwight A. Washington, Esq.

Date of Award: June 23, 2003

INTRODUCTION

The matter before the Arbitrator is a grievance pursuant to the Collective Bargaining Agreement ("CBA") in effect March 1, 2000, through February 28, 2003, between the State of Ohio and the Ohio Civil Service Employees Association AFSCME Local 11, AFL-CIO ("Union").

The issue before the Arbitrator is whether just cause exists to support the removal of the Grievant, Kimberly Gordon ("Gordon"), for violating the Department of Rehabilitation/Corrections ("DRC") Rules regarding an unauthorized relationship and lying during an investigation. The discipline was issued because the Grievant's conduct was such of a serious nature that removal was warranted.

The removal of the Grievant occurred on September 9, 2002 and was appealed in accordance with Article 24 of the CBA. This matter was heard on April 24, 2003 and both parties had the opportunity to present evidence through witnesses and exhibits. Post hearing briefs were received on May 12, 2003 at which time the record was closed. This matter is properly before the Arbitrator for resolution.

BACKGROUND

Gordon worked for DRC as a Corrections Officer ("CO") since March 24, 1997 and at the time of removal had no prior discipline of record. Gordon worked at Mansfield Correctional Institution ("ManCi") on the first shift. CO's are required to exemplify the highest order of credibility due to the public trust required, being that their primary responsibility is to monitor and direct all inmate activity while incarcerated. On September 9, 2002 the Grievant was removed for violation of DRC Standards of Employee Conduct ("Rules"): Rule 24 – lying during an official investigation; and Rule 46(A) – unauthorized relationships with any individual under the supervision of the Department.

In June 2002, confidential information came to the attention of ManCi that a relationship existed between the Grievant and a former inmate, named Darco Graves ("Graves"). Graves was incarcerated at ManCi for two (2) years and was released on parole on October 22, 2001.

David Blake ("Blake"), Assistant Investigator, was assigned the investigatory task and spoke with the informant who indicated that the Grievant was seeing Graves who now resided in the Cleveland, Ohio area. The Grievant's home phone records were subpoenaed by Blake which contained calls to Graves' cell phone and pager (Joint Exhibit ("JX")-4A). The Grievant's phone records also revealed calls to Graves' girlfriend, Candice Cooper's ("Cooper")[1] home number and to Graves' mother's cell phone. Each of these calls originated from the Grievant's home phone number.

Blake subpoenaed the cell phone records of Graves which indicated twenty (20) calls were made to the Grievant's home number and six (6) calls were made to her cell phone, during the months of May/June 2002 (JX-5, pp. 13 – 14). The Grievant's home phone records during May 2002 indicated that a total of eighteen (18) calls were made to either Graves', Cooper's or Graves mother's phones (JX-5, p. 13, JX-4A).

On July 25, 2002 Blake interviewed Graves who was incarcerated in the Cuyahoga County Jail for violating certain terms of his probation. Blake stated that he met the Grievant while he was incarcerated at ManCi and since his release he had spoken with her about ten (10) or eleven (11) times (JX-3A, p. 4). Graves indicated that he considered their relationship like brothers and sisters, just friends. Blake further indicated that the Grievant would call him at Cooper's or his mother's house sometimes. Graves provided the cell and home numbers of Cooper and his mother's to Blake. Graves, also believed that he sent the Grievant a Mother's Day card from an upscale restaurant, to demonstrate that he was no longer "hanging out" in undesirable places (JX, 3A, p. 7). Finally, Graves agreed to participate in a control call to the Grievant the following day with the understanding that the conversation would be recorded. Throughout Blake's interview with Graves, Parole Officer Munez ("Munez") was present in the room.

[1] Graves was living with Cooper apparently during the May – July 2002 timeframe.

numbers; daughter's age; and who lived with her during the April – June of 2002 time period (JX, 3B, pp. 1 – 2). The Grievant, initially denied that any former inmate at ManCi had called her home, except Christopher Small who was a boyfriend of her cousin, Twyla Walton ("Walton"). Blake asked the Grievant if she had corresponded with Graves within the past three (3) months. The Grievant initially replied – No! (JX-3B, p. 6) Upon further questioning the Grievant denied ever calling Graves' pager, cell phone or his mother's house. (JX-3B, p. 6)

Blake at this time told the Grievant that he had interviewed Graves in Cleveland and was aware of the phone calls and other exchanges between them. The Grievant was then asked if Graves had called her the previous Friday. The Grievant, finally, admitted to receiving the call on July 26, 2002, and then added, that Walton told her Graves had called her home one previous occasion. The Grievant had a general recollection about the phone conversation and denied receiving a card from Graves. Furthermore, the Grievant denied talking to Graves ten (10) or twelve (12) times or giving Graves her phone numbers. (JX-3B, p. 8) At no time did the Grievant admit to calling Graves', Cooper's or Graves mother's numbers.

The Grievant was placed on administrative leave and ultimately removed on September 9, 2002 for violation of Rules 24 and 46(A). The Grievant received a copy of the Rules on October 18, 2001 and received training on employee conduct and responsibility (JX-6, pp. 1 – 7), which included an understanding that unauthorized relationships with parolee's are unacceptable.

During the pre-disciplinary and Step 3 hearings the Union questioned the thoroughness of the investigation by pointing out critical evidence (i.e. questions as to how Graves obtained the phone numbers and why was Graves calling the Grievant) was not solicited. The credibility of Graves and his motivation to be less than truthful to obtain his release from jail by cooperating taints the investigation.

The employer relies upon the phone records submitted as well as the statement of the Grievant which indicates she was lying during the investigation.

On July 26, 2002 the control call was made by Graves to the Grievant's home phone. Blake and Munez were present during the call, which was taped and transcribed verbatim. Certain portions of the transcribed transcript contained the following **(emphasis added)**:

Grievant: "Hello, yes.
Graves: Hello, what's up Kimmy, what are you into?
Grievant: We are going out of town.
Graves: You going out of town?
Grievant: **Yes**.
Graves: **Where** are you going?
Grievant: To Detroit.
Graves: For what?
Grievant: What do you mean, for what?
Graves: To gamble or something?
Grievant: **Yes** and to see a friend of mine tonight. Why what is going on..."(JX-3C, p. 1, LL 22 – 42).

Graves: "Your check ain't gonna be nothing. Your little **girl** going with you?
Grievant: No...."(JX-3C, p. 4, LL 4 – 6).

Graves: My friends ain't got you in nothing. You know what I am saying. What did you do with the Walnut card? **Did you get the one Walnut card**?
Grievant: **Yes**, I got it.
Graves: You ain't even looked it up on the internet.
Grievant: I ain't seen or put nothing on.
Graves: You didn't look it up on the internet.
Grievant: No...."(JX-3C, p. 8, LL 18 – 29).

Graves: "I am not going to be in no dilemma. No, I am not going to trip like that. You have always been my friend. It is cool. I am not going to trip like that.
Grievant: You just wait. I am going to just wait.
Graves: I am not going through that no more. I don't know what time it is. I got to get to work. Look when **are you coming back**? What time **are you leaving**? When you leaving?
Grievant: I am leaving at 12 o'clock.
Graves: No, I will be at work. Call, holler **at me** when you get back.
Grievant: **Alright**." (JX-3C, p. 9, LL 20 – 32).

At no time during the phone conversation did Graves identify himself, nor did the Grievant require him to. The phone conversation lasted about ten (10) minutes and suggested to DRC that the Grievant and Graves had prior conversations and were comfortable with each other to discuss personal matters with no reservations.

On July 29, 2002 the Grievant was interviewed by Blake in the presence of her union representative, and anecdotal questions were asked regarding her home and cell phone

ISSUE

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

RELEVANT PROVISION OF THE CBA
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. In cases involving termination, if the arbitrator finds that there has been an abuse of a patient or another in the care or custody of the State of Ohio, the arbitrator does not have authority to modify the termination of an employee committing such abuse. Abuse cases which are processed through the Arbitration step of Article 25 shall be heard by an arbitrator selected from the separate panel of abuse case arbitrators established pursuant to Section 25.04. Employees of the Lottery Commission shall be governed by O.R.C. Section 3770.02(I).

DR&C STANDARDS OF EMPLOYEE CONDUCT
RULE 24 & RULE 46(A)

Rule 24: Interfering with, failing to cooperate in, or lying in an official investigation or inquiry.

Rule 46(A): The exchange of personal letters, pictures, phone calls, or information with any individual under the supervision of the Department or friends or family of the same, without express authorization of the Department.

POSITION OF THE PARTIES

POSITION OF THE UNION

The employer failed to demonstrate that the Grievant's conduct was aggravated requiring removal. In fact, there was no indication of a love relationship or that a conveyance of contraband occurred between the Grievant and Graves. Rule 46(A) violation, could result in a suspension or removal and no consideration was given to the Grievant's length of service, exemplary evaluations and contributions to the workplace by serving on various institutional committees.

Regarding the phone records, the majority of calls by Graves to the Grievant occurred while she was at work and the investigation failed to establish the depth of the relationship between them. The investigator did not obtain probative information from his interview with

Graves to address questions such as: How did Graves obtain the Grievant's phone numbers? Why was Graves calling the Grievant? Why were calls made while the Grievant was at work? and, when was the relationship established? Failing to require Graves to address those matters undermines the investigation and is indicative of the employer's attempt to mold the investigation results based solely upon the phone records.

Graves' credibility is at risk based upon the promise that if he cooperated, he would be released from the county jail. The inducement occurred prior to the control call on July 26, 2002 and, thereafter, Blake was released from jail.

Equally troublesome, is the employer allowed the Grievant to remain on the job for almost two (2) months after finding out about the alleged relationship in early June. The Grievant was placed on administrative leave at the end of July 2002 after the conclusion of the investigation, not during the investigation. DRC demonstrated no sense of urgency, indicating that the removal was not for just cause, but punitive.

Moreover, in other cases involving unauthorized relationships the employer suspended one (1) employee (Joe LeMaster) for ten (10) days and another (Jan Smith) for one (1) day, indicating the employer's willingness to use discipline in a corrective manner for similar violations. The Grievant was treated differently than LeMaster and Smith. The disparate treatment of the Grievant warrants that the removal be modified to allow for corrective intervention, not issue the death penalty.

The employer failed to meet its burden of proof and just cause was not established, requiring the Grievant's reinstatement with all economic benefits, or in the alternative, suspension for an appropriate period of time should occur.

POSITION OF THE EMPLOYER

The Grievant was removed for lying during an investigation and having an unauthorized relationship with a parolee. The Grievant was aware of the work rule forbidding unauthorized relationships with individuals under DRC's supervision, including phone calls (JX-6, p.1). The

Grievant admitted at the hearing that she was aware of the unauthorized relationship policy, and she received training on the rules contained within the Standards of Employee Conduct (JX-6, p.7). The rules were communicated to the Grievant and no evidence exists to suggest she was unaware of what was expected as a CO.

The cell phone records, of Graves and the Grievant established the fact that numerous calls were made between them during May, June and July 2002. As example, Graves cell phone records indicates he called the Grievant's home number on May 15th, 16th, 17th, 18th, 19th, 21st, 23rd and 24th. The majority of the calls occurred while the Grievant was at work and indicates durations of three (3) minutes or less. However, for calls to her home that occurred after her shift ended the durations were: 18 minutes on May 17th at 10:19 p.m.; 12 minutes on May 18th at 6:54 p.m. and 15 minutes at 8:55 p.m.; and 9 minutes at 9:12 p.m. on May 19th. Additionally, Graves made several calls to the Grievant's cell phone that lasted from one (1) minute to twelve (12) minutes.

Blake interviewed Graves on July 25, 2002 who admitted meeting the Grievant while he was incarcerated at ManCi, and after release he had been in contact by phone with the Grievant at least ten (10) or more times. Graves, considered their relationship as a brother/sister and believes he sent her a card for Mother's Day from a restaurant. Additional phone contacts would occur at Cooper's house, via cell phone where he stayed sometimes or his mom's house. Graves agreed to conduct a control call to the Grievant understanding that the phone conversation would be monitored and transcribed verbatim.

On July 26, 2002 Graves called the Grievant at home and a ten (10) minute conversation occurred which was recorded by DRC. Graves did not identify himself at any time, and they talked about rumors at ManCi, weekend plans of the Grievant going to Detroit, did she receive the walnut card and other topics, suggesting to Blake that they had previous conversations in the past.

Blake interviewed the Grievant on July 29, 2002 who initially denied any contact with Graves since his release. Upon presentment of evidence regarding the control call the Grievant

then admitted contact with Graves, as well as one time prior her cousin told her that Graves called. The Grievant did not report this contact or any other contact to her supervisor, as required by the DRC policy.

An excuse offered during the investigatory interview was that her cousin, Twyla Walton ("Walton") may have used her phone. Another excuse included, she was unaware that Graves was on parole and that a male cousin of Graves lived with her who could have called Graves. The male cousin excuse was not mentioned at the administrative review, the pre-disciplinary meeting or during the Step 3 grievance meeting. The "surprise" excuse demonstrates the Grievant's willingness to create false evidence and continue to cover up her conduct.

Regarding the phone calls between Graves and the Grievant, calls that occurred while the Grievant was at work that were very brief suggesting that only a message was left on the answering machine. The Graves' interview, the control call and the phone records established the consensual relationship engaged in by the Grievant, contrary to the rules.

The Union's attempt to establish disparate treatment that other CO's were given lesser discipline for similar conduct, failed to establish the similarity in the fact pattern. The union witness was not familiar with the prior cases and a clear distinction indicates an absence of falsification, contrary to the Grievant's facts.

The Grievant's willingness to continually provide false information at each step of the proceeding supports a violation of Rule 24, and the corroborated unrefutted direct evidence confirms a violation of Rule 46(A). DRC took the appropriate action after weighing all the variables, and her removal is supported by just cause.

BURDEN OF PROOF

It is well accepted in discharge and discipline related grievances, the employer bear the evidentiary burden of proof. see, Elkouri & Elkouri – "How Arbitration Works" (5th ed., 1997)

The Arbitrator's task is to weigh the evidence and not be restricted by evidentiary labels (i.e. beyond reasonable doubt, preponderance of evidence, clear and convincing, etc.)

commonly used in the non-arbitable proceedings. see, Elwell- Parker Electric Co., 82 LA 331, 332 (Dworkin, 1984).

The evidence in this matter will be weighed and analyzed in light of the DRC burden to prove that the Grievant was guilty of wrongdoing. Due to the seriousness of the matter and Article 24 requirement of "just cause", the evidence must be sufficient to convince this Arbitrator of guilt by the Grievant. see, J.R. Simple Co and Teamsters, Local 670, 130 LA 865 (Tilbury, 1984).

DISCUSSION AND CONCLUSIONS

After thoughtful consideration of the testimony and all of the evidence submitted by the parties, I find that the grievance is denied. My reasons are as follows:

DRC presented the following evidence in support of an unauthorized relationship with Graves: (1) the Grievant's home phone records for May 2002 (JX 4A); (2) the Grievant's cell phone records for April, May, June & July of 2002 (JX 4B): (3) Graves' cell phone records for May & June 2002 (JX 4C); (4) Graves' investigatory interview of July 25, 2002 (JX 4C); (5) verbatim transcript of the July 26, 2002 control call between the Grievant and Graves (JX 3C); (6) the Grievant's investigatory interview dated July 29, 2002 (JX 3B); and (7) Blake's testimony at the Arbitration hearing. DRC presented evidence that the Grievant was untruthful in the investigatory interview and has remained untruthful throughout these proceedings.

The union relies solely on the testimony of the Grievant to refute the unauthorized relationship charge, as well as the lying in an official investigation charge.

Despite the unrefutted phone records, the control call and Graves' interview the Grievant continues to cover-up and lie without offering any proof to support her defenses or refute DRC's evidence. I find the facts are overwhelming that multiple phone contacts occurred between the Grievant and Graves without the knowledge of DRC in May, June and July 2002. The Grievant's version and/or excuses were simply not believable and did not rebut any of the employer's material facts.

The explanations of the Grievant regarding either her cousin or a male boyfriend making over twenty-five (25) calls to Graves', his mother's or Cooper's phones without her knowledge defies common sense. Her theories are unsupported by any credible evidence and no witnesses or evidence was offered to verify her assertions.

An analysis of this matter is relatively uncomplex. The Grievant was aware of DRC's policy regarding unauthorized relationships (Rule 46A) and lying during an investigation (Rule 24) and nothing in the record suggests that either Rule was unfair or unreasonable, given that, the facts support removal for the unauthorized relationship maintained by the Grievant with Graves. In an effort to cover up this relationship the facts further established the Grievant lied to Blake, and in this Arbitrator's opinion, continued to be less than credible at the hearing.

As an example, the Grievant testified when she stated that she had **not** corresponded with any inmates or parolees, she understood correspondence to mean writing to or seeing an inmate in person. The Grievant further testified under oath that she **did not** know that Graves was a parolee, nor did she make any calls to Graves, his mother or Cooper's phones. The Grievant's sworn testimony is not credible in light of the corroborated phone records to support the informant's theory and Graves' statements made during the investigatory interview. The foregoing facts, and the continual refusal to come clean by the Grievant, warrants no mitigation of the discipline. Moreover, the impact of the Grievant's participation in the control call underscores the gravity of what's at stake and further convinced this Arbitrator that removal was appropriate.

In the transcribed conversation the Grievant had numerous opportunities to end the discussion with Graves, particularly if she did not know his voice or had not spoken with him previously. Graves, made comments on her travel plans; her daughter; a card; and he'll call her when she gets back from Detroit. The Grievant willingly participated, and her **own words** provides the singular, most credible evidence to deny this grievance.[2] Simply, the Grievant's

[2] At no time during the July 26, 2002 conversation did the Grievant indicated uncertainty as to the caller **or** any subject discussed by them.

deceitful attempt to cover up her relationship with Graves is the kind of action that could compromise her ability to function effectively as a CO. An example of such potential compromising conduct is illustrative in the following:

> Graves: "You know we have to go out to eat or something.
> Grievant: Somebody might really see us and think that shit is real.
> Graves: I know. Don't worry about it. We haven't done nothing it ain't nothing. You know what am saying? People were saying that when I was there.
> Grievant: Quick talking. I wish I did know the mother fucker that was starting it. I would cuss his ass out and **put him in the hole too**..."(JX 3C, p. 4, LL 29 – 37) (Emphasis added).

The Grievant's words are troublesome, considering she had the apparent authority to carry out this punitive vendetta, absent the removal. The Grievant's position requires the highest of public trust and confidence. Credibility, lacking herein by the Grievant, is paramount for a CO due to the ongoing need for safety of herself and co-workers.

The phone records corroborate the unauthorized relationship and no plausible rationale was offered to refute DRC's credible evidence. Regarding when the time of day the calls occurred to the Grievant's[3] home, is not instructive as to why the calls occurred and why the Grievant didn't report to her supervisor any calls or messages by Graves.

The disparate treatment theory of the union centers upon DRC employees who were not ostensibly removed for violating the same policy. The comparables submitted by the Union (i.e. Smith and LeMaster) indicate a violation of Rule(s) 7 – Failure to follow post orders, 45(B) – Preferential treatment or 46(D) – Residing with a current or former individual under supervision. However, no evidence was offered that LeMaster or Smith violated 46(A) of that the similarity of their conduct, if any, compared to the Grievant's. Unanswered questions abound regarding the applicability of the LeMaster/Smith discipline to the Grievant's. Such as: How did the unauthorized relationship(s) start in the LeMaster/Smith matters? Did LeMaster/Smith lie/cover up the relationship(s)? How was the relationship(s) discovered? Did LeMaster/Smith report any contact(s) to the authorities?

[3] Union contends that the Grievant was at work when the majority of calls occurred, hence no contact occurred.

Disparate treatment is not per se unjust and mitigation evidence regarding consistency and enforcement of rules in a nondiscriminatory manner is important. See, In re Ohio Department of Rehabilitation and Corrections and O.C.S.E.A. Local 11, AFSCME, 93CA1186,1187 (Riveria 1990) "[To] prove disparate treatment, the "different treatment" must have no reasonable and contractually appropriate explanation or be motivated by discrimination or ill purpose. " In re State of Ohio and A.F.S.M.E Local 11, 99 LA 1169, 1173 (Riveria 1992). Without similar comparables to Grievant's facts, the **LeMaster** and **Smith** matters are readily distinguishable on the basis that the specifications are dissimilar, and do not allow an appropriate comparison based upon being similarly situated. Further, no facts exist to find the removal of the Grievant was motivated by animus, of any kind, to mitigate against the removal. Grievant's mitigation theory based upon the LeMaster/Smith grievances, fails to demonstrate disparate treatment warranting a downward departure of the removal.

This Arbitrator is convinced that under any evidentiary standard, DRC met its burden of just cause for violations of Rules 24 and 46(A) and the discipline will stand unabated.

AWARD

The grievance is denied.

Respectfully submitted this 23rd day of June, 2003.

Dwight A. Washington, Esq., Arbitrator