

#1913

VOLUNTARY LABOR ARBITRATION

IN THE MATTER OF ARBITRATION BETWEEN:

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

-AND-

OHIO DEPARTMENT OF YOUTH SERVICES SCIOTO, JUVENILE
CORRECTIONAL FACILITY

GRIEVANT: Andrew Baker
GRIEVANCE NO: 35-07-(050906)-0039-01-03

Arbitrator's Opinion and Award

Arbitrator: David M. Pincus

Date: December 12, 2006

Appearances

For the Employer

Larry Alessio
Bruce Brock
Steve Wolfe
Mark Tackett

Deputy Superintendent/Investigator
Labor Relations Officer
Labor Relations Specialist
Advocate

For the Union

Karl Wilkins Jr.
Calvin Collins
Andrew Baker
Mike Hill

Chief Steward
Local Union President
Grievant
Advocate

INTRODUCTION

Pursuant to the procedures of the parties a hearing was held in this matter at the Scioto Juvenile Correctional Facility on October 6, 2006. At the hearing, the parties were provided complete opportunity to present testimony and evidence. The record was closed on or about October 27, 2006 when the parties submitted written closing arguments.

STIPULATED ISSUE

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

STIPULATIONS

The parties agree to the following joint stipulations:

1. The Grievant's date of hire with the State of Ohio is March 14, 1988.
2. The Grievant was removed effective August 22, 2005 for violating DYS Policy 103.17, General Work Rules, specifically 3.1 Dishonesty and Rule 4.11 Sexual conduct or activity with youth.
3. At the time of the removal, the Grievant had the following active prior discipline history:

11/2/04 - 15 Day suspension - 4.9 Operating a state vehicle or driving on state business without a valid license and 5.1 Failure to follow policies and procedures (transporting youth without a valid drivers' license)

12/15/02 - 3 Day fine - 4.3 AWOL three days or more and 5.1 Failure to follow policies and procedures.

4. The Grievant held the position of Juvenile Correctional Officer at the time of his removal at the Scioto Juvenile Correctional Facility.
5. The matter is properly before the administrator.

CASE HISTORY

Andrew Baker, The Grievant, was employed for eighteen years as a Juvenile Correctional Officer (JCO). He was removed from his position as a Transportation Officer on August 22, 2005.

During the course of an investigation involving alleged sexual misconduct by the Grievant, a female Youth, Michelle Vanmeter, alleged the Grievant was writing letters and "messaging around" with youth Melissa Palmer. Youth offender Palmer was eventually interviewed and confirmed Youth Offender Vanmeter's allegations.

On August 18, 2005, a removal order was authored by Superintendent Robert L. Pritchett. The Grievant was removed for the following articulated particulars:

It has been determined that you had inappropriate sexual contact with a youth and that you failed to give accurate information during an investigatory interview. Your actions are in violation of DYS Policy 103.17, General Work Rules, Rule 2.4 Bringing discredit to the agency, Rule 3.1 Dishonesty and Rule 4.11 Sexual conduct or activity with youth.

On September 6, 2005, The Grievant formally challenged the removal decision. The grievance, itself, stated in pertinent part:

Mr. Andrew Baker was removed from his position as a JCO at Scioto Village on August 22, 2005. The discipline issued was punitive and inconsistent with progressive discipline.

The grievance was not settled during subsequent stages of the grievance procedure. Neither party raised procedural nor substantive arbitrability issues. As such, the grievance is properly before the Arbitrator.

THE MERITS OF THE CASE

The Employer's Position

The Employer maintained it had just cause to remove the Grievant. Sufficient proofs were provided which support the just cause conclusion.

During the criminal investigation, the victim testified at the grand jury investigation which ultimately led to an indictment. The indictment, however, was dropped because the victim was unable to testify.

She was, moreover, interviewed by the Department regarding the allegations made by her peers. The victim confirmed that the Grievant had touched her sexually outside the unit and during a transportation trip. Unfortunately, the victim was unable to testify at the arbitration hearing; she died prior to the hearing.

The Grievant's investigatory interview provides the strongest evidence of his wrongful misconduct. Larry Alessio, Deputy Superintendent and Investigator, conducted the Grievant's interview. Alessio stressed he never formulated the questions to confuse the Grievant. Alessio testified that the Grievant understood the questions and initialed each response at the end of the process. He noted the Grievant admitted the victim had been sexually active and had sexual contact and/or activity with her. Obviously, the Grievant never reported these prior incidents, as required by directive, because he had something to hide.

Within this context, the Grievant's testimony at the hearing lacks veracity. He attempted to recant responses given during the investigatory interview. He maintained his responses were unintended, and he never had sexual contact with the Youth Offender.

The record indicated the Grievant's actions brought discredit to the Department. Newspapers and television broadcasts illuminated the indictment which identified the Grievant as employed by the Department.

THE UNION'S POSITION

The Union maintained the Employer did not have just cause to remove the Grievant. The Union opined that the investigation was defective causing proof difficulties. Other elements of the Employer's case in chief were also vigorously challenged.

The investigation used to establish just cause was defective in a number of ways. First, a number of alleged incidents took place without any specified dates. Second, in light of these serious allegations, it is surprising that Youth Offender Palmer never filed any formal complaints in 2004. Third, video evidence was never evaluated to substantiate Youth Offender Palmer's facility-specific claims. Fourth, a credible evaluation of the vehicle-specific claim would have determined physical contact was virtually impossible. Last, the charges were never supported by any credible evidence.

In contrast to the previously articulated defects, the Grievant has consistently denied having sexual contact with the Youth Offender. Allesio's questions were purposefully ambiguous causing unintended responses by the

Grievant. The skewed questions and related responses should be given very little weight. The dishonesty charge was, therefore, never supported by the record.

Similarly, the Employer erred by charging the Grievant with bringing discredit to the Department. Granted, the Department and the prosecutor brought criminal charges against the Grievant. By never being convicted, this particular charge is nothing but a bogus attempt to “stack the deck” against the Grievant.

THE ARBITRATOR'S OPINION AND AWARD

From the evidence and testimony introduced at the hearing, a complete and impartial review of the record, including pertinent contract provisions, it is this Arbitrator's opinion that the Employer has not met its quantum of proof that the Grievant was guilty as charged. None of the charges were properly supported by the record. This finding was somewhat fashioned by the circumstances surrounding the disputed matter; some of which were outside the Employer's control. The Youth Offender's untimely death crumbled the Employer's case in chief. Other investigation-related factors, those within the Employer's control, raised sufficient doubts regarding the credibility of the Employer's decision.

The Youth Offender, during the course of the investigation, referenced certain general sexually related incidents and other specific acts of misconduct. Her general relationship with the Grievant appeared to be quite provocative, while spearheaded by the Grievant's interactive style and proactive approach. Yet these allegations do not comport with other facts. The Youth Offender's credibility is grievously challenged by her own inaction during the period in question. The Youth Offender never viewed these incidents as mutually generated. Rather, she characterized the Grievant as the aggressor. She never, however, filed one formal complaint regarding the Grievant's alleged actions. The allegations only came to the Employer's attention when the Youth Offender's cellmate raised certain concerns. This friend, however, merely provided general accusation while never referencing the specific incidents raised by the Grievant. She, moreover, was never formally interviewed nor brought forth to testify at the arbitration hearing. With Youth Offender Palmer unable to testify, her sole link to the dispute should have been made available for direct and cross-examination.

Specific incidents of sexual related misconduct were raised by Palmer and the Employer. One incident allegedly took place at the facility outside the Allman Cottage. The other incident allegedly took place while the Grievant served as a

Transport Officer on a medical trip. For a number of reasons, the Employer was unable to credibly support the specific sexual incidents raised by Palmer.

Certain data are readily available within the facility. However, the transport log, including date and time, never surfaced at the hearing. At a minimum, the Employer could have established the protagonists' whereabouts. It could have also surfaced other potential witnesses in support of Palmer's allegations. Again, review of Palmer's interview raised suspicion regarding the accuracy of Palmer's version. It is hard to fathom how the Grievant could have engaged in this misconduct while physically separated from Palmer's location in the van. The record never surfaced an alternative supposition.

Proof difficulties were further engendered by issues surrounding the Allman Cottage incident. Palmer alleged the Grievant "put his hands in her pants," in an area outside the cottage, and continued his misconduct by alternatively touching her butt and/or breasts on the outside and inside of her clothes. Again, devastating allegations if supported by something or someone other than the deceased Youth Offender.

The Employer had an opportunity to fulfill its investigatory responsibility by establishing the location and pursuing a full and thorough investigation. The record establishes unrebutted testimony that a security camera existed in the exact location in question. The Employer, however, never attempted to determine whether an archival copy existed. An initiative of this sort could have

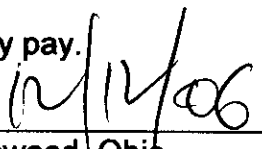
corroborated Palmer's version or exonerated the Grievant. An impartial investigation requires such an effort; anything less jeopardizes any just cause determination.

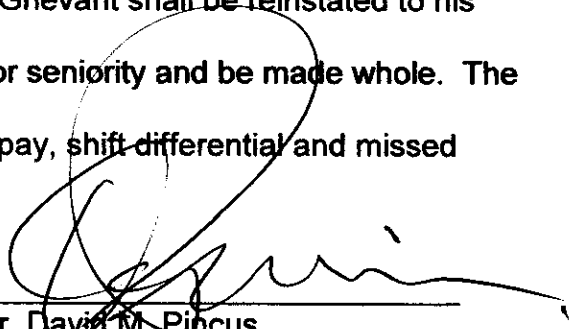
The Employer placed a great deal of reliance on the Grievant's answers during the course of an investigatory interview. The Arbitrator does not share a similar view. The totality of the Grievant's responses do not surface the admissions identified by the Employer. At the beginning of the interview, the Grievant entirely denied the sexual misconduct activity. He said he might have touched the youth Offender's breasts and buttocks while escorting and/or placing her in restraints; reasonable duties and responsibilities for any Transportation Officer. Within this contract, the cherry-picked responses identified by the Employer make less sense and are viewed as less plausible outcomes.

The previously articulated finding render moot the remaining two charges. The Grievant did not bring discredit to the Agency and he was not dishonest.

THE AWARD

The Employer did not have just cause to terminate the Grievant. The grievance is sustained in its entirety. The Grievant shall be reinstated to his former position, suffer no less of benefits or seniority and be made whole. The remedy shall include all back pay, roll call pay, shift differential and missed holiday pay.


Beachwood, Ohio
December 12, 2006


Dr. David M. Pincus
Arbitrator