

ARBITRATION DECISION NO.:

366

UNION:

OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:

Department of Rehabilitation
and Correction, Ohio Reformatory
for Women

DATE OF ARBITRATION:

June 12, 1991 and
July 2, 1991

DATE OF DECISION:

July 28, 1991

GRIEVANT:

John Fragmin

OCB GRIEVANCE NO.:

27-19-(90-05-02)-0151-01-03

ARBITRATOR:

Harry Graham

FOR THE UNION:

Brenda Goheen

FOR THE EMPLOYER:

Thomas E. Durkee

KEY WORDS:

Removal
Sexual Harassment
Late Step 3 Response

ARTICLES:

Article 24 - Discipline
 §24.04-Pre-
Discipline
Article 25 - Grievance
Procedure
 §25.02-Grievance Steps
 §25.05-Time Limits
 §25.07-Advance
Grievance Step Filing
 §25.08-Relevant
Witnesses and Information

FACTS:

The grievant was among the staff members at the Ohio Reformatory for Women in Marysville in 1990. In March 1990 grievant was removed from his position with the State for committing what the employer identified as three offenses. According to the State he had muttered the Italian phrase, "bruta butana" which is translated as "ugly whores." In addition, he had been working on union business while on duty in the visiting hall of the prison. Thirdly, he was accused of sexually fondling an inmate on February 14, 1990.

EMPLOYER'S POSITION:

The State insists that the grievant committed three offenses which warrant his discharge. First, three inmates reported that the grievant uttered an Italian phrase which translates as "ugly whores." Second, a Major at the Marysville facility observed the grievant writing in a ledger book. When he inquired whether grievant was working on Union business during business hours and asked to see the ledger, the grievant refused to comply. Finally, on February 14, 1990 the grievant called an inmate to the rear of the visiting hall ostensibly to have her put something away. When she arrived he allegedly grabbed her left breast. Later the same afternoon, the grievant directed the inmate to accompany him to the backstage area. She was directed to disconnect an electric coffee pot. When they arrived at the site the grievant touched the inmate in the vaginal area and kissed her on the mouth.

The State urges that the testimony of the inmate be credited because at the time of the incident she was due to go before the parole board. It is not reasonable to believe that she would jeopardize her chances for parole by coming forward and accusing the grievant of sexual harassment unless it actually occurred. The State urges the grievance be denied.

UNION'S POSITION:

According to the Union there are procedural defects in this case that require the grievance to be sustained. The Union alleges that at the pre-disciplinary hearing the grievant was not provided an opportunity to question those inmates who brought his alleged misbehavior to the attention of management. Therefore, in violation of Section 24.04 of the Agreement, the grievant was unable to confront his accusers.

Section 25.08 of the Agreement provides that the Union request relevant documents and witnesses from the Employer. These requests were made but were not honored according to the Union.

Also Section 25.02, Step 3 of the grievance procedure specifies that certain time limits be observed. Step 3 responses in removal cases must be made within 35 days of the meeting. That did not occur in this situation. Approximately six months passed between the step three meeting and the response.

On the merits, the Union asserts that the State simply has not shown just cause to discharge the grievant. Regarding the utterance of Italian curse words and the grievant doing Union business on work time, the Union contends that the evidence is flimsy at best.

As to the sexual harassment allegations, in the Union's opinion, the inmate was seeking to curry favor with the prison administration by advancing charges against the grievant, therefore the inmate's statements should not be given credibility. Further, the grievant could not have committed the offense with which he was charged because he spent part of February 14, 1990 on Union business and when he returned he went to the Union hall, not the visiting hall. The Union contends that there is sufficient uncertainty about this incident as to compel a conclusion that insufficient proof of the grievant's guilt exists.

ARBITRATOR'S OPINION:

Section 24.04 of the Agreement does not provide that either the Union or the grievant be given the opportunity to question witnesses at the pre-disciplinary hearing. The record indicates that the grievant was provided the contractually mandated opportunity to ask questions, comment, refute and/or rebut the charges against him. No violation of Article 24.04 occurred.

Section 25.08 specifies that the Union may request specific documents, etc. and that the request will not be unreasonably denied. The record indicates that the Union made copious requests for documents and that some of them were denied. A review of the record does not support a claim that the Union's preparation for

this case was compromised in any way by the refusal of the Employer to provide certain documents it requested.

As claimed by the Union, there has indeed been a violation of the Agreement by the Employer at Section 25.02. The grievant undoubtedly did not receive the expeditious processing of his grievance contemplated by the Agreement. However, that defect is not fatal to the Employer's position in this case. It must be concluded that this dispute must be determined on its merits.

The allegation concerning the swearing in Italian is simply not proved. Similarly, there is insufficient proof to conclude that the grievant was working on Union business on March 2, 1990.

Regarding the charges levied by the inmate concerning the grievant's sexual harassment of her, neither of their life histories prompt a determination that the testimony of one should be given more weight than the other. That the inmate came forward in a situation not conducive to such action and was willing to submit to a polygraph exam to support or refute her testimony is given great weight by this Arbitrator. Similarly, that she is now beyond the reach of the Marysville staff and continues her testimony unchanged tends to support it. Her specific, graphic recollection of the events of February 14, 1990 compels belief.

AWARD:

The grievance is denied.

TEXT OF THE OPINION:

In the Matter of Arbitration

Between OCSEA/AFSCME Local 11

and

**The State of Ohio, Department of
Rehabilitation and Correction**

Case Number:

27-19-(90-05-02)-0151-01-03

Grievant:

John Fragmin

Before:

Harry Graham

Appearances:

For OCSEA/AFSCME Local 11:

Brenda Goheen
Staff Representative
OCSEA/AFSCME Local 11
1680 Watermark Dr.
Columbus, OH. 43215

**For Department of Rehabilitation
and Correction:**

Thomas E. Durkee
Labor Relations Administrator
Department of Rehabilitation
and Correction

1050 Freeway Drive North
Columbus, OH. 43229

Introduction:

Pursuant to the procedures of the parties a hearing was conducted in this matter on June 12 and July 2, 1991 before Harry Graham. At that hearing the parties were provided complete opportunity to present testimony and evidence. Post hearing briefs were not filed in this dispute. The record was closed at the conclusion of oral argument on July 2, 1991.

Issue:

At the hearing the parties agreed upon the issue in dispute between them. That issue is:

“Did the Employer have just cause to remove John Fragmin?
If not, what shall the remedy be?”

Background:

Whether or not the event giving rise to the discharge of John Fragmin occurred or not is the central issue in this proceeding. As will be set forth more fully below, that question is hotly debated by the parties. The background of the incident that prompts this arbitration is simple and is not a subject of dispute. The Employer operates a number of correctional facilities within the State of Ohio. Among them is the Ohio Reformatory for Women in Marysville, OH. In 1990 there was confined at the Marysville facility a person named Amy Strader. She had been convicted of receiving stolen property. Among the staff members at Marysville was the Grievant, John Fragmin. In March, 1990 Mr. Fragmin was removed from his position with the State. It was the opinion of the Employer that he had committed three offenses. According to the State he had muttered the Italian phrase, "bruta butana" which is translated as "ugly whore." In addition, he had been working on union business while on duty in the visiting hall of the prison. Thirdly, he was accused of sexually fondling inmate Strader on February 14, 1990.

A grievance protesting the discharge was filed and processed through the procedure of the parties. It was not resolved and the parties agree it is properly before the Arbitrator for determination on its merits.

Position of the Employer:

The State insists that the Grievant committed three offenses which warrant his discharge. According to the Employer, Mr. Fragmin was overheard on muttering the phrase "bruta butana" under his breath. That phrase is translated as "ugly whores." The statement was reported by an inmate, Linda Bert. Bert's account was supported by two other inmates. Inmate Bert's testimony was credited by the Employer and provides grounds for disciplinary action it asserts.

On March 2, 1990 Major Robert Beightler entered the visitation hall at the Marysville facility. Upon entry, he observed Officer Fragmin writing in a ledger book. The volume contained green lined pages. Major Beightler asked Officer Fragmin if he was working on Union business during working hours, when he had not been given permission to do so. Officer Fragmin denied working on Union business. When Major Beightler asked to see the volume Officer Fragmin was working with the Officer declined to give it to him.

The third incident prompting the State to discharge the Grievant occurred on February 14, 1990. Officer Fragmin allegedly gave Inmate Strader candy, cigarettes and soda. According to Inmate Strader Officer Fragmin subsequently called her to the rear of the visiting hall. He ostensibly wanted her to put something away. When she arrived he grabbed her left breast. She left the area immediately. Subsequently, later the same afternoon, Officer Fragmin directed her to accompany him to the backstage area. She was directed to disconnect an electric coffee pot. When they arrived at the site Officer Fragmin touched Inmate Strader in

the vaginal area. He also pulled her towards him and kissed her on the mouth. Inmate Strader immediately broke free and left the scene. She returned to her cell and told her roommate, Inmate Allen, of the event.

The State urges that the testimony of Amy Strader be credited. She is now out of prison. At the time of this incident she was due to go before the parole board. It is not reasonable to believe that she would jeopardize her chances for parole by coming forward and accusing Officer Fragmin of sexual harassment unless it actually occurred. Furthermore, according to the State it is likely that if an officer is going to misbehave in the fashion alleged to occur it is likely that it would be done in an isolated area, away from the view of inmates or co-workers. This is so that the officer can raise the defense of "its your word against mine." The State acknowledges that situation exists in this case but urges the Arbitrator credit the testimony of Amy Strader. It points out that during this incident she has testified consistently. Moreover, during cross examination at the arbitration hearing itself she was steadfast in her account of the events of February 14, 1990. Ms. Strader has nothing to gain in this proceeding. She came forward despite great mental anguish and trepidation. At the hearing she was visibly upset at recounting the events and with the presence of Officer Fragmin. Under such circumstances, her account should be accepted and the discharge sustained the State urges.

According to the State there were no procedural defects associated with the processing of this dispute. Notice was provided to the Union in proper fashion. Documents used by the State in its case were provided to the Union. In no way may the Union claim that its representation of the Grievant was compromised or contractual rights violated by the State's action it insists. In the final analysis, the State urges that the testimony of Amy Strader be credited and that of Officer Fragmin be disregarded. He obviously has his livelihood at stake. Amy Strader has nothing to gain from her testimony. As that is the case, the State urges the grievance be denied.

Position of the Union:

According to the Union there are procedural defects in this case that require the grievance to be sustained. Section 24.04 of the Agreement was violated in the opinion of the Union. At the pre-disciplinary conference Mr. Fragmin was not provided an opportunity to question those inmates who had brought his alleged misbehavior to the attention of management. It is obvious that serious charges were levied against the Grievant that resulted in his removal from State service. That he was unable to confront his accusers should result in granting of the grievance according to the Union.

Section 25.08 of the Agreement provides that the Union may request relevant documents and witnesses from the Employer. Those requests were made in this case. They were not honored according to the Union. Its ability to prepare a defense for Mr. Fragmin was compromised and Agreement was breached. Accordingly, the Union urges the grievance be granted.

At Section 25.02, Step 3 of the grievance procedure specifies that certain time limits be observed. Step 3 responses in removal cases must be made within 35 days of the meeting. That did not occur in this situation. Approximately six months passed between the step three meeting and the result. No question exists concerning this sequence of events. As that is the case, the grievance must be sustained in the Union's opinion.

Turning to the merits, the Union asserts that the State simply has not shown just cause to discharge John Fragmin. No witness testified that uttered Italian curse words. As that is the case, no discipline can issue for that allegation made against him.

Similarly, the evidence concerning Mr. Fragmin doing Union business on work time is flimsy at best according to the Union. Mr. Fragmin has consistently denied that this was the case. At the pre-disciplinary hearing he brought the visiting hall log book to show to Major Beightler. Beightler discounted them. The evidence against the Grievant concerning the charge of performing union work on State time is so weak as to require it be disregarded in the Union's view.

Turning to the alleged sexual harassment involving Amy Strader, the Union points out that at no time prior to the arbitration hearing did the Grievant have an opportunity to confront her. There is an aspect of unfairness about the manner in which the hearing process was conducted. Furthermore, the Union indicates

that in the final analysis, it is the word of the Grievant against that of his accuser, Ms. Strader. No particular reason exists to credit Ms. Strader and not Mr. Fragmin. In the Union's opinion, Ms. Strader was seeking to curry favor with the prison administration by advancing charges against Mr. Fragmin. She was coming up to a parole hearing. Implicating the Grievant in a disciplinary proceeding would advance her cause in the Union's view. As that is the case, her testimony should be given short shrift. Furthermore, the sequence of events in this situation indicates that Mr. Fragmin could not have committed the offense with which he is charged. On February 14, 1990 Mr. Fragmin was on Union business from about 2:00PM to somewhat after 4:00PM. He was not in the visiting hall. Rather, he was at the Union hall. When he returned to the visiting hall the inmates were preparing to return to their cells. There was simply no time for him to harass Ms. Strader on the afternoon of February 14, 1990. Furthermore, Ms. Strader was not precise concerning the time the alleged incident occurred. As that is the case, the Employer has not proven its case under any standard of proof. There is sufficient uncertainty about this incident as to compel a conclusion that insufficient proof of Mr. Fragmin's guilt exists. As that is the case, the grievance must be sustained in the Union's opinion. It seeks an award directing that Mr. Fragmin be restored to employment and back pay made to him.

-

Discussion:

Section 24.04 of the Agreement does not provide that either the union or the grievant be given an opportunity to question witnesses at the pre-disciplinary hearing. The record indicates that the grievant was provided the contractually mandated opportunity to ask questions, comment, refute and rebut the charges against him. No violation of the Agreement at Section 24.04 occurred.

Section 25.07 specifies that the Union may request specific documents, books and papers and that the request will not be unreasonably denied. The record indicates that the Union made copious requests for documents and that some of them were denied. (E.g. Union Ex. 3). A review of the record does not support a claim that the Union's preparation for this case was compromised in any way by the refusal of the Employer to provide certain documents requested it requested. At all times the Union was aware of the reasons for which Mr. Fragmin was discharged and the people who were involved in the charges levied against him. It cannot be concluded that the Employer "unreasonably denied" the Union's various requests for documents, papers, books and witnesses.

As claimed by the Union, there has indeed been a violation of the Agreement by the Employer at Section 25.02. The answer required of the Employer at the third step must be provided within 35 days of the third step meeting. At Joint Exhibit 2 the record indicates that the third step meeting was held on May 15, 1990. The third step response is dated November 5, 1990. This is obviously beyond the time period prescribed by the Agreement. The Union urges that due to that violation the grievance be granted. The Agreement does not prescribe that result and this Arbitrator will not direct it. Section 25.05 of the Agreement provides that "grievances not appealed within the designated time limits will be treated as withdrawn grievances." There is no analogous default placed upon the Employer. Section 25.05 merely specifies that when the grievance response "has not been received by the grievant and the Union representative within the designated time limits, the grievant may file the grievance to the next successive step in the grievance procedure." That occurred in this situation as the Union advanced the grievance to arbitration. Mr. Fragmin undoubtedly did not receive the expeditious processing of his grievance contemplated by the Agreement. That defect is not fatal to the Employer's position in this case. Nor is it mandated by the Agreement that such a defect in processing the case made by the Employer result in the granting of the grievance. It must be concluded that this dispute must be determined on its merits.

The allegation concerning the swearing in Italian is simply not proved. No witnesses were produced by the State to testify that Mr. Fragmin said what the State alleges to have been said. In the absence of any evidence other than written reports from third persons who were not produced and subjected to direct and cross examination this charge is unworthy of further consideration.

Similarly, there is insufficient proof to conclude that Mr. Fragmin was working on Union business on March 2, 1990. He was observed by Major Beightler to be writing in a ledger book. Mr. Fragmin declined to

produce the volume. The hearing officers at the third step of the grievance procedure characterized his behavior as "evasive." Perhaps that is the case. Perhaps as well Mr. Fragmin was untruthful concerning his performance of Union business on March 2, 1990. Were that the case, it remains the fact that there is a complete absence of evidence to support the conclusion of Major Beightler that the Grievant was doing Union work on State time. It is not possible to sustain the discharge in question by placing any reliance upon this charge whatsoever.

Attention must now be devoted to the charges levied by Amy Strader and the credibility dispute posed by this proceeding. Neither Ms. Strader nor Mr. Fragmin bring sterling records to the hearing. Ms. Strader is a convicted felon. Mr. Fragmin's record is replete with discipline. Their life histories do not prompt a disposition that the testimony of one should be given more weight than the testimony of the other.

Similarly, that Mr. Fragmin has an obvious substantial interest in the outcome of this dispute does not tip the scales against him. Certainly his incentive to deny the charges of sexual harassment is clear: his job and career are at stake. That said, Ms. Strader has no interest in the outcome of this dispute. She is no longer incarcerated. Furthermore, when she came forward and charged Mr. Fragmin with sexual harassment she was within the confines of the Marysville facility. It took some courage for her to offer her account to the authorities. That account has remained unchanged to the dates of the arbitration hearing. She has remained unwavering in testifying that Mr. Fragmin touched her left breast and subsequently kissed her while grabbing her vaginal area. No plausible reason was advanced as to why she would testify to those actions unless they had occurred.

During the course of the investigation of this incident Ms. Strader submitted to a polygraph examination. When the State attempted to introduce the result it was not accepted by this Arbitrator. Suffice it to observe that polygraph results are notoriously unreliable and that the normal arbitral practice is to exclude them. That observation is tempered with the observation that Ms. Strader was willing to take the polygraph exam without reservation. That factor is given weight by the Arbitrator. Whatever the failings of the polygraph exam that Ms. Strader voluntarily took such an exam tends to corroborate her testimony.

The determination of credibility disputes is a very subjective process. There are no mechanical tests that may be applied to determine veracity. That Ms. Strader came forward in a situation not conducive to such action and was willing to submit to a polygraph exam to support or refute her testimony is given great weight by this Arbitrator. Similarly, that she is now beyond the reach of the Marysville staff and continues her testimony unchanged tends to support it. Her specific, graphic recollection of the events of February 14, 1990 compels belief.

Award:

The grievance is denied.

Signed and dated this 28th day of July, 1991 at South Russell, OH.

Harry Graham
Arbitrator