#1803

IN THE MATTER OF ARBITRATION

BETWEEN

DISTRICT 1199 SEIU

AND

OHIO DEPARTMENT OF CORRECTIONS

Before: Robert G. Stein

Case # 27-24-040520-1025-02-12
Lisa Corwin, Grievant

Advocate(s) for the UNION:

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Advocate(s) for the EMPLOYER:

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INTRODUCTION

This matter came on for hearing before the arbitrator pursuant to the collective bargaining agreement (herein "Agreement") between the State of Ohio (herein "Employer", "DRC" or "Department") and District 1199, SEIU (herein "Union"). The Agreement is effective from June 1, 2003 through May 31, 2006 and includes the conduct that is the subject of this grievance.

A hearing on this matter was held on October 13, 2004. The parties mutually agreed to the hearing date and location and were given a full opportunity to present both oral testimony and documentation supporting their respective positions. The parties each subsequently submitted post-hearing briefs in lieu of making closing arguments. There was a problem with the submission of the Union's brief in that it was written by the Grievant and included testimony that was not presented in the hearing. The arbitrator halted any consideration of this case until this problem was corrected. The parties spoke to one another and forwarded opinions to the arbitrator on this matter. After a period of several weeks the arbitrator ruled he would not consider any information or arguments made

regarding evidence not presented in the hearing. The record was finally closed on December 17, 2004.

The parties have also agreed to the arbitration of this matter pursuant to Article 7 of the Grievance Procedure.

ISSUE

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

RELEVANT CONTRACT LANGUAGE
(As cited by the parties, listed for reference. See Agreement for actual language)

ARTICLES 6, 8

BACKGROUND

The Grievant is Lisa Corwin, ("Grievant," "Corwin"), a Social Worker 2. Her employer is the Ohio Department of Corrections/Southeast Correctional Institution ("SCI," "DRC," "Employer" or "Department"). Corwin had been employed with DRC for approximately fourteen (14) years and was terminated on May 14, 2004. She was terminated from her employment for her alleged violation of DRC Policy 76-VIS-02 after she was charged with allowing two three-way telephone calls from her office. The rule violated was Employer Standards of Conduct 45A, which prohibits the following: "Without express authorization, giving preferential treatment to any individual under the supervision of the Department, to include but

not limited to: to offering, receiving, or giving of a favor. The telephone calls, which were made on March 9, 2004, were arranged by the Grievant and provided for telephone conversations between Ms. April Smetley, inmate Mathew Fox, an inmate at Noble Correctional Institution ("NCI") and inmate Brian Skinner, an who was incarcerated at Southeastern Correctional Institution ("SCI"). Inmates Fox and Skinner are domestic partners and were in a relationship at the time of their convictions. Both inmates were serving sentences of several years for felony convictions related to corrupting a minor and pandering sexual material involving a minor.

After being charged with violating Policy 76-VIS-02/Rule 45A for permitting the prohibited telephone conversations, the Grievant was subsequently discharged from her employment. She subsequently filed a grievance stating her termination was not for just cause.

SUMMARY OF EMPLOYER'S POSITION

The Employer contends that the facts in this case are unambiguous. The Grievant allegedly acted in clear violation of Department rules in attempting to place a total of three three-way telephone calls involving inmates Fox and Skinner and their mutual friend, April Smitley. The Grievant completed two of the calls on the same day. The Department asserts that the calls were made as a favor to the two inmates and that

there was no therapeutic planning or documentation regarding their execution.

The Employer also argues that, although the Grievant was a long-term employee, her actions in this matter have irreparably destroyed her credibility in working with inmates. Moreover, the Employer argues the Grievant's fourteen years of experience should have taught her that her actions were not only improper but had the potential of placing the safety of the inmates and others in jeopardy.

Based upon the evidence and testimony, the Employer urges the arbitrator to deny the grievance.

SUMMARY OF UNION'S POSITION

The Union asserts that this is a case involving a fourteen-year employee with an unblemished and exemplary work record. The Union argues that Corwin's work record demonstrates she has been consistently been rated above average and has constantly given more than what is expected of her.

The Union also claims asserts that the three-way telephone calls were designed to be of a therapeutic nature. Moreover, the separation order the Employer relies upon in justifying its actions was never placed in the inmate's mental health file in order to alert staff, and the separation order did not addresses telephone calls. The Union also points out that

prior to the instant offenses the Department housed both inmates Fox and Skinner in the same institution for three months and then sent them to another institution for another two months prior to separating them.

Based upon the above the Union urges the Arbitrator to sustain the grievance.

DISCUSSION

Generally, in an employee termination case, an arbitrator must determine whether an employer has proved clearly and convincingly that a discharged employee has committed an act warranting discipline and that the penalty of discharge is appropriate under the circumstances. *Hy-Vee Food Stores, Inc. and Local 147, Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen, and Helpers of America*, 102 Lab. Arb. 555 (1994). Most arbitrators will not substitute their own judgment for that of an employer unless the penalty imposed is deemed excessive given any mitigating circumstances. *Verizon Wireless and CWA, Local 2336*, 117 Lab. Arb. 589 (2002). However, any judgment rendered must be based upon the Collective Bargaining Agreement, relevant convincing evidence and testimony, and any applicable law. The Employer must produce clear and convincing evidence that the Grievant committed the prohibited act, knew it was contrary to Department policy, and was aware that

discharge was the only reasonable measure to take under the circumstances.

In large part, the parties concur with the essential facts of this case. Moreover, the Grievant admits she permitted inmates Fox and Skinner to engage in three-way telephone conversations, involving a mutual acquaintance. After listening to the tape of the conversations, it is clear that the calls evoked an emotional response from both inmates. Most notable was the reaction of inmate Fox, who broke down crying. The Grievant admitted she never notified NCI of this "therapeutic intervention" even though she knew Fox was on the mental health caseload. It is also clear that the Grievant had only a vague idea of the convictions of each inmate (See Jx 3, p. 36). The Grievant was also aware of the fact that these two inmates were under a separation order, yet she never inquired as to the meaning of the order.

The Grievant stated in the documentation that a telephone call was a "common therapeutic intervention" (Jx. 3, p. 18). However, the Grievant was speaking of telephone conversations between inmates undergoing treatment and individuals outside of the corrections system. This matter involved two inmates at two different institutions, NCI and SCI. The Grievant's position is that she had no responsibility for inmate Fox's welfare during these conversations. During the calls, inmate Fox was not accompanied by a social worker or psychologist, and even though he

was on the mental health caseload at NCI, no one at NCI was aware of these conversations, labeled as therapeutic interventions by the Grievant. Inmate Fox's depression following the telephone calls, as validated by Dr. Thrower, is disturbing. The Grievant's defense that her actions were therapeutically based, is undermined by the fact that she never documented this "therapy" in inmate Skinner's mental health file. All mental health professionals, regardless of where they practice, are expected to adhere to standards of documentation (see SOP 4, 5). The unique nature of arranging calls between inmates from different institutions providing even more of a reason to document these events.

Because the Grievant did not testify at the arbitration hearing, the arbitrator is deprived of the Grievant's first hand account of her rationale and motives for her actions. When considering whether there is mitigation to an action, such testimony can be revealing. Without such testimony, an arbitrator is obligated to understand the Grievant's actions through second hand accounts, stipulated facts, and other relevant evidence.

The facts and circumstances of the calls arranged by the Grievant do not comport with her main defense that they were therapeutic. I must concur with the largely unrebutted testimony of Dr. Sydney Thrower that the calls were professionally unsound. The lack of documentation of the calls in inmate Skinner's mental health file, and the fact they were made without consultation with mental health supervision at NCI (to assist inmate

Fox) casts serious doubt on any assertion by the Grievant that they were designed to be a therapeutic exercise.

There are two disturbing things about the Grievant's actions in this matter. The first is her apparent lack of inquiry as to the separation order in place for inmates Fox and Skinner, and the second concern is her failure to inquire about the appropriateness of arranging an unusual inmate-to-inmate telephone call between institutions. The Grievant's purposeful arrangement of a three-way call involving an outside person without any apparent thought to the unusual aspects of such a call does little for her credibility. Additionally, the arrangement and execution of the subject calls without supervisory input, documentation, and arranged support for inmate Fox, gives the distinct appearance that the arrangement and participation in the calls lacked a therapeutic basis. A professional employee of fourteen years service should reasonably know what is normally within her purview of responsibility and authority and what is not.

Based upon the totality of evidence and without hearing from the Grievant, it is reasonable to conclude that this fourteen year employee was not engaged in therapy, but took it upon herself to do a favor for inmates Skinner and Fox. A correctional institution is in large part a paramilitary operation that requires adherence to the discipline of rank and formal policies and procedures. This arbitrator has ruled upon several

cases involving Rule 45 violations, and it is well-documented that doing personal favors for inmates in a correctional institution may pose a serious threat to the stability of the institution, the health and safety of the prison population, and may pose a threat to the employees who work there. The fact that other inmates are not permitted to call their wives, girlfriends, family members, or significant others, who are also incarcerated, is alone a security concern that the Grievant apparently ignored or considered unimportant. Moreover, the fact that inmates Skinner and Fox were granted special privileges to call one another using private telephones would certainly draw the attention of other inmates, who may be disposed to exact some form of revenge on Fox or Skinner for being so privileged.

An employee, even one with a long record of good performance, is not above adherence to the fundamental principles of safety and security that are the operational foundation of a correctional institution. Even the testimony of Union witness, Dr. Stephanie Miller, supports the fact that a telephone call placed on behalf of an inmate to someone outside of the institution, let alone a three-way telephone call, should not be made unless appropriate. Dr. Sydney Thrower, a clinical psychologist, labeled such behavior as highly inappropriate. The Grievant had to have known that arranging such a three-way call was out of the ordinary, kept her activities undocumented, and did nothing to support inmate Fox,

whom she knew was on the mental health caseload of NCI. The Union supplied a copy of a case involving the discharge of another employee charged with the same offense and whom Arbitrator Graham reinstated in June of 2004. The facts of Arbitrator Graham's case are sufficiently different that no meaningful weight or precedent value can be attached to the ruling.

I find the Employer's actions in discharging the Grievant were not arbitrary, capricious, or unreasonable. Human beings will error and, had the Grievant been able to demonstrate that she made a serious misjudgment while conducting a bona fide therapeutic intervention, the outcome of this case may have been different. However, the Employer demonstrated with a combination of evidence and expert testimony that the Grievant's behavior was not a result of documented therapy, but was a deliberate act to do a favor for two inmates in direct violation of known Department policy and orders.

AWARD

The grievance is denied.

Respectfully submitted to the parties this 31st day of January, 2005.

Robert G. Stein, Arbitrator