

IN THE MATTER OF THE ARBITRATION BETWEEN

GRIEVANCE NO.: 27-35-20090626-0113-01-03

STATE OF OHIO
DEPARTMENT OF REHABILITATION & CORRECTION

Toledo Correctional Institution

AND

OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION
AFSCME Local 11

Grievant: Dayna Newton

*Arb
Decision
1053*

OPINION AND AWARD

ARBITRATOR: Meeta Bass Lyons

AWARD DATE: February 1, 2010

APPEARANCES FOR THE PARTIES

EMPLOYER:

Buffy Andrews, Labor Relations Officer
Employer Advocate

Marissa Hartley, Office of Collective Bargaining
Second Chair

UNION:

Jim Hauenstein, Ohio Civil Services Employees
Association, AFSCME Local 11,
Union Advocate

Karen Vroman, Ohio Civil Services Employees
Association, AFSCME Local 11,
Second Chair

Grievant: Dayna Newton

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FEB - 1 2010

OCSEA-OFFICE OF
GENERAL COUNSEL

PROCEDURAL HISTORY

Ohio Department of Rehabilitation & Correction, Toledo Correctional Institution, is hereinafter referred to as "Employer". Ohio Civil Services Employee Association, AFSCME Local 11, is hereinafter referred to as "Union". Dayna Newton is hereinafter referred to as "Grievant".

Grievance No. 27-35-20090626-0113-01-03 was submitted by the Union to Employer in writing on June 26, 2009 pursuant to Article 25 of the parties' collective bargaining agreement. Following unsuccessful attempts at resolving the grievance, it was referred to arbitration in accordance with Article 25, Section 25.03 of the 2006-2009 Collective Bargaining Agreement.

Pursuant to the collective bargaining agreement between the Union and Employer, the parties have designated this Arbitrator to hear and decide certain disputes arising between them. The parties presented and argued their positions on November 30, 2009 at the Toledo Correctional Institution. During the course of the hearing, both parties were afforded full opportunity for the presentation of evidence, examination and cross-examination of witnesses, and oral argument. Witnesses were sequestered during the hearing. The parties submitted written closing arguments on December 18, 2010. The hearing record was closed on December 18, 2010.

The parties stipulated that the grievance and arbitration were properly before the Arbitrator.

The parties stipulated that the issues to be resolved in the instant arbitration to be: Was the Grievant, Dayna Newton, removed from her position of Correction Officer for just cause? If not, what shall the remedy be?

PERTINENT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT**ARTICLE 24 - DISCIPLINE****24.01 - Standard**

Disciplinary action shall not be imposed upon an employee except for just cause. The Employer has the burden of proof to establish just cause for any disciplinary action. ...

BACKGROUND

Set forth in this background is a summary of undisputed facts and evidence regarding disputed facts sufficient to understand the parties' positions. Other facts and evidence may be noted in the discussion below to the extent knowledge of either is necessary to understand the Arbitrator's decision.

The facts in this case are largely undisputed and are hereinafter summarized. Where, however, relevant evidence regarding pertinent facts conflicts, the evidence is summarized.

Grievant was a correction officer at the Toledo Correctional Institution of the Ohio Department of Rehabilitation and Corrections. She was hired on July 24, 2000. Grievant had approximately nine years of service at the time of her removal on June 25, 2009. She had no active discipline in her record.

Grievant was terminated from her position due to the alleged violation of Rule 37 and 49 of the Employee Standards of Conduct arising from the following circumstances:

On February 19, 2009, Grievant was working at her post position in the D-1 Control Center, a secure post. The control center is "the focal point of all internal security networks for the Toledo Correctional Institution and the D-1 housing unit. The D-1 control center shall remain secure at all times, and access into D-1 Control Center is limited to only authorized staff." No one can enter the control center unless the officer working the post allows access. On said date, Grievant was responsible for maintaining the security of the D-1 area.

Grievant allowed the Sergeant access into the control center. The Sergeant does have access to the control center, and it is not unusual that the Sergeant would be in the control center. Grievant and the Sergeant discussed the behavior and removal of an Inmate from the area. Grievant, the Sergeant, and for a brief period, Officer Davis were present in the downstairs control room. Officer Davis left. At some point during their conversations, the Sergeant massaged the shoulders of Grievant with her consent, and the actions between the two officers advanced with Grievant's hand on the genital area of the Sergeant that ended in the ejaculation of his semen into her hands.

At the time of his ejaculation, another correction officer approached the control center from the direction of the B-block in order to gain admission into the control center to relieve Grievant. Grievant did not immediately open the door. The relief officer "stood there for a little bit" about two to three minutes waiting to gain access into the control center. The relief officer became concerned that Grievant may not have seen her approach the control center because of the position of B-Block. The relief officer then hit the buzzer, and was permitted access into the control room. When the relief officer first entered into the control room, the Sergeant was standing directly to the right of Grievant, and Grievant was seated in her chair. The relief officer proceeded to vent regarding a work situation. The Sergeant then went and sat in the chair closest to the black box. After the relief officer had finished her story, the Sergeant left and Grievant went upstairs to the restroom.

Grievant reported the incident as nonconsensual a little over an hour later. Grievant saved a portion of the semen of the Sergeant in a baggy. The Sergeant was removed from his position. As the investigation continued, the Employer made the determination that the act was consensual and Grievant was removed as well.

The Union filed its grievance on June 26, 2009 alleging a violation of Article 24 Discipline and any other article, which applied. The grievance was not resolved within the procedure established by the collective bargaining agreement, and was properly advanced to arbitration.

POSITIONS OF THE PARTIES

EMPLOYER

Employer contends that Grievant and the Sergeant engaged in a consensual sexual act, the masturbation of the Sergeant, on February 19, 2010. The only witnesses to the incident are Grievant and the Sergeant. Employer determined that the Sergeant is the more credible witness based upon the prior inconsistent statements and inactions of Grievant in failing to stop the acts, the polygraph of the Sergeant supports his credibility, the conviction of Grievant, and the rebuttal testimony of two coworkers of Grievant confirming a prior social occasion and sexual activity of Grievant and the Sergeant through the admissions of Grievant. The actions of Grievant constitute a violation of the Standard of Employee Conduct Rules 37 and 49. The nature of the violations supports the removal of Grievant.

Employer contends that all elements of just cause have been met, and Grievant was removed for just cause.

Employer requests the Arbitrator deny Grievance No. 27-35-20090626-0113-01-03.

UNION

Union contends that Grievant was sexually battered at the workplace on February 19, 2009. The testimony and statements of Grievant throughout the administrative process have been consistent, and her actions are consistent with that of a victim of sexual assault. The removal of Grievant by Employer only furthers the victimization of Grievant.

Union contends that the appropriate quantum of proof in a removal case is beyond a reasonable doubt. The Employer did not meet its burden of proof beyond a reasonable doubt to demonstrate that the sexual act between

Grievant and the Sergeant was consensual, and therefore the grievance should be granted.

Union requests the Arbitrator grant Grievance No. 27-35-20090626-0113-01-03 and that Grievant be reinstated to her position as a correction officer with full back pay and benefits and her situation be made whole with a remedy the Arbitrator deems appropriate. The Union further requested that the Arbitrator retain jurisdiction over this case for a period of no less than one year.

DISCUSSION

Union contends that the appropriate quantum of proof, or burden of persuasion, in a removal case is beyond a reasonable doubt. This is the highest degree of proof to meet the burden of proof of a party. Beyond a reasonable doubt does not mean that no doubt exists as to the wrongdoing of the accused, but only that no reasonable doubt is possible from the evidence presented. This Arbitrator disagrees. This is a labor relation case, a civil matter. It is well established in labor arbitration that the employer has the burden of proving that the removal of an employee was for just cause. The removal is more than an ordinary discipline matter, and a higher standard should be utilized. The more appropriate measure of proof is by clear and convincing evidence.

The issue presented in this grievance is whether or not the sex act was consensual or not. Employer argues that it was consensual and Union argues that it was a sexual battery. What happened on February 19, 2009? The evidence establishes that the Sergeant came to the D-1 control center while Grievant was on duty. Grievant opened the doors, and allowed him entrance into the control room. Another officer left the control center leaving Grievant and Sergeant alone on the first floor. Grievant and Sergeant discussed the moving of an inmate from a particular area. During some point of the conversation, the Sergeant began massaging the

shoulders of Grievant. Grievant did not tell him to stop. While massaging her shoulders, the Sergeant began making what Grievant characterized as sexual noises simulating a sexual act. In characterizing the sounds as sexual noises, it is inferred that Grievant knew that this was more than a friendly or simple massage. However, Grievant did not tell him to stop. Grievant admits under cross-examination that the massage was consensual. Once the Sergeant began to move his hands downward from her shoulders to her breast area, Grievant testified that she gave him a look and he stopped the massage. However, during the patrol investigation, Grievant stated that she asked the Sergeant what was wrong with him, and he stopped.

Grievant testified that the Sergeant took her hand and swiped it over his penis. He then twisted her hand so that the palm of her hand was facing upward, unzipped his pants, placed his penis into her hands and ejaculated. Grievant denies that she massaged his penis as alleged by the Sergeant who reported and testified that Grievant stopped and started touching him several times before he became aroused and ejaculated into her hands. Grievant admits that she did not tell him to stop, pull her hand away, or call for help. In fact, Grievant's response to the question, what were you doing when he ejaculated in your hand, was "I let him ejaculate in my hand, and thought "oh, no you didn't just do this..." Grievant admits that she did not avail herself of any of the emergency procedures of the Institution. A signal 3 is an emergency call when an officer needs assistance. Grievant testified "she did not feel that she needed to call a signal-3 at that time". If she did not have fear of her safety, then it is inferred that no threats or coercion happened.

The parties stipulated that the Sergeant is not the supervisor of Grievant, and did not have authority over her.

Employer introduced the polygraph test of the Sergeant to support his credibility. It was the opinion of the examiner that no deception was

indicated on his answers to the pertinent questions. At least three of questions use the terms against her will or force. Grievant admits that she did not attempt to stop, resist or say anything to the Sergeant with the exception noted. So there would be no deception on the test.

The record is replete with examples where Grievant's versions of the facts and incident have changed, adding and omitting relevant, material facts throughout the process. For example, her original incident report does not state the consensual massage between Grievant and the Sergeant. Grievant explained that she thought the incident report was only a draft. Grievant did not report the massage to the other officers that she called on the date of the incident.

Grievant testified that she only had a professional relationship with the Sergeant prior to the date of the incident. Grievant stated that she "dealt with him outside of the workplace." Grievant denied any contact with the Sergeant at a local club called Roberts as suggested by the Sergeant. Two rebuttal witnesses testified that Grievant told them that she was at the club with the Sergeant. One witness testified that she told him that the Sergeant did "some jacking off stuff with her". The other witness testified that she told him that they were at the club and the Sergeant pulled a stunt inside and outside the club. The Sergeant had exposed his penis. The two left the club together and went to his car. Grievant described the Sergeant as freaky to the witness, and that he retrieved petroleum jelly from his glove compartment. The incident happened approximately a year ago.

Ohio State Highway Patrol Statement Form indicates that the Grievant was asked: "Did you ever feel threatened? Tell him to stop?" She responded as follows: "No. I never felt threatened. More violated than anything. No, I asked what his problem was because it was out of his character." (Emphasis Added) Yet, Grievant testified that she had heard rumors of the Sergeant having similar acts with other persons who were no longer with the institution. There was no evidence introduced other than Grievant's testimony of rumors to support this allegation.

Union argues that Grievant would not have reported the incident if it was in fact consensual. Grievant knew she would have lost her job for consensual sexual activity at the workplace. Grievant denies that she thought that she may have been observed. No one knows but Grievant why she truly reported the incident. Based upon the evidence presented and the credibility of the witnesses, the Arbitrator finds that the act was consensual.

Union did not dispute the other mandates of just cause. Employer provided Grievant notice of the Employee Rules of Standard. Grievant testified that she was aware that consensual sexual activity at the workplace is grounds for removal. Moreover, a reading of the Work Rules 37 and 49 shows that the conduct of Grievant constituted a violation of each of those rules. Rule 37 prohibits an employee from engaging "in actions that could compromise or impair the ability of an employee to effectively carry out his/her duties as a public employee". A first violation can result in a removal. Rule 49 prohibits an employee from engaging "in immoral conduct, ...neglect of duty...violation of such section or rules of the Director of Administrative Services or the commission, or any failure of good behavior, or any others of misfeasance, malfeasance or nonfeasance in office." A first violation can result in a removal. The work rules are reasonably related to the operation of correctional institution. Employer conducted a fair and objective investigation. Employer discussed its efforts to initially shield Grievant from any stigma associated with administrative leave and the events. Grievant was treated as a victim until the investigation demonstrated that the sexual act was consensual. The warden testified to the best of his knowledge that this was the first time an incident of this nature occurred at the institution. He had no tolerance for such activity at the workplace, and does not condone sex on the clock. The seriousness of

the act warrants removal on the first Instance. Having determined that the act was consensual, both employees were removed from their position within the institution.

Employer had the burden of persuading the Arbitrator by clear and convincing evidence that the discharge of Grievant was for just cause. Employer satisfied that burden. In summary, the evidence persuades the Arbitrator that Grievant violated Work Rule 37 and 49 of the Employee Standards of Conduct on February 19, 2009, and the removal was for just cause. Giving appropriate weight to all relevant factors, the Arbitrator finds the removal of the Grievant was not so excessive as punishment as to be unreasonable, and was not contrary to Article 24 of the 2006-2009 Collective Bargaining Agreement.

Union requests that the Arbitrator retain jurisdiction over the case for a period of less than one year. Article 25.03 of the Collective Bargaining Agreement states that the arbitrator shall render her decision in writing as soon as possible, but no later than forty-five (45) days after the conclusion of the hearing, unless the parties agree otherwise. The jurisdiction of the arbitrator ends when the award has been issued unless the parties otherwise agree. There was no such agreement in the instant case.

AWARD

Having heard or read and carefully reviewed the evidence and argumentative materials in this case and in light of the above Discussion, Grievance No. 27-35-2009-06-26-00113-01-03 is denied.

Dated: February 1, 2010

/s/ Meeta Bass Lyons

Meeta Bass Lyons, Arbitrator

Steubenville, Ohio