#1946

IN THE MATTER OF ARBITRATION

BETWEEN

STATE OF OHIO DEPARTMENT OF REHABILITATION AND CORRECTIONS

AND

SEIU/DISTRICT 1199

Grievant: Marcia Webb

Case No. 27-20-20061026-7211-02-12

Date of Hearing: June 15, 2007

Place of Hearing: SEIU – 1199 Office – Columbus, Ohio

APPEARANCES:

For the Union:
Advocate: Kevin Muhammad, SEIU Staff Representative
2nd Chair: Jim Tudas, SEIU
Witnesses:
Grievant: Marcia Webb
Stewart Hudson – Warden, Mansfield Correctional
Joseph M. Clark – Correction Officer
Sybil E. McNabb – Business Owner
Wayne McDowell – Retired Employee
Greg Morrow – Correction Officer
Margaret A. Bradshaw – Former Warden, Mansfield Correctional

For the Employer:
Advocate: Chris Lambert, Labor Relations Officer
2nd Chair: Steve Little, Office of Collective Bargaining
Witnesses:
Janet Tobin – Labor Relations Officer
Paul Shoemaker – Assistant Chief Inspector

OPINION AND AWARD

ARBITRATOR: Dwight A. Washington, Esq.

Date of Award: September 6, 2007

INTRODUCTION

The matter before the Arbitrator is a Grievance pursuant to the Collective Bargaining Agreement ("CBA") in effect June 1, 2006 through May 31, 2009, between the State of Ohio Department of Rehabilitation and Corrections ("DR&C") and the SEIU/1199 Chapter ("Union").

The issue before the Arbitrator is whether just cause exists to support the removal of the Grievant, Marcia Webb ("Webb"), for violating the Standards of Employee Conduct Rules 30(C), unauthorized conveyance, distribution, misuse, or possession of other contraband; 46(A), . . . exchange of personal letters, pictures, phone calls or information with any individual under the supervision of the Department and 46(E), committing a sexual act with an individual under the supervision of the Department.

The removal of the Grievant occurred on October 25, 2006, and was appealed in accordance with Article 24 of the CBA. This matter was heard on June 15, 2007, and both parties had the opportunity to present evidence through witnesses and exhibits. Post-hearing briefs were submitted by both parties on or about July 24, 2007.

BACKGROUND

Webb was hired in 1991 by DR&C and was removed on October 26, 2006, for violating Rules 30(C), 46(A) and 46(E). At the time of her removal Webb worked at the Mansfield Correctional Institution ("MANCI") as a case manager. The Grievant is African American. As a case manager, part of her duties included working with paroled individuals to assist in their reacclimation into the community. Webb worked with organizations such as the NAACP to secure jobs for parolees. The Grievant was considered by Warden Hudson Stewart ("Stewart") to be a good employee and as recently as June 23, 2006, she received a letter of appreciation regarding her work performance. (Joint Exhibit (JX) 5).

At the time of removal, a prior discipline of Rules 20 and 46(A) resulting in a 2-day fine existed on her record. This reprimand involved unauthorized contact Webb had with a parolee named Jacque Ellman ("Ellman"). (Management Exhibit (MX) 1). The Grievant was ordered effective November 9, 2005, to cease all contact with Ellman, outside of church services, and report immediately any contact/communication with Ellman.

On September 29, 2006, MANCI with the assistance of the Ohio Highway Patrol ("OSP") conducted an employee/visitor search, aka shakedown, after the employees had passed through the initial building security checkpoint. The Grievant successfully passed through MANCI's entrance security process, but during the shakedown contraband items were found.

A leatherman's tool[1] and four CDs were found in a shoulder bag that the Grievant was carrying. The Grievant stated she had placed the leatherman in her bag after using the screwdriver to perform some repair work on a restroom at church on Wednesday (September 27). (JX 3, pp. 65-66). The Grievant also admitted that the CDs were considered contraband and not allowed into the institution. The Employer contends, by introducing these contraband onto the property the Grievant violated Rule 30(C). When the contents of the Grievant's bag were searched a letter dated September 20, 2006 from Ellman was discovered. The letter described romantic acts in intimate detail between Ellman and the intended person. The letter was titled "Dear Lover."

The Grievant identified Ellman as a current inmate at Toledo Correctional Institution ("ToCI") whom she had a previous relationship with. (JX 3, p. 78). The Grievant added that the relationship had ended over a year ago and the letter was in her possession to bring it to the institution for reporting purposes. The Grievant acknowledged she had a modified approved

[1] Leatherman is a multi-purpose tool with attachments which could be used as a wire cutter, knife, can opener or a screwdriver. The blade of the knife was about 2-1/2" long.

Nexus[2] on Ellman restricting all contact other than attending church services since November 9, 2005. Therefore, it would make no sense for Webb to transport the letter unless it was her intent to turn the letter in.

Due to the contraband and the letter, the Grievant was interviewed on September 29, 2006 and October 6, 2006 by Paul Shoemaker ("Shoemaker"), Assistant Chief Inspector. The interviews were taped and transcribed with the consent of the Grievant. The Employer contends that during the September 29, 2006 interview she admitted the following: (a) introduced contraband into ManCI; (2) had in her possession a letter from Inmate Ellman dated September 20th that had not been disclosed; and (3) had a sexual relationship with Inmate Ellman while he was on parole. Additionally, DR&C believes that the September 20th letter contains specific references to events which were unique to the Grievant such as: out of state funerals; car accident; and parents being deceased.

The October 6, 2006 interview included follow-up discussions, and inquiries regarding a September 2, 2006 personal letter that was obtained from Inmate Ellman's cell in ToCI. That letter was signed by Kitty Boo. The Grievant denied any knowledge of the letter and/or authoring it.

Inmate Ellman was interviewed and stated that the September 2, 2006 letter was from Jacqueline Bradford, aka "Kitty Boo" – and not the Grievant. Inmate Ellman added that he met Jacqueline Bradford at church while on parole. (JX 3, p. 100).

The Grievant contends that she received the September 20th letter from Pastor Irene Bradley ("Bradley") on September 27th while at church and it was her intent to disclose the

[2] Nexus forms are required and must be authorized by the Warden, which allow DR&C employees express consent to interact with individuals under the supervision of DR&C. Of note, the November 9, 2005 Nexus form which will be discussed hereafter, eliminated any and all contact between the Grievant and Ellman except for church services.

document to Warden Hudson. Because Warden Hudson was unavailable on September 28th and 29th, the Grievant did not report the letter to any other administrator at MANCI.

By not immediately reporting Inmate Ellman's letter the Grievant violated the revised Nexus of November 9, 2005, which required her to immediately report any contact from Ellman. This act according to DR&C violates Policy 46(A) (exchange of personal letters . . .). Moreover, the Grievant admitted to engaging in a sexual relationship with Ellman during the September 29th interview.

The following investigatory statements are admissions of the sexual relationship:

Q. ". . . was this relationship ever a sexual one?"

A. ". . . after he was released, yes." (JX 3, p. 79).

Q. "Did you report this sexual relationship to anyone?"

A. "No." (JX 3, p. 81).

The Grievant attempted to create confusion regarding what sexual misconduct meant, and her testimony that the sexual relationship she had with Ellman meant church hugs defies logic according to DR&C. DR&C concluded that Webb's admissions were pivotal in concluding a sexual relationship with Inmate Ellman occurred in violation of Rule 46(E).

The Grievant denies that she engaged in any sexual act and only admits that while at church she would hug and/or kiss Ellman as part of the "greeting" aspect of the service. (JX 3, pp. 84-85). The Grievant testified that due to her prior discipline in November 2005, if she had denied having a sexual relationship with Ellman, it would have constituted lying in an investigation because kissing is an example of misconduct per DRC Policy 31-SEM-07.

The Grievant also presented examples of employees who were alleged to have had unauthorized relationships with inmates who were not removed; and contends that disparate treatment has occurred and/or she was treated differently on account of race.

The Grievant seeks re-employment, back pay and any other economic benefit lost due to her removal. The Employer urges the Arbitrator to deny this grievance because just cause existed to remove Webb.

ISSUE

Was the Grievant removed for just cause?

RELEVANT PROVISIONS OF THE CBA AND DR&C WORK RULES

ARTICLE 8 – DISCIPLINE

8.01 – STANDARD

Disciplinary action may be imposed upon an employee only for just cause.

DR&C STANDARDS OF EMPLOYEE CONDUCT

RULES: (In Part)

30(C)

	OFFENSE			
	1st	2nd	3rd	4th
Unauthorized conveyance, distribution, misuse, or possession of other contraband	2 or R	5 or R	R	
46. Unauthorized Relationships A. The exchange of personal letters, pictures, phone calls, or information with any individual currently under the supervision of	2 or R	5 or R	R	

the Department or friends
or family of same, without
express authorization of
the Department

E. Committing any sexual act with any individual under the supervision of the Department R

POLICY NUMBER 31-SEM-07 (In Part)

Subject: Unauthorized Relationships

IV. DEFINITIONS

Adult Parole Authority (APA): The section of the Division of Parole and Community Services that includes the Parole Board and Field Services, including interstate Compact and the Offender Services Network.

Division of Parole and Community Services (DPCS): That Division of the Department of Rehabilitation and Correction which includes the Adult Parole Authority, the Bureau of Community Sanctions, the Bureau of Adult Detention and the Office of Victim Services.

Nexus: Any relationship or association an employee, volunteer or contractor may have with another person(s).

Offender: Any individual under the supervision of the department. In the case of APA employees this includes any individual under the supervision of any criminal justice agency.

Sexual Misconduct: Any behavior or act of a sexual nature directed toward an offender by an employee, volunteer, visitor or agency representative. This includes acts or attempts to commit such acts including but not limited to sexual assault, kissing, sexual harassment, sexual contact, conduct of a sexual nature or implication, obscenity and unreasonable invasion of privacy. Sexual misconduct also includes but is not limited to conversations or correspondence, which suggests a romantic or sexual relationship between an offender and any party mentioned above.

Sexual Contact: Includes, but is not limited to, all forms of sexual contact, intentional sexual touching or physical contact in a sexual manner, either directly or through clothing, of the genitalia, anus, groin, breasts, inner thighs, buttocks, with or without the consent of the person; or any unwanted touching with intent to arouse, humiliate, harass, degrade, or gratify the sexual desire of any person.

Sexual Assault: Any contact between the sex organ of one person and the sex organ, mouth or anus of another person, or any intrusion of any part of the body of one person, or of any object into the sex organ, mouth or anus of another person, by the use of force or threat of force.

Unauthorized Relationship: A relationship with any individual under the supervision of the Department of Rehabilitation and Correction (department) and in the case of an APA employee, a relationship with any individual under the supervision of any criminal justice agency, which has not been approved by the Managing Officer/APA Regional Administrator in writing.

POSITION OF THE PARTIES

EMPLOYER'S POSITION

The Grievant was removed because she had a sexual relationship with Ellman; received a letter from Ellman that was not immediately reported; and brought a multi-purpose tool into the prison which was contraband.

The conveyance of the tool, aka Leatherman, is not in dispute. During the shakedown on September 29, 2006, the multi-purpose tool was discovered in a bag that the Grievant was carrying into the prison. The Leatherman could be used as a wire cutter and/or a knife, and must be considered a weapon that could cause injury or death.

No evidence or policy exists that would have permitted the Grievant to take the Leatherman back to her vehicle as opposed to imposing disciplinary action. Even though no evidence indicates that the Grievant intended to convey the tool to an inmate, it is the responsibility of each employee not to transport contraband into the prison. Although the entry correction officer failed to discover the tool prior to her entering the prison, the Grievant remains responsible for her personal property. The conveyance is a clear violation of Rule 30(C) and the Grievant admitted ownership. (JX 3, pp. 63-65).

As a result of searching the Grievant's bag, the letter from Inmate Ellman was discovered. (JX 3, pp. 36-39). The letter was discussed at length on September 27, 2006 during the investigatory interview. The Grievant did not deny that the letter was written to her (JX 3, p. 78) or that the letter was in her possession for a couple of days. (JX 3, p. 85). The Grievant admitted that in November 2005 she received special instructions to immediately report any contact with Ellman, so why did she ponder the correct response with the letter after being previously disciplined for similar conduct in 2005?

DR&C also points to the credibility of the Grievant in that in her arbitration testimony she refutes a sexual relationship existed; however, on September 29th the Grievant does not dispute that she had sexual contact with Ellman and sought the assistance of her pastor regarding her feelings toward Ellman. The Grievant also indicated to her pastor her reluctance in reporting the letter ". . . because I do not want to cause him any more grief or any more problems" (JX 3, p. 79), the implication being clear that the Grievant knew the letter was intended for her.

The hesitancy of the Grievant to report is compounded by the prior discipline received for an unauthorized relationship with Ellman that resulted in the 2-day fine. The Grievant should have reported on Thursday the receipt of the letter and her arbitration testimony indicated that she kept the letter for a couple of days, violating her obligation to report on a timely basis. DR&C contends that the letter indicates a relationship; the Grievant did not report its existence; and Rule 46(A) was violated as a consequence.

Regarding whether a sexual relationship existed DR&C points to actual responses of the Grievant provided on September 29, 2006. The Grievant somehow wants the Arbitrator to believe that she couldn't distinguish sexual conduct from innocent activity such as hugs and kisses at church. The Grievant's testimony is unbelievable in that she contends that ambiguity

existed regarding the meaning of "sexual relationship" because she considered hugs/kisses at church as being sexual conduct.

The DR&C points out that on several occasions the Grievant had an opportunity to deny the existence of a sexual relationship. Included, but not limited to the following, are some examples:

> "Q. Would you like to explain to me what kind of relationship you and Mr. Ellman have?
>
> A. Had. We have no relationship now. (JX 3, p. 78), emphasis added.
>
> Q. Okay, let me ask you since we're there. Who gave you permission? Did you report the extent of this relationship?
>
> A. At that time it was not to that extent. It wasn't to that extent.
>
> Q. Was this relationship ever a sexual one?
>
> A. After he was released, yes.
>
> Q. Was he still on parole?
>
> A. Yes.
>
> Q. Did you report this sexual relationship to anyone?
>
> A. No." (JX 3, p.79).
>
> "Q. What was the extent of that nexus?
>
> A. To assist him in re-entry to society, with whatever needs he had.
>
> Q. Did you have a sexual relationship with Inmate Ellman while he was on parole?
>
> A. Yes." (JX 3, p. 84).

The Grievant's own admissions prove a violation of Rule 46(E) occurred. The facts are indisputable that a sexual relationship existed and the Grievant's attempt to define sexual relationship as hugs and kisses exchanged only at church with Ellman is ludicrous.

DR&C contends that Grievant's credibility is a major issue in comparing her arbitration testimony against the investigatory interview. DR&C submits that a reasonable person if confused during the investigatory interview as to what sexual relationship meant she had numerous opportunities to clarify the uncertainty – which did not occur.

Finally, DR&C points to other factors that infer a sexual relationship existed such as: (1) the Grievant believed that the unauthorized relationship policy only applied if Ellman was locked up, not on parole (JX 3, p. 81); (2) the Grievant admitted that she had no sexual relationship with any other inmate (JX 3, p. 85); and (3) a picture of Ellman was discovered in her personal property. (JX 3, p. 83).

UNION'S POSITION

The removal was not for just cause and due to lack of credible evidence this long-term employee should be reinstated.

The Rule 30(C) alleged violation involving the multi-purpose tool is an example of DR&C's failure to apply its own rules. Post Order 3(A) 019 provides that if a prohibited item is discovered the employee is directed to secure the contraband prior to granting entrance to the institution. The practice has been to allow employees to secure the item in their vehicle without any problem. The past practice allowed employees to place unauthorized items in their vehicles, except illegal contraband such as weapons or drugs.

Lt. Joe Clark ("Clark"), Corrections Officer at Mansfield Correctional Institution, testified that he helped draft the post order and if a mistake occurs with no intent to introduce contraband into the prison, DR&C has not disciplined employees in the past for this oversight. The Grievant testified that she forgot the Leatherman was in her bag and DR&C violated its own

post order for disciplining her, and allowing other employees the opportunity to secure unauthorized items in their vehicles.

No dispute exists that on November 9, 2005, Grievant received a two-day suspension for a Rule 46(A) unauthorized relationship with Ellman. The Grievant testified that all contact ceased except for seeing him at church. The Union argues that any violation actionable under Rule 46(A) would have had to occur between November 9, 2005 and October 25, 2006.

After reading the September 20th letter, the Grievant testified that she realized the letter was intended for someone else but was uncomfortable "... submitting the letter to anyone else as she was afraid of repercussions and retaliation from the Labor Relations Officer ..." Union's Post Hearing Statement, p. 3. The Grievant intended to give the letter only to Warden Hudson but he was out of the facility from September 25, 2006 through October 2, 2006. Moreover, if a sexual relationship existed with Ellman why not simply destroy the letter and eliminate the possibility of the letter's disclosure?

The Grievant also disputes the content of the letter regarding specific items related to her. The Grievant testified that she does not own a big TV; never took baths with Ellman; did not roll on the carpet and had no legal situation that was referred to therein. Moreover, DR&C preserved no evidence that the Grievant exchanged letters, pictures, and/or talked with Ellman by phone. The only evidence offered by DR&C is the letter was in her possession. Therefore, just cause is absent for a Rule 46(A) violation.

The sexual relationship, if any, had to occur between November 9, 2005 and February 1, 2006, the date Ellman's parole terminated. (JX 3, p. 100). The only evidence offered by DR&C was the investigatory statement(s), particularly the questions which inquired whether the Grievant had a sexual relationship while Ellman was on parole.

The Grievant testified the reason she answered yes, was because sexual conduct included hugging and kissing on the cheek, occurred at church with Ellman. The Grievant added that DR&C's policy defines sexual misconduct as including hugging/kssing and if she had answered "no" she would have been lying in an official investigation subjecting her to further discipline. Aside from her interaction with Ellman at church, the Grievant denies any contact after November 9, 2005. DR&C aside from the letter and investigatory interviews provided no evidence to support that a sexual relationship existed between the Grievant and Ellman.

The Union presented several witnesses who indicated that the Grievant was treated differently than fellow employees because of her race. Sybil E. McNabb ("McNabb") and Wayne McDowell ("McDowell"), NAACP representatives, testified that other employees had unauthorized relationships with inmates who were not removed under Rule 46(A). McDowell indicated that former white employees Patrice Carter ("Carter") and Emma Jean Smith ("Smith") had relationships with inmates but were not removed. Therefore, the Grievant was treated differently than co-workers because of race.

The Grievant as a sixteen (16) year employee with excellent performance evaluations, the Employer acted without just cause by removing the Grievant. The Union seeks reinstatement, back pay and all other benefits the Grievant was otherwise entitled to by the CBA.

DISCUSSION AND CONCLUSIONS

Based upon the sworn testimony at the arbitration hearing, exhibits and the post hearing statements, the grievance is denied. My reasons are as follows:

The involvement by the Grievant with Ellman while he was paroled is the basis of the Rule 46(E) alleged violation, and the Grievant's possession of Ellman's letter of September 2,

2006 is the basis for the Rule 46(A) alleged violation. The violation of Rule 30(C) will be dealt with separately, after a discussion and analysis of Rule 46(A) and (E) alleged misconduct.

It must be noted from the outset that the obtainment of the infamous letter was only because of the shakedown. The evidence is clear that on September 27th, the Grievant received the letter. It is also undisputed that the Grievant transported the letter into the prison on the 28th as well as the 29th of September. Finally, only due to the shakedown was the letter discovered on the 29th of September.

Somewhat curious to the arbitrator is the conduct of the Grievant regarding her ability to access her personal belongings from the bag after it was initially confiscated. A review of the record from early afternoon until 1:27 p.m. indicates that the Grievant inquired about the personal belongings in the bag on at least two (2) occasions. (JX 3, pp. 65, 74). On three (3) other occasions, the Grievant stated words to the effect ". . .All I need to know is what is the deal with this, am I getting my stuff or ain't I?. . ." (JX 3, pp. 75-78).

Throughout the interview, the behavior of the Grievant to access her bag created an unusual amount of nervousness during the interview. After being informed of the Ellman letter the initial response of the Grievant is instructive to this Arbitrator – because credibility in this case is pivotal – particularly the Grievant's.

The Grievant responded when initially asked if the letter from Ellman was for her – she responded that "It would presumably look that way." (JX 3, p. 78). The Grievant did not deny the letter was not for her or state the letter was intended for Lakeisha Bradford. Given the numerous events and things that allegedly did not apply to the Grievant in the letter, her initial response is at odds with her later denials. If specific references, i.e., big TV, taking baths, etc. were inapplicable when she initially received the letter, those facts would have remained

constant throughout these proceedings. The Grievant's failure to **initially** repudiate the letter, which was in her possession for 2 days, clouds her believability thereafter.

The prior 2-day discipline of November 9, 2005 was due to unauthorized telephone calls between Ellman and the Grievant, prompting Warden Bradshaw to issue the following change in the nexus.

> "Effective immediately you are to desist any/all communications/contact, including but not limited to telephone calls, with Jacque Ellman, parolee, outside of attending church worship service.
>
> **Any incidental contact/communication** with the parolee is to be immediately reported to the managing officer."
>
> (Management Exhibit (MX) 1, emphasis added).

Therefore, on September 27th, the Grievant understood her obligation was to immediately report any contact and/or communication with Ellman. The Grievant's position to deliver the letter only to Warden Hudson because of past animosity with the LRO, makes no sense, for several reasons. Warden Hudson's absence from the prison until October 2, 2006 did not relieve the Grievant of her obligation to report the contact, and the November 9, 2005 Nexus change made it abundantly clear what was required if any communication occurred from Ellman. For sake of argument, if the Greivant believed that she could only give the letter to Warden Hudson, why not leave the letter on September 28th in the warden's office in a sealed envelope, dated and signed with a copy to the LRO?

In other words, no set of facts can this arbitrator imagine which would relieve the Grievant of her reporting obligation. The Grievant decided not to report the letter and only due to the shakedown did the letter become an issue.

One of the Grievant's defenses is that she did not want to cause any more problems or grief by reporting it. The record is uncertain if she was referring to Ellman or herself. The

evidence is nonexistent that the Grievant would have suffered any adverse consequences if she had followed the directive. Another defense advocated by the Grievant is that the letter was not intended for her. If that be the case, why not outright reject the letter? There were many options for the Grievant to pursue in demonstrating her adherence to the Nexus. The only adverse course to pursue was not to report the contact.

The contents of the letter references numerous romantic activities jointly shared between Ellman and someone; however, because of the totality of the circumstances, sufficient evidence exists to infer that a good probability exists that the letter was intended for the Grievant, not Bradford.

If the letter was written to the Grievant, why not destroy it, argues the Union, and avoid any disciplinary potential. Good question! However, based upon the Grievant's admitted failure to recall placing the multi-purpose tool in her bag, it is easy to infer that the Grievant simply forgot the letter was in her bag until after it was confiscated during the shakedown. Another "forget me not" was Ellman's picture that was recovered from the Grievant's personal property that she admitted printing from an email that included over thirty (30) pictures. Ellman was the only inmate picture found in her personal belongings.

Credibility again plays a pivotal role in whether the evidence supports the charge that the Grievant was engaged in a sexual relationship with Ellman. The Grievant contends that she did not admit to a specific sexual act, therefore the policy was not violated. The Grievant further argues that when she admitted to being involved in a sexual relationship with Ellman she was only referring to the social exchange of greetings during church service. The Grievant's position is not well taken on either position by this Arbitrator.

Clearly, if a sexual act was admitted a violation of Policy 31-SEM-07 would occur. Also, sexual misconduct includes a plethora of other conduct such as kissing, sexual contact, conduct of a sexual nature, conversations or correspondence which suggests a romantic or sexual relationship. (Un X 1, p. 2). The letter is replete with romantic/sexual references regarding acts performed as well as anticipated future romantic engagements. Given my earlier determination that the evidence infers that the letter was intended for the Grievant, there is no need to itemize all of the salacious material in the letter. That alone is only a part of my finding that the evidence supports a Rule 46(E) violation.

The Grievant presented herself at the hearing as articulate and aware of the seriousness of the charges against her. Also, the record contains several well written memorandums prepared by the Grievant in 2005 and 2006 advocating her position on different issues. (Un Xs 6, 7, 8, 9). At no time did this arbitrator receive the impression that the Grievant was unable to express her thoughts verbally or in writing. Therefore, totally at odds with her persona as an intelligent individual is her position of not understanding what the term sexual relationship meant when asked several times by the investigator.

The record contains direct evidence that the Grievant by her <u>own words</u> admitted to a sexual relationship with Ellman while on parole – and any retreat to the contrary is useless. Moreover, I, like the Greivant, attend a church where members socially greet each other with handshakes, hugs or kisses as part of the service. If these activities in her church constituted sexual conduct, why wasn't the pastor subpoenaed as a witness to verify these "acts of love" constituted a sexual relationship?

With respect to disparate treatment because of race, a prima facie showing is required consisting of the following elements: (1) the Grievant was a member of a protected class; (2)

adverse employment action; (3) she was qualified for the position; and (4) a non-protected employee was treated more favorable or in matters involving termination that she was replaced by someone outside of the protected group. McDonnell Douglas v. Green, 411 U.S. 792 (1973). DR&C would have the opportunity to rebut the prima facie showing by presenting evidence that their action was required due to business necessity. Thereafter, Webb would be required to show that DR&C's rationale was pretextual.

In this matter, the Union alleged at the hearing that white employees, Carter and Smith had unauthorized relationships with inmates but were not removed. Smith was alleged to have had sexual relations with an inmate. DR&C concluded that "an inmate's statement alone is not enough evidence to discipline a staff member." (MC 3). Carter was alleged to have had a baby by an inmate according to McDowell, who was discharged and later reinstated via a grievance settlement. (UN X 12). The disparate treatment evidence presented before this Arbitrator was offered through testimony of McNabb, McDowell and exhibits. (Un Xs 12, 13). Their knowledge consisted of NAACP materials, but upon cross examination both admitted that they had no direct evidence of any relationship other than documents they reviewed. The valued work performed by the NAACP in the greater Mansfield community is not at issue in this matter. Their testimony coupled with the exhibits failed to meet the burden of establishing prima facie since the alleged misconduct and the facts of the Carter and Smith matters were not shown to be similar as the Grievant's. Darnell v. Northern Can, 937 F. Supp. 668 (ND Ohio 1995).

Even if prima facie was established, DR&C produced sufficient evidence to establish violations of its work rules, thereby justification existed for disciplining the Grievant. In other words, DR&C had legitimate reasons to remove the Grievant. Finally, the Grievant's disparate

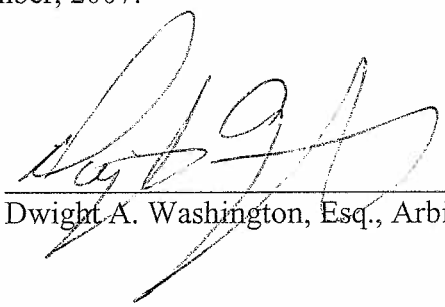
treatment evidence failed to show that DR&C's reasons were false or pretextual to support a finding of discrimination. St. Marys Honor Center v. Hicks, 509 U.S. 502 (1993).

Finally, the Leatherman tool was contraband and conveyed by the Grievant onto the property. If this was the only violation removal would not have been appropriate in my opinion. However, given the infractions of Rule 46(A) and (E) proven by reliable and credible evidence, the Rule 30(C) violation will remain on the record.

AWARD

The grievance is denied.

Respectfully submitted this 6th day of September, 2007.



Dwight A. Washington, Esq., Arbitrator