

#2087

**ARBITRATION PROCEEDINGS**

In the matter of arbitration between:	)	Gr. # 27-17-20090225-
	)	0003-01-03
THE STATE OF OHIO	)	Joseph Holzauer
	)	Dated February 24, 2009
and	)	
	)	Hearing: June 21, 2010
THE OHIO CIVIL SERVICE	)	at Cleveland, Ohio
EMPLOYEES ASSOCIATION, AFSCME	)	
LOCAL 11, AFL-CIO	)	Date of Award:
	)	July 24, 2010

**OPINION AND AWARD**

Appearances:

Mitchell B. Goldberg, Arbitrator

For the Employer:

Buffy Andrews,	Advocate, ODRC
Ashley Hughes,	Second Chair, OCB
Ted Williams,	NEPRC-Labor Relations Officer
Melissa Cantoni,	Investigator, ODRC
Renee Leonard,	Witness
Jamie Wagner,	Witness

For the Union:

Robert Robinson,	Union Advocate
Joseph W. Holzauer,	Grievant
Leslie Maki,	Acting Local President

I. Introduction and Background.

The parties selected the undersigned as the arbitrator of this grievance from the agreed upon panel of arbitrators established under Section 25.05 in the collective bargaining agreement ("CBA"). This arbitration was conducted in accordance with

Section 25.03. The Union filed a grievance on behalf of Correction Officer Joseph Holzhauser ("Grievant") on February 24, 2009, alleging that the Grievant was removed from service in violation of the CBA. The grievance seeks a make-whole remedy including reinstatement, removal of discipline from the personnel file, and recovery of lost pay and benefits.

The Employer denied the grievance throughout each step, and the matter proceeded to arbitration at the North East Pre-Release Center in Cleveland, Ohio. The parties presented testimonial and documentary evidence. There was no transcript or official record of the proceedings. Witnesses were examined and cross-examined. Post-hearing briefs were filed with the arbitrator after all of the evidence was received. The parties entered into the following stipulations: (1) The grievance is properly before the Arbitrator; (2) there are no procedural objections; (3) the Grievant was hired on 09-23-2002 at the State of Ohio, Department of Rehabilitation & Correction; and (4) the Grievant's active discipline record states a Written Reprimand on 02-28-08 for violation of Rule 03F and 03H (absenteeism), a Last Chance Agreement on 04-17-08 for Rule 45A (drugs), and a Written Reprimand on 10-06-08 for Rule 05B (misuse of state property).

## II. Contract Provisions. Rules and Policies.

Section 24.01 of the CBA provides that discipline may not be imposed upon an employee except for just cause. Section 24.02 states that the Employer will follow principles of progressive discipline and shall apply disciplinary action commensurate

with the offense. Section 24.06 states that disciplinary action shall be reasonable and shall not be used solely for punishment.

The Employer has issued Standards of Employee Conduct that specify objectionable conduct and related penalties under the above principles of progressive discipline, based upon the seriousness of the offense. The failure to follow post orders, administrative regulations, policies or directives (Section 7) provides for a written warning of the first offense, a 2-day suspension for the second offense, a 5-day suspension for the third, and removal for the fourth. Falsifying, altering, or removing any document or record (Section 22) provides for a written warning, a 1-day suspension or removal for the first offense, a 2-day or removal for the second, a 5-day or removal for the third offense and removal for the fourth offense, depending upon the seriousness of the subject offense. Section 46 deals with penalties for engaging in unauthorized relationships with an inmate. The misconduct includes the exchange of personal letters, phone calls or information, engaging in any other unauthorized personal relationship, visiting without authorization, and committing any sexual act, or engaging in sexual contact with an inmate. The penalties range from suspensions to removal depending upon the seriousness of the misconduct.

### III. Factual Background.

The Grievant, at all relevant times was working as a Corrections Officer ("CO") as the only CO assigned to Housing Unit-J, one of the buildings of the North East Pre-Release Center of the ODRC. He worked the third shift that began at 10:00 pm and

ended at 6:00 am the following day. The facility houses inmates in a medium to minimum security level. The inmates are convicted felons who have served substantial sentences and have earned the right to serve their remaining time at this facility. While the facility's perimeter is secured, inmates are not confined to their cells or rooms and may freely move within the facility. The CO assigned to the building, however, must make 16 security checks during an 8-hour shift where inmates must report to their rooms and be counted. A rover CO then accounts for each inmate while the assigned CO is present at approximately 30-minute intervals. The assigned CO has the responsibility to accurately report his activities and assigned duties in his logbook for purposes of record keeping and accountability.

Jamie Wagner is an inmate who is serving time for an aggravated assault conviction. She was working as the third shift porter during the Grievant's shift. The porter is responsible for cleaning and related maintenance work in the building. The specific charges of misconduct against the Grievant state that the Grievant was removed from service for failing to follow post orders, administrative regulations, policies or directives, in violation of Section 7, falsifying, altering or removing any document or record in violation of Section 22, and engaging in an unauthorized relationship with inmate Jamie Wagner in violation of Section 46. The charge states specifically:

On the night of 8-31-08 and the morning of 9-1-08, you worked Third Shift. Your shift began on 8-31-08 at 10:00p.m. and ended at 9-1-08 at 6:00a.m. You were assigned to work Housing Unit-J. Video surveillance records you failed to conduct a minimum of two (2) per hour [security rounds] with no more than thirty (30) minutes between each round, at staggered intervals. Your actions were in violation of NEPRC Housing Unit Post Orders 04-500.

In addition, you falsified security round entries in the Housing Unit-J Log Book.

Moreover, an investigation revealed you were involved in an unauthorized relationship with inmate Wagner #55665.

The post orders state that the officer is to conduct security rounds, look into each cell, ensure that all inmates in each cell are alive and breathing, make a minimum of two rounds per hour with no more than thirty minutes between each round at staggered intervals. The Employer compared the videotape evidence with the log entries and determined that the Grievant falsified his logbook entries. He stated that he made the required security rounds and accurately recorded his activities. The Employer believes that the video evidence shows otherwise.

Management attempted to show through its evidence that during the subject shift the Grievant was with inmate Wagner in his area near his work desk throughout the night and he did not make his scheduled security rounds at the required intervals. It produced several letters, which purport to show the unauthorized relationship between the Grievant and Wagner. It believes the evidence shows that Wagner's sister Renee Wagner was enabling this relationship by conducting 3-way telephone calls between the Grievant, inmate Wagner and her sister.

The Union and the Grievant believe that the Employer has not proved the charges and allegations against the Grievant by the high standard of proof that is required in

arbitration proceedings when an employee is terminated for alleged unethical or illegal conduct. The video evidence is incomplete; other video evidence that would show the Grievant making his rounds was not produced. The letters were not written by the Grievant, and it is not the Grievant's voice on the recorded telephone calls. The Grievant was indicted in criminal court and was tried for a felony before a jury of his peers. The charge alleged that the Grievant committed a sexual battery upon inmate Wagner. The jury after hearing the evidence acquitted the Grievant on these charges. This exoneration should suffice to establish the Grievant's innocence relative to these administrative charges, and the Grievant should be reinstated to his former position and be made whole with respect to reinstatement of his seniority, the clearing of his record, and the recovery of any and all lost earnings and benefits.

#### IV. Evidence, Discussion and Findings.

##### *The Relevance of the Criminal Trial Acquittal*

The criminal trial acquittal has limited relevance in this arbitration proceeding for the following reasons: First, the parties are different. The criminal proceeding involved the Grievant and the State of Ohio that was prosecuting him on a criminal charge of a sexual battery against inmate Wagner. This matter involves the Grievant's employer, the State of Ohio and the Union representing the correction officers, including the Grievant. Second, the issues are substantially different. The issue in the criminal trial was whether the State could prove the elements of the specific charge or crime involving the Grievant's action. This matter involves the issue of whether the Grievant violated the stated employer promulgated workplace

policies and procedures. Finally, the burden of proof imposed upon the prosecution and upon the employer is different in each matter. In criminal proceedings, the State must prove its charges against the Grievant “beyond a reasonable doubt.” This is because the jury’s finding of guilty may result in the removal of the defendant’s liberty with confinement in a prison. Arbitration matters are civil proceedings in nature, involving the termination of the Grievant’s employment as the maximum penalty.

The burden of proof upon the employer in disciplinary cases is normally only proof by a “preponderance of the evidence,” or by the greater weight of the evidence. However, when the employee’s alleged offense would constitute a serious breach of law, or would be viewed as moral turpitude sufficient to damage an employee’s reputation and hinder future career or employment opportunities, most arbitrators require a higher quantum of proof, typically expressed as “clear and convincing evidence.” Some require proof “beyond a reasonable doubt,” as in the criminal setting, but, absent an express contractual provision to the contrary, most hold that the criminal-law standard of “beyond a reasonable doubt” has no place in an informal dispute resolution mechanism like arbitration.<sup>1</sup>

Moreover, the difference between the Grievant’s criminal trial and verdict, and this matter is even more pronounced due to the fact that the Grievant did not testify in his criminal trial, thereby exercising his constitutional 5<sup>th</sup> amendment right to protect himself

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<sup>1</sup> The Common Law of the Workplace, The Views of Arbitrators, 2<sup>nd</sup> Ed., NAA, Theodore J. St.Antoine, Editor, BNA Section 6.10, pp. 191-94 (2005).

against self incrimination. The jury, therefore, did not have the opportunity that was afforded to me in this proceeding to judge the Grievant's credibility. The Grievant testified under oath in this matter, and was cross-examined at length. I was able to consider the Grievant's responses and denials compared to the testimony from other witnesses, and his explanations of the documentary and video evidence presented against him.

#### *The Unauthorized Relationship Charge*

I find that the evidence supports the finding that the Grievant was involved in an unauthorized relationship with inmate Wagner with the requisite degree of certainty required by the above arbitration standards. This finding is based upon an abundance of evidence, including personal notes written from the Grievant to inmate Wagner, and testimony from inmate Wagner and her sister, Renee Leonard, both of who testified about the ongoing romantic relationship between the Grievant and Wagner. The testimony included personal facts about the Grievant and information that would ordinarily not be known by the two women if the Grievant's relationship with Wagner were only a normal CO-inmate relationship.<sup>2</sup> The handwriting on the notes is similar to the Grievant's handwriting on other documents. There was no expert evidence ruling out a finding that the notes were not written by the Grievant. Leonard's telephone records and the substance of the phone conversations between inmate Wagner and the Grievant establish

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<sup>2</sup> Inmate Wagner accurately described the Grievant's tattoos and other physical characteristics. She knew about the Grievant's home life, that he lived with his father and owned two motorcycles for a period of time. She knew the name of his friend and a fake name that was created for purposes of communicating with the Grievant. She knew the name of the Grievant's ex-girlfriend. She knew the Grievant's work computer password.



the unauthorized relationship. The phone records establish three-way phone calls that Leonard arranged between the Grievant and her sister. It is clear to me that the Grievant was the male person engaged in the phone conversations. Wagner was clearly involved in an unauthorized relationship with the caller, who was a corrections officer at the facility.

The Grievant provided no evidence that would connect the calls and conversations to any other CO. His defense against the charge consisted of denials. He was not the person engaged in the phone conversations. He did not write the notes. The Grievant could have seen his tattoos during his training. He never conversed with Leonard. While the Grievant contends that Leonard and Wagner were lying in an attempt to frame him, he could not reasonably articulate or establish any motive on their part to lie and falsify evidence in this proceeding. He speculates about conspiracies to damage his employment relationship, and that inmate Wagner used her manipulative skills to obtain his personal information, but he provided no evidence sufficient enough to reject the extensive evidence that was presented against him. After carefully reviewing all of the presented evidence, I find that the unauthorized relationship clearly existed between inmate Wagner and the Grievant.

#### *The Remaining Charges*

It is unnecessary to discuss and resolve the remaining charges against the Grievant. The prohibited and unauthorized relationship between the Grievant and inmate Wagner is a serious offense, enough under these facts and circumstances to sustain the

forfeiture of the Grievant's employment. He compromised the trust that is inherent in his employment position. His duties and responsibilities require appropriate supervision over inmates within his charge. He compromised and abused his position of authority and control over an incarcerated person for his own self-interest. He acted inappropriately and irreparably violated the fundamental requirement of his trusted position. The Union presented no compelling mitigating factors that would justify a reversal of the Employer's discharge decision. The Grievant's past work record contains prior discipline. Accordingly, I find that the Employer's decision was for just cause.

V. Award.

The grievance is denied for the above reasons.

Date of Award: July 24, 2010

*Mitchell B. Goldberg*  
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Mitchell B. Goldberg, Arbitrator