

IN THE MATTER OF ARBITRATION
BETWEEN
STATE OF OHIO – DEPARTMENT OF REHABILITATION & CORRECTIONS
AND
STATE COUNCIL OF PROFESSIONAL EDUCATORS (SCOPE)/OEA/NEA

Grievant: Kristin Guthrie

Case No. 27-30-20091218-0187-06-10

Date of Hearing: February 24, 2011

Place of Hearing: Marion, Ohio

APPEARANCES:

For the Union:

Advocate: Mark E. Linder, Esq., Labor Relations Consultant

2nd Chair: Dominic Marsaro, SCOPE Representative

Witnesses:

Kristin Guthrie – Grievant

For the Employer:

Advocate: Buffy Andrews, Labor Relations Officer

2nd Chair: Jackie Milsom, Office of Collective Bargaining

Witnesses:

Andrew Burdick – Detective

Teri Baldauf – Administrative Assistant

Edward Sheldon – Warden

William Freed - Investigator

OPINION AND AWARD

ARBITRATOR: Dwight A. Washington, Esq.

Date of Award: May 6, 2011

INTRODUCTION

The matter before the Arbitrator is a Grievance pursuant to the Collective Bargaining Agreement ("CBA") in effect July 14, 2009 through June 30, 2012, between the State of Ohio Department of Rehabilitation and Corrections ("Employer") and the State Council of Professional Educators (SCOPE)/OEA/NEA ("Union").

The issue before the Arbitrator is whether just cause exists to support the removal of the Grievant, Kristin Guthrie ("Grievant") for violating the following Employer's Standards of Employee Conduct Rules: 7 – Failure to follow post orders; administrative regulations, policies or directives; 26 – Failure to immediately report any personal arrest or criminal charge; and 39 - Any act that would bring discredit to the Employer.

The removal of the Grievant occurred on December 16, 2009 and was appealed in accordance with Article 13 of the CBA. This matter was heard on February 24, 2011, where both parties had the opportunity to present evidence through witnesses and exhibits. Post-hearing briefs were agreed to be submitted to the Arbitrator by both parties on or about March 25, 2011 and this matter is properly before the Arbitrator for resolution.

BACKGROUND

The Grievant was removed on December 16, 2009 primarily because she failed to timely notify the Employer of her arrest for shoplifting on November 8, 2009, in violation of Rule 26. The sequence of events regarding the November 8th incident indicates that the Grievant was arrested at the Community Market in Marion, Ohio while attempting to steal four (4) steaks. She was charged with criminal theft, and her arraignment was set for November 10, 2009.

The Grievant plead no contest at her arraignment, and the Court imposed the following sanctions: (1) two years community control – abide by laws of Ohio; (2) obey terms and

conditions of supervised probation; (3) stay away from the Community Market; (4) 90 days jail time (82 days suspended); and (5) \$400.00 fine with \$250.00 suspended. On November 11, 2009, the Grievant's name appeared in the local newspaper (Marion Star) under the Police section for theft (JX 3, p. 28).

The Employer was informed on November 12, 2009 around 8:25 a.m. by the Grievant that she was "picked up," but she failed to provide any specifics regarding the November 8th incident.

During the Employer's investigation of the November 8, 2009 incident, it was discovered that in July 2007 and in July 2009, the Grievant had two other criminal charges on her record. Neither of these incidents was reported to the Employer by the Grievant.

In seemingly stark contrast to the foregoing, the record indicates that the Grievant held a Master's Degree in Education and was employed as a teacher. The Grievant was hired by Employer in July 2000. The Grievant received several distinguished awards between 2005-2009, highlighted by receiving the Ohio Teacher of the Year in 2007, which was awarded by the Correctional Education Association. By all accounts, the Grievant was an exceptional instructor and highly regarded by her peers. However, due to low self-esteem issues, the Grievant admittedly in 2007-2008 began ". . . shoplifting to help alleviate her anxiety and constant nervousness." (Union's Post Hearing Statement, pp. 4-5).

Although the Grievant may have been excelling as a teacher, her active disciplinary record indicated that she was not an exemplary employee. Grievant's active discipline included: written warning for allowing inmates to have access in others' earned credit or class attendance information; 2 day suspension for falsifying inmate class attendance (later reduced to a written warning); and 2 day suspension for forging inmates' signatures on evaluations. The Employer

submits that the Grievant has been deceitful and untrustworthy throughout her employment, and has progressed through the disciplinary grid to warrant removal, whereas the Union contends that intervening mental health conditions caused the Grievant to resort to abnormal behavior, eventually hitting rock bottom.

ISSUE

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

RELEVANT PROVISIONS OF THE CBA AND DR&C WORK RULES

DR&C STANDARDS OF EMPLOYEE CONDUCT

	1 st	2 nd	3 rd	4 th
Rule 7.				
7. Failure to follow post orders, administrative regulations, policies or directives.	WR or 1	2	5	R
Rule 26.				
26. Failure to "immediately" report any personal arrest or criminal charge.	2	5	R	
Rule 39.				
39. Any act that would bring discredit to the employer.	WR or 1 or R	2 or 5	5 or R	R

POSITION OF THE PARTIES

EMPLOYER'S POSITION

The Grievant failed to immediately report the July 2007 check fraud¹ and the May 2009 theft charge² in violation of Rule 26. Both incidents resulted in judicial sanctions being issued against her. Moreover, if the November 8, 2009 incident didn't occur, the Grievant wouldn't have reported the above incidents.

The November 8, 2009 arrest and theft charge is another unrefuted example of a Rule 26 violation when she failed to contact anyone at the facility on November 8th, 9th, 10th or 11th even though she works in a facility that operates 24/7. The Grievant's apparent motivation to "come clean" is that on November 11th, her name appeared in the local newspaper (JX 3, p. 28) under the Police section.

Warden Edward Sheldon ("Sheldon") testified that, although the Grievant was a good employee, this was the first knowledge he had of her prior unreported incidents, and her conduct resulted in negative publicity to the institution in violation of Rule 39. Furthermore, he was unaware of any employee other than the Grievant who failed to immediately report a criminal charge.

The Employer further points out that Grievant's behavior inside and outside the institution is eerily similar, in that her active discipline results from her failure to follow rules as indicated by her allowing inmates the ability to read other inmates' information for attendance/earned credit (10-14-08). Another example is when the Grievant was given a 2 day working suspension because she forged inmate names on evaluation reports (8-26-09); and also

¹ On July 23, 2007 the Grievant plead no contest to the theft charge of \$403.33, and she was found guilty. The Grievant received various sanctions from the Court.

² On July 7, 2009 the Grievant plead no contest to a charge of shoplifting which occurred on May 17, 2009, and she was found guilty. The Grievant received various Court-imposed sanctions.

when she received a written warning for knowingly marking inmates present in class when they were absent (2-23-09). Despite the Grievant's community involvement and awards, she was anything but an exemplary employee.

The justification(s) offered by the Union to mitigate the removal fail to overcome the evidence that the Employer had just cause for removal. As example, the Grievant's pending bariatric surgery scheduled in October 2009 required that she undergo a thorough psychological evaluation in February 2009. The Grievant successfully underwent the evaluation with no demonstrative mental and/or physical condition to postpone the bariatric surgery. No medical evidence suggests that, as a result of psychological conditions, Grievant was unable to comply with the Standards of Employee Conduct.

Finally, the Employer cites Arbitrator John J. Murphy for the proposition that "immediately" under Rule 26 requires an employee to do just that. "It does not mean one day later or when you return to work. It means you report any personal arrest or criminal charge immediately." OCSEA v. State of Ohio, Dept. of Corrections Medical Center, 27-04-20070914-1673-01-03 (Arb. Murphy 2008), p. 7.

UNION'S POSITION

The Grievant had twenty years of teaching experience of which ten years were with the Employer. The Grievant was well regarded by her peers and the community as indicated by the numerous professional and civic awards she received.³ The Grievant was an extraordinary teacher and highly regarded in the community.

³ December 2005 – Gold Star award as an outstanding teacher;
September 2007 – Newspaper article in Marion Star;
September 2007 – Named Ohio Teacher of the Year by Correctional Ed. Assn.;
Summer 2008 – Named Ohio Teacher of the Year by Ohio Central School System;
March 2009 – Article in "The Buckeye".

The Union cites several defenses to rebut and/or mitigate the removal, such as: improper investigation; Employer failed to establish just cause existed through clear and convincing evidence; Employer stacked the charges against the Grievant; Employer failed to offer the Grievant a last chance agreement; and that the Grievant's medical problems were the reason(s) for the conduct which led to her removal. Moreover, the Union asserts the Grievant's length of service must be properly considered as a mitigating factor.

It is fair to note that the Union concedes that the Grievant did not notify the Employer regarding the July 2007 or the July 2009 incidents. However, it attributes this oversight to the Grievant's poor judgment and belief that the July 2007 incident was not a criminal matter. The July 2009 incident occurred during the period she suffered from ". . . severe anxiety as well as psychological and emotional problems that led to her shoplifting." (Union's Post-Hearing Statement, p. 12).

A review of the records indicates that Dr. Don McIntire prepared what was titled a Brief Psychological Evaluation after seeing the Grievant on two occasions in early February 2010 (UN X. 9). This evaluation was not connected to the bariatric surgery, and was scheduled by her therapist whom the Grievant began seeing on November 11, 2009. Dr. McIntire's report indicates that apparently when the Grievant became overwhelmed and stressed, one way of coping was eating, which was replaced with ". . . acquisition of items from stores." (UN X 9).

According to the Union, the Grievant's inability to control her mental problem led to her shoplifting behavior. However, due to the treatment received from her therapist since November 11, 2009, it appears that the Grievant has successfully returned from the depths of her personal challenges.

The Union seeks another opportunity via a last chance agreement or a determination that just cause did not exist to justify the Grievant's removal. Moreover, the Grievant had worked almost a decade for the Employer and as such her length of service requires deference.

In summary, the Union contends that the Employer failed to provide the quantum of evidence, i.e., clear and convincing, necessary to meet the just cause standard. The Employer's investigation was not objective or thorough, only focused upon the evidence of "guilt," and ignored any mitigating circumstances.

DISCUSSION

Based upon the sworn testimony, the exhibits presented at the hearing, and the post-hearing briefs submitted, the grievance is denied.

The Grievant worked at the North Central Correctional Institution as a teacher. She holds a Master's Degree in Education and appeared at the hearing as a caring and intelligent witness. The Grievant was cognizant of all of the events preceding her removal and was actively engaged throughout the proceeding. The Grievant further acknowledged the receipt of rules which govern her employment (Joint Exhibit (JX) 3, p. 97), but also freely admits she made some wrong choices along the way.

To support the removal of the Grievant, the record must contain substantial evidence of wrongdoing to support a finding of violations of Rules 7, 26 and 39. Moreover, an analysis of the record must demonstrate that the Employer's actions were reasonable and not arbitrary or capricious. I concur with the Union that removals must be closely scrutinized, given the finality and harshness of the impact of the decision. The Grievant's length of service and impressive array of job-related recognitions demands a closer inspection to ensure "just cause" to remove is

supported in the record. They, however, do not sufficiently mitigate against termination in this matter.

With respect to Rule 7 (failure to follow policies and directives), the Grievant admits that she did not comply with Rule 26 (failure to immediately report any . . . arrest or criminal charge) regarding the July 2007 and July 2009 incidents. Moreover, she did not report the incident of November 8, 2009 until November 12, 2009. Whether or not the appearance of the Grievant's name in the local newspaper on November 11, 2009 was a motivating factor, is immaterial to her duty to **immediately** report any criminal charge. The Grievant's failure to immediately contact the institution on November 8th provides the basis for a violation of **both** Rules 7 and 26. Contrary to the Union's contention that the charges were stacked, namely if a violation of Rule 26 occurs, a violation of Rule 7 results, I disagree. Point in case: If the evidence supported that circumstances precluded Grievant from reporting "immediately," a potential finding for a Rule 7 violation would still be viable.

With respect to Rule 39, the Union and the Grievant presented evidence which included newspaper articles printed in the Marion Star on September 22, 2007 (UN X 1); September 10, 2007 (UN X 3) and March 8, 2009 (UN X 7). The referenced news articles are positive and meant to share the good news of Grievant's work and selection as a finalist to receive a valued award given to a select number of women in the community.

However, on November 11, 2009 the Marion Star printed the Grievant's name, age and address and stated [she] ". . . was issued a summons for theft." (JX 3, p. 28). The parties disagreed over the impact of the adverse publicity focusing upon issues such as number of readers who actually saw this exhibit. However, this Arbitrator finds such numbers immaterial.

The Grievant's off duty arrest on November 8, 2009 and subsequent publication in the Marion Star clearly discredited the Grievant and her position as an educator with the Employer, which is a Department of Rehabilitation and Corrections. Certain off-duty conduct is extremely important because of the Employer's need for trust and public confidence. Simply, if the off-duty conduct subjects an employee to lack of trust by inmates and/or staff, it compromises the ability of the employee to be effective in her position.

The Warden's testimony indicated the violation of trust inherent with the Grievant's behavior supports a Rule 39 violation. Coupled with her active discipline record and my finding that a violation of Rules 7, 26 and 39 occurred, the remaining question is whether the discipline was commensurate with the offense? An overall review of the record supports that just cause existed to remove the Grievant.

The Union contends that mitigating circumstances exist for several reasons, centering to a large extent upon her mental problems. The record is silent as to the state of her mental conditions in 2007 and 2008. In 2007 and 2008 several incidents occurred (July 2007 – bad check; October 2008 – failure to follow Rule 7), which contributed to her removal. In 2009, no evidence in the record indicates that her mental problems were the reason for her institutional discipline in February and August 2009. In other words, if her mental challenges caused her to shoplift, did the same condition cause her to forge inmates' signatures or grant inmates access to other inmates' records? I carefully reviewed Dr. McIntire's February 2010 report to find medical support for her mental problems (UN X 9), but it was not comprehensive nor persuasive.

Finally, the Arbitrator considered the Union's other contentions, such as: inadequate investigation; failure to offer the Grievant a last chance agreement; and the overall quantum of proof.

Having previously determined the Employer satisfied its burden of proof that the Grievant violated Standards of Employee Conduct Rules 7, 26 and 39, I find that discipline is appropriate, and the grievance is denied.

Dwight A. Washington
Dwight A. Washington, Esq.
Arbitrator