

#2007

SUSAN GRODY RUBEN, Esq.
Arbitrator and Mediator
30799 Pinetree Road, No. 226
Cleveland, OH 44124

IN ARBITRATION PROCEEDINGS PURSUANT TO
COLLECTIVE BARGAINING AGREEMENT BETWEEN THE PARTIES

In the Matter of

SEIU DISTRICT 1199

and

**OHIO DEPARTMENT OF
REHABILITATION AND CORRECTION**

Case No. 27-20-20080325-0067-02-12

Grievant: Juanita Murphy

ARBITRATOR'S
OPINION AND AWARD

This Arbitration arises pursuant to the Collective Bargaining Agreement ("Agreement") between SEIU DISTRICT 1199 ("the Union") and THE STATE OF OHIO ("the State"). SUSAN GRODY RUBEN was selected to serve as sole, impartial Arbitrator; her decision shall be final and binding pursuant to the Agreement.

Hearing was held November 7, 2008 in Mansfield, Ohio. The Parties were afforded full opportunity for the examination and cross-examination of witnesses, the introduction of exhibits, and for argument. Both parties submitted timely post-hearing briefs to the Arbitrator.

APPEARANCES:

On behalf of the Union:

**KEVIN MUHAMMAD, Staff Representative, and
ROBERT DALTON, Executive Board Member, SEIU
District 1199, 1395 Dublin Rd., Columbus, OH 43215.**

On behalf of the State:

**BUFFY ANDREWS, Labor Relations Specialist, Office
of Collective Bargaining, 100 E. Broad St., 18th Floor,
Columbus, OH 43215.**

ISSUE

**Was the Grievant, Juanita Murphy, discharged for
just cause? If not, what is the appropriate remedy?**

RELEVANT PROVISIONS OF COLLECTIVE BARGAINING AGREEMENT

June 1, 2006 - May 31, 2009

. . .

ARTICLE 6 - NON-DISCRIMINATION

6.01 Non Discrimination

**Neither the Employer nor the Union shall unlawfully discriminate
against any employee of the bargaining units on the basis of race, sex,**

creed, color, religion, age, national origin, political affiliation, union affiliation and activity, handicap or sexual orientation, or discriminate in the application or interpretation of the provisions of this Agreement, except those positions which are necessarily exempted by bona fide occupational qualifications due to the uniqueness of the job, and in compliance with the existing laws of the United States or the State of Ohio. In addition, the Employer shall comply with all the requirements of the federal American with Disabilities Act and the regulations promulgated under that Act.

The Employer and Union hereby state a mutual commitment to equal employment opportunity, in regards to job opportunities within the agencies covered by this Agreement.

...

...

ARTICLE 8 - DISCIPLINE

8.01 Standard

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

8.02 Progressive Discipline

The principles of progressive discipline shall be followed. These principles usually include:

- A. Verbal Reprimand**
- B. Written Reprimand**
- C. A fine in an amount not to exceed five (5) days pay.**
- D. Suspension**
- E. Reduction of one step. This shall not interfere with the employee's normal step anniversary. Solely at the Employer's discretion, this action shall only be used as an alternative to termination.**
- F. Removal**

The application of these steps is contingent upon the type and occurrence of various disciplinary offenses.

...

...

FACTS

The Grievant has been employed as a Correctional Program Coordinator with the Department of Rehabilitation & Correction ("DRC") at Mansfield Correctional Institution ("MANCI") since January 17, 1995. The Grievant's employment was terminated March 12, 2008¹ for violation of DRC Standards of Employee Conduct Rule 18 – Threatening, intimidating or coercing another employee and Rule 24 – Interfering with, failing to cooperate in, or lying in an official investigation or inquiry.

As stated in the termination letter:

On 2/1/2008 you accessed a recently activated "Spoofcard" account while at work. You then spent approximately 39 minutes making "spoofed" telephone calls (altered voice and caller ID number) to a fellow employee working in the Clinic. The calls and messages you left were threatening and intimidating not only due to the content of the messages but also the use of an altered voice. In addition to the malicious harassment of this fellow employee you also used the spoofing account to call her credit card holder, identify yourself as the employee, report her cards as stolen and attempt to have them canceled. You adamantly denied any involvement during the investigatory interview on 2/13/2008. Not until the pre-disciplinary conference held 2/29/2008 did you admit your guilt.

This is clearly a violation of Rule 18 and 24 of the Standards of Employee Conduct....

¹ All dates are 2008 unless otherwise indicated.

POSITIONS OF THE PARTIES

State Position

On January 31, the Grievant purchased a Spoofcard. She testified that on her way to work February 1, she received a call on her cellphone threatening her son. She believed the call was from her former partner's current partner. She testified she became so upset, she spoof-called her coworker/former partner. Grievant's testimony is contradicted by the fact she bought the Spoofcard the day before she allegedly received the telephone threat against her son. Moreover, the Grievant never reported the alleged threat to any law enforcement authority, and she produced no phone records supporting it.

The coworker contacted the Ohio State Highway Patrol assigned to MANCI on Friday, February 1. OSHP told her she needed to contact her local police department. She contacted the Mt. Vernon Police Department and Sheriff's Department. On her next workday, Monday, February 4, she filed an incident report at MANCI.

At the Grievant's February 13 investigatory interview, she denied making the calls. At the February 29 pre-disciplinary hearing, the Grievant admitted making the calls only after she realized the evidence against her was overwhelming. The Grievant was removed March 12.

After her removal, the Grievant contacted a MANCI corrections officer and asked him to tell the MANCI investigator she knew of an unauthorized relationship between a MANCI employee and a MANCI inmate, and would divulge the name of the employee if that would help get her job back. Though the Grievant knew of an unauthorized relationship which she was required to report, she chose to withhold that information until she needed something for herself. The employee having the unauthorized relationship was removed.

The Grievant's post-removal misconduct continued. After seeing the State's witness list, she twice contacted a MANCI corrections officer to ask him about his testimony.

The Warden testified he considered the Grievant's clean record. However, given the great lengths the Grievant went to in harassing a coworker during the workday, and then lying about it during the investigatory interview, removal was justified. The grid provides for a two-day suspension or removal for a first-time violation of Rule 18 and/or 24. The Warden testified he could not justify a two-day suspension for such a serious offense. He also testified there had been no disciplinary cases with a similar fact pattern.

Union Position

The Grievant has never had any prior discipline. She is remorseful and takes responsibility for her actions on February 1. Extraordinary behaviors often are the result of extraordinary circumstances. A personal relationship that blossomed in the workplace unfortunately also met its peril in the workplace. The Grievant's "replacement" in her personal relationship interviewing for a job at MANCI, combined with the Grievant receiving threats against her son proved to be a catalyst that triggered a "once in a lifetime" response.

The Grievant made the phone calls in approximately a two-hour period on February 1. The incident ended that day with no intervention from the State. The investigatory interview presented the Grievant with the dilemma of choosing between following DRC policy and not incriminating herself. She chose the latter, though she later recanted.

The investigator failed to examine any mitigating factors. He ignored the threats made to the Grievant's son, and he did not look at e-mails between the Grievant and her former partner that would have established the intensity of that workplace relationship. The investigator also failed to recognize the awkwardness caused by the Grievant having to discuss her lesbian relationship with a coworker in the presence of the three men at the

investigatory interview. Other MANCI staff have lied to investigators and received only a two-day fine.

The State failed to follow its own internal procedures in the investigation. The incident report was made three days after the incident; policy requires it be completed by the end of the shift when the incident occurred. The investigator was required to start his investigation the following day; he did not do so until thirteen days later. And despite the State's portrayal of the Grievant as a menace, it allowed her to work for six weeks after the investigation concluded.

The pre-disciplinary hearing violated the Grievant's Loudermill rights. The Deputy Warden refused to permit the Grievant to bring certain witnesses to the hearing, ask questions of another witness, and present mitigating evidence.

A MANCI human resources employee testified discharge of the Grievant was unduly harsh compared to discipline received of other employees. In particular, an employee received only a five-day fine for his second offense of phone harassment, a violation of Rule 24.

The State violated the Grievant's union representative's e-mail account to gain unfair advantage in arbitration. Article 3.08 permits the Union to use the State e-mail system regarding "contract enforcement and interpretation

and grievance processing matters.” The Grievant and her Union rep expected their communications would be protected by some level of confidentiality. Though DRC policy requires the Warden’s permission to access an employee’s e-mail account for intelligence purposes, OCB and MANCI Labor Relations contacted a CRC Investigator for reasons not listed in DRC policy.

The NLRA prohibits an employer from surveilling employee union activities. This includes e-mail. Timekeeping Systems, Inc., 323 NLRB 244 (1997); et al.. The State has engaged in a manifest disregard for the law that has interfered with the Union’s ability to represent the Grievant.

OPINION

As a just cause discipline case, the State has the burden of proving:

- 1) Whether the Grievant violated Rules 18 and 24;
and**
- 2) If she did, was removal the appropriate discipline
under all the circumstances.**

There is no question the Grievant violated Rules 18 and 24. By making the spoofcalls to her coworker, the Grievant violated Rule 18 – Threatening, intimidating or coercing another employee. And by lying during her investigatory interview, the Grievant violated Rule 24 – Interfering with,

failing to cooperate in, or lying in an official investigation or inquiry.

Accordingly, the only real question is whether removal was the appropriate discipline under all the circumstances.

Whether removal was the appropriate discipline boils down to two questions:

1) Given that the grid gave the Warden the choice of a two-day suspension or removal, was removal the appropriate choice; and

2) Are there any mitigating circumstances sufficient to reverse the removal.

The Disciplinary Grid

Given the disparity between a two-day suspension and a removal, it is apparent the grid recognizes Rule 18 and 24 offenses fall into two categories – moderate and severe. So the question for the Arbitrator is whether it was reasonable for the Warden to conclude the calls made by the Grievant and the lies told by the Grievant were severe, rather than moderate.

The Calls

The record contains recordings of the calls. Among the things said by the Grievant in a disguised voice from a disguised telephone number to her coworker/former partner were:

- Ⓢ Your turn is coming**
- Ⓢ I will get a hold of you**

- ⑥ **Threatening me isn't going to help either one of you²**
- ⑥ **She will rot in hell and so will you if you did this to someone else**
- ⑥ **All I want is for her to pay for what she did to me**
- ⑥ **I have so much anger built up over the shit that has happened to me I would love to take it out on her, I'd love to take it out on her**
- ⑥ **You think you're going to call the Ohio State Highway Patrol, wait 'til someone at your house [address] hears from the Ohio State Highway Patrol**
- ⑥ **You thinking I'm fucking pissed, you've never seen me fucking pissed**
- ⑥ **Don't make me have to come down there**

These approximately ten calls including approximately three hang-ups, lasted for a total of approximately thirty-nine minutes over a two-hour period, and took place during the workday using a State telephone. It is easy to see the Warden had a good-faith basis for concluding the number of calls and the content of the calls constituted severe misconduct, rather than moderate misconduct.

² The other person referred to in the calls is the coworker's current partner, an individual who was applying to work at MANCI in a position having interaction with the Grievant's position.

The Lies

The Grievant told the following lies during the investigatory interview:

- **She did not make any harassing phone calls to the coworker on February 1**
- **She had no idea who made the calls**
- **She was being “absolutely” truthful**

The Grievant stuck to this story despite being expressly warned by the Investigator that giving false information during the interview was a Rule 24 violation subjecting her to discipline.

Again, it is easy to see the Warden had a good-faith basis for concluding the Grievant's lies during her investigatory interview constituted severe misconduct, rather than moderate misconduct. The lies she told were not peripheral; rather, they went to the heart of the investigation – whether she had made the calls to the coworker.

Mitigating Circumstances

There are a variety of mitigating circumstances present in this matter:

- **The Grievant was distraught her coworker/former partner had a new partner**
- **The Grievant was distraught her former partner's current partner had applied for a position at MANCI that interacted with the Grievant's position**

- The Grievant was used to communicating with her former partner on worktime using State computers and phones
- The Grievant may have received a phone call from her former partner's current partner threatening her son
- The Grievant is remorseful and takes responsibility for her actions
- The Grievant's work record prior to this incident was very good

The Warden considered many or all of these factors and determined they were insufficient to overcome the reasons for the removal. The Arbitrator has considered all these factors and also finds they do not outweigh the Grievant's severe misconduct and lying. As the Grievant well knows, she worked in a prison – a highly structured, but potentially volatile environment. In her role as a Correctional Program Coordinator, she dealt daily with staff and inmates. Prison staff must be able to rely on each other's judgment and integrity at all times. Sadly, the Grievant made an enormous error in judgment on February 1, and compounded her severe misconduct by lying about it in an investigatory interview.

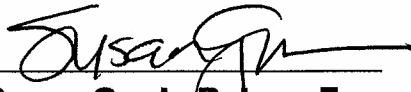
There is no question the Grievant was under stress on February 1. While that may explain her behavior, however, it does not excuse it. The

State had just cause for the removal.³

AWARD

**For the reasons set out above, the
grievance is denied.**

DATED: February 6, 2009


Susan Grody Ruben, Esq.
Arbitrator

³ The Union contends the Grievant's discipline was more severe than that received by other employees who conducted themselves similarly. Based on the record evidence, the Arbitrator finds the other matters to be dissimilar to the instant one. The Union also points out investigatory and disciplinary timeframes that do not support a termination. The Arbitrator finds the investigatory timeframes to have been reasonable under the circumstances, and the six-week lag until termination to not be dispositive. The Union also alleges the Grievant was deprived of her Loudermill rights at the pre-disciplinary hearing. The Arbitrator finds the hearing officer made reasonable rulings regarding which evidence and witnesses were relevant to this matter. Additionally, the Union suggests both a contractual and a statutory violation occurred when the State reviewed Union e-mails. Whether that is the case is not before the Arbitrator.