

ARBITRATION DECISION NO.:

607

UNION:

OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:

Department of Mental Health
The Northwest Psychiatric Hospital Forensic Unit at Oakwood

DATE OF ARBITRATION:

April 19, 1996

DATE OF DECISION:

June 2, 1996

GRIEVANT:

Niki Musto

OCB GRIEVANCE NO.:

23-05-(95-04-14)-0026-01-09

ARBITRATOR:

David M. Pincus

FOR THE UNION:

Butch Wyles, Advocate
Bill McDonnell, Local President

FOR THE EMPLOYER:

Malleri Johnson-Myricks, Advocate
Georgia Brokaw, Second Chair

KEY WORDS:

Inmate Fraternalization
Just Cause
Removal
Unauthorized Relationship with Inmate/Parolee or Ex-Inmate

ARTICLES:

Article 24 - Discipline
 § 24,01 - Standard
 § 24.02 - Progressive Discipline

FACTS:

The grievant was employed as a secretary in the admissions department at the Northwest Psychiatric Hospital Forensic Unit at Oakwood for eighteen years. This mental health facility merged with and became a tenant of the Department of Rehabilitation and Corrections. The grievant's removal was triggered by two handwritten letters sent to the facility addressed to an investigator and the warden. The letters were filled with allegations involving inappropriate conduct between the grievant and an inmate who had been a resident of the mental health facility on eight previous occasions. An investigation was launched, the inmate's property was shaken down and several photographs of the grievant were found. Additionally, the inmate's handwriting appeared virtually identical to the handwriting contained in both the letters. The investigator was later informed that the inmate made eight phone calls to the grievant's home. Two of the phone calls were monitored, recorded and transcribed. The grievant, as a result of the two phone calls, was removed for violating Department of Rehabilitation and Corrections ("DR&C") Standards of Employee Conduct, Rule #46 - Unauthorized Relationships.

EMPLOYER'S POSITION:

The Employer argued that it had just cause to remove the Grievant for violating Rule #46. The Employer also argued that the penalty imposed was commensurate with the offense, especially when there was a severe lack of mitigation. The Employer further contended that an unauthorized personal relationship does not require a sexual or romantic underpinning.

UNION'S POSITION:

The Union argued that the Employer did not have just cause to remove the grievant for violating Rule #46 and that the discipline was too severe in light of the evidence and testimony. The Union conceded that an offense was committed in direct violation of Rule #46. However, the Union argued that only five calls were made in a five month period, only two calls were accepted and the calls were for a short duration. The Union's position was that a "true relationship" never existed and that the grievant spoke with the inmate for therapeutic purposes since she had known him a considerable period of time. Additionally, the Union argued that the grievant had not received adequate training when the mental health facility was transformed into a correctional facility.

ARBITRATOR'S OPINION:

The Arbitrator concluded that the Employer had just cause to remove the grievant because her relationship with the inmate was in direct contravention of Rule #46. The Arbitrator found that the testimony and various transcripts introduced at the hearing adequately supported the notion that "a meaningful and prolonged relationship" between the grievant and the inmate existed. Additionally, the Arbitrator found that the grievant's version of the facts lacked credibility because there were a number of testimonial conflicts. The Arbitrator did not agree with the Union's contention that the grievant did not receive adequate DR&C training since she was employed by the Department of Mental Health. The grievant was aware of DR&C Standards of Conduct - Rule #46, as well as the consequences of violating the rule as evidenced by her signature on a document which recited the rule. Furthermore, the grievant had constructive notice regarding the unauthorized relationship policy as contained in the Oakwood Forensic Code of Ethics - Rule R which was similar to DR&C's Rule #46. Hence, the Arbitrator concluded that the grievant's uncertainty regarding the import of the document she signed seemed "far fetched and incredulous." The grievant acknowledged that she accepted collect calls from the inmate and did not report them to the proper authority. Therefore, the Arbitrator held that, by definition, the grievant's actions and admissions constituted an unauthorized relationship.

AWARD:

The grievance is denied.

TEXT OF THE OPINION:

**STATE OF OHIO AND OHIO CIVIL
SERVICE EMPLOYEES
ASSOCIATION LABOR
ARBITRATION PROCEEDING**

IN THE MATTER OF THE
ARBITRATION BETWEEN

**THE STATE OF OHIO, THE
OHIO DEPARTMENT OF MENTAL
HEALTH, THE NORTHWEST PSYCHIATRIC
HOSPITAL FORENSIC UNIT AT OAKWOOD**

-and-

**OHIO CIVIL SERVICE EMPLOYEES
ASSOCIATION, LOCAL 11, AFSCME, AFL-CIO**

GRIEVANT:

Niki Musto (Discharge)

CASE NO.:

23-05-(95-07-14)-0026-01-09

ARBITRATOR'S OPINION AND AWARD**ARBITRATOR:**

DAVID M. PINCUS

DATE:

June 2, 1996

APPEARANCES

For the Employer

Sharon Grove, Personnel Officer
 Donald J. Shewalter, Warden's Assistant
 Sherri J. Rodney-Kahle, Inspector/Investigator
 Rick Mowhorr, Labor Relations Officer
 Georgia Brokaw, Second Chair
 Malleri Johnson-Myricks, Advocate

For the Union

Niki Musto, Grievant
 Janet Campbell, Nurse Supervisor
 David Slone, Corrections Officer
 Bill McDonnell, Local President
 Butch Wyles, Advocate

INTRODUCTION

This is a proceeding under Article 25, Sections 25.02 and 25.03 entitled Arbitration and Arbitration Procedures of the Agreement between the State of Ohio, the Ohio Department of Health, the Northwest Psychiatric Hospital Forensic Unit at Oakwood, hereinafter referred to as the Employer, and the Ohio Civil Service Employees Association, Local 11, AFSCME, AFL-CIO, hereinafter referred to as the Union for March 1, 1994 - February 28, 1997 (Joint Exhibit 1).

The arbitration hearing was held on April 19, 1996, at the Northwest Psychiatric Hospital Forensic Unit at Oakwood, Lima, Ohio. The Parties had selected David M. Pincus as the Arbitrator.

At the hearing the Parties were given the opportunity to present their respective positions on the grievance, to offer evidence, to present witnesses and to cross-examine witnesses. At the conclusion of the hearing, the Parties were asked by the Arbitrator if they planned to submit post hearing briefs. Both Parties indicated that they would not submit briefs.

STIPULATED ISSUE

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

STIPULATED FACTS

1. DATE OF HIRE: 4/18/77
2. CLASSIFICATION OF GRIEVANT: SECRETARY
3. NO PRIOR DISCIPLINARY HISTORY
4. THE DEPARTMENT OF REHAB AND CORRECTIONS TOOK OVER OAKWOOD IN FEBRUARY OF 1994.
5. ODMH OPERATED MENTAL HEALTH UNITS WITHIN THE OAKWOOD CORRECTIONAL FACILITY.
6. THE CASE IS PROPERLY BEFORE THE ARBITRATOR.
7. GRIEVANT DID NOT ATTEND THE CORRECTIONAL TRAINING ACADEMY.

PERTINENT CONTRACT PROVISIONS**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. In cases involving termination, if the arbitrator finds that there has been an abuse of a patient or another in the care or custody of the State of Ohio, the arbitrator does not have authority to modify the termination of an employee committing such abuse. Abuse cases which are processed through the Arbitration step of Article 25 shall be heard by an arbitrator selected from the separate panel of abuse case arbitrators established pursuant to Section 25.04. Employees of the Lottery Commission shall be governed by O.R.C. Section 3770.02.

24.02 - Progressive Discipline

The Employer will follow the principles of progressive discipline. Disciplinary action shall be commensurate with the offense.

Disciplinary action shall include:

- A. One or more oral reprimand(s) (with appropriate notation in employee's file);
- B. One or more written reprimand(s);
- C. A fine in an amount not to exceed two (2) days pay for discipline related to attendance only; to be implemented only after approval from OCB;
- D. One or more day(s) suspension(s);
- E. Termination.

Disciplinary action taken may not be referred to in an employee's performance evaluation report. The event or action giving rise to the disciplinary action may be referred to in a performance evaluation report without indicating the fact that disciplinary action was taken. Disciplinary action shall be initiated as soon as reasonably possible consistent with the requirements of the other provisions of this Article. An arbitrator deciding a discipline grievance must consider the timeliness of the Employer's decision to begin the disciplinary process. The deduction of fines from an employee's wages shall not require the employee's authorization for withholding of fines.

(Joint Exhibit 1, Pgs. 68-69)

CASE HISTORY

Prior to February of 1994, the Ohio Department of Mental Health, now the Oakwood Forensic Hospital operated the facility independently. On the date in question, the Ohio Department of Mental Health became a tenant and the Ohio Department of Rehabilitation and Corrections became the host facility. The facility's purpose and mission has not, per se, changed as a consequence of this host/tenant relationship. It, still, houses mentally ill inmates committed to the custody of the Department of Rehabilitation and Corrections.

Niki Musto, the Grievant, was employed as a Secretary in the admissions department at the time of removal. She had realized approximately eighteen (18) years of service. In this capacity, she processed admissions by gathering information, documented personal possessions and ensured that other medically-related documents were forwarded to the proper medical personnel. The patients/inmates were housed a distance from her work location and were allowed there if escorted by appropriate personnel.

The disputed matter was triggered by two handwritten letters (Joint Exhibit 5) sent to the Oakwood Correctional Facility. One letter was sent to Dan Parker, an Investigator, while another was sent to Warden T. Haskins. Both letters, however, were addressed from an Inmate Dillion housed at Mansfield Correctional Institution. The letters (Joint Exhibit 5), themselves, appeared to be written by the same person and contained similar content. They were laden with allegations involving inappropriate conduct between the Grievant and Inmate Kenneth Collier.

During the time of the disputed incident, Collier was incarcerated for a number of offenses causing him to serve a 59-225 year sentence. He was initially admitted on July 14, 1982, and had realized numerous transfers. In fact, he had been a resident of Oakwood Forensic Center approximately eight times.

These accusations caused Sherri J. Rodney-Kahle, an Investigator, and Parker to travel to Mansfield to look for Inmate Dillion. Dillion was never found to be a resident at the facility, but the reference to Collier in the letters caused a continuance of the investigation. Collier's property was shaken down which surfaced several photos of the Grievant which were confiscated. Also, a comparison of Collier's handwriting revealed a virtual correspondence to the handwriting in both letters.

As a consequence of these circumstances, Rodney-Kahle contacted Donald F. Shewatter, the Warden's Assistant at Mansfield Correctional Institution. They decided to monitor Collier's phone activity, and to subpoena the Grievant's phone records.

On May 2, 1995, Shewatter contacted Rodney-Kahle regarding several incriminating telephone conversation between Collier and the Grievant. For the period November 1, 1994, to May 31, 1995, Collier initiated eight (8) telephone calls (Joint Exhibit 13) to the Grievant's home number. Two (2) of the calls were monitored, recorded and transcribed.

(Joint Exhibit 6).

As a consequence of the content contained in these transcribed conversations, an investigatory interview resulted in an Order of Removal issued on July 5, 1995. The following reasons were cited in support of the removal:

This will notify you that you have been found guilty of Neglect of Duty and Failure of good behavior in the following particulars, to wit: Your personal involvement and social fraternization with Inmate #169-056 is in direct violation of the agreement that you signed that dictates employee behavior while working in a facility operated by the Ohio Department of Rehabilitation and Corrections, specifically the D&C Standards of Employee Conduct, Rule #46: Unauthorized Relationships. Engaging in conduct which violates the Ethics Act is considered a violation of Ohio Revised Code, Chapter 102, and Ohio Revised Code 124.34 and Oakwood Forensic Center Policy, Corrective Action. As a result, you are removed from employment at the Toledo Mental Health Forensic Center at Oakwood Correctional Facility. The Chief Executive Officer will notify you of the date of removal.

(Joint Exhibit 1)

The Grievant was effectively removed on July 14, 1995. On this date a Union representative filed a grievance on her behalf. The following particulars were identified in the grievance form.

OCSEA/AFSCME grieves that management is in violation of Articles 2, 8, 24, 44 and any other pertinent (sic) Articles and Sections of the Contract OCSEA/ AFSCME makes such claim that on 14 July 1995, the Grievant was unjustly removed from the position of secretary.

(Joint Exhibit 2)

The parties were unable to resolve the disputed matter in subsequent portions of the grievance procedure. Neither party raised substantive nor procedural arbitrability concerns. As such, the grievance is properly before the Arbitrator.

The Merits of the Case

The Employer's Position

The Employer opines it had just cause to remove the Grievant for violating the Standards of Conduct, specifically Rule #46-Unauthorized Relationships. Sufficient proof was presented in support of the administrative decision. Due process issues, moreover, dealing with notice and equal treatment were properly rebutted. Clearly, the imposed penalty was commensurate with the offense; especially when one considers the severe lack of mitigation.

The record indicates the Grievant engaged in an unauthorized personal relationship with Collier. A relationship of this sort does not require a sexual or romantic underpinning. In fact, the Grievant admitted she engaged in a personal relationship with Collier.

The transcripts of the telephone conversations further support this conclusion. They discussed various facets of their relationship including Collier's desire to determine his present status. Collier and the Grievant also discussed the exchange of gifts, and the Grievant's conveyance of gifts and monies for particular purchases. Collier, moreover, discussed sending of a birthday present, and his request to have certain FBI documents sent to him by the Grievant.

These expressions of personal interest nullified the Grievant's attempt to characterize the telephone conversations as therapeutic. None of the transcriptions support this conclusion.

The facility's custom and practice prior to the formal takeover by the Department of Rehabilitation and Corrections does not support the Union's assertions. None of the relationship incidents alluded to approximate the nature and degree of involvement engaged in by the Grievant. Union witnesses did testify that letters were sent to the facility by former inmates/patients. These letters, moreover, were subsequently distributed by supervisory staff. Often times letters were received around holiday periods, or were sent to advise prior direct-care providers about present day activities and conditions. None of the Union's witnesses, however, testified they had received collect calls on their personal phones. Also, they never admitted that letters were sent to their homes by former patient/inmates.

Notice arguments proposed by the Union were not viewed as persuasive. The Grievant received sufficient proper notice of the work rule in question, and was aware of the possible negative consequences attached to any form of supported misconduct. The Grievant received and signed (Joint Exhibit 8) for the Department of Rehabilitation and Corrections' Standards of Employee Conduct (Joint Exhibit 7). This policy contains a specific prohibition against unauthorized personal relationships with inmates. Notice was further provided in a virtual identical charge contained in Ohio Department of Mental Health's guideline "R" which the Grievant signed and received (Employer Exhibits 2 and 13). As such, the proposed notice defect is hardly supported when one considers the Grievant's admissions regarding the conveyance and acceptance of these documents.

Lack of training, in terms of the specific application of the disputed Department of Rehabilitation and Corrections' policy (Joint Exhibit 7), does not diminish the severity of the proven offenses. With affirmed prior notice, and the nature of the offense, alleged training deficiencies do not negate the legitimacy of the charge and associated penalty.

Lax enforcement of a facility grooming policy (Union Exhibit 1) does not necessitate a more lenient application of the relationship work rule. The rule in question is reasonable and directly related to the safety and security of the facility, staff and inmates. In fact, the administration agreed to relax the effective date of the grooming policy after being asked to do so by the local Union leadership. A similar request regarding the relationship policy was neither offered nor requested by the Union.

The Employer has consistently applied the work rule in question. A Psychiatric Attendant either resigned or was removed for engaging in an unauthorized relationship with an inmate.

The removal was commensurate with the offense. Such conduct passes a clear and present security risk inside a correctional facility. Even the Union's own witnesses supported this conclusion

The Union's Position

In the Union's opinion, the employee did not have just cause to remove the Grievant for violating Rule #46 - Unauthorized Relationship. Several procedural matters were raised, and the penalty assessed was viewed as too severe in light of evidence and testimony. The Union admitted an offense was committed in direct violation of Rule #46. The violation, however, is limited to a total of five (5) phone calls for the period of August of 1995 to January of 1996. Only two (2) collect phone calls were accepted, and were rather short in terms of duration.

Questions were also raised concerning the nature and content of the calls. The Union and Grievant proposed that a

"true relationship" never existed. Rather, the Grievant engaged in these conversations for therapeutic purposes. The Grievant had known Collier for a considerable period of time, was aware of his problems and merely attempted to help him overcome his problems. She had nothing to gain from engaging Collier in any relationship. An affair of this sort appeared ludicrous in light of Collier's incarceration history and potential for future release.

The best evidence for establishing the relationship theory was never provided by the Employer. The Employer had every opportunity to have Collier appear at the arbitration hearing. He was in the care and custody of the Department of Rehabilitation and Corrections. The nature of the relationship could have been established with his testimony. Other than the taped conversations (Joint Exhibit 6), nothing in the record indicates the relationship was extensive. The Grievant never visited the inmate nor any member of his family. Although the telephone transcripts indicate that money had been received and gifts exchanged, institutional documents failed to surface any objective evidence substantiating these transactions.

The Grievant's conduct was not unusual in light of the practice condoned by the facility involving intimate contact. Several Union witnesses testified they had received letters from inmates at home and the facility. A supervisor, moreover, noted she had often distributed letters and cards to bargaining unit members after inmates sent these items to the facility.

The imposed penalty was tainted by notice and related training deficiencies. Even though the Grievant received the Ohio Department of Rehabilitation and Corrections' Standards of Employee Conduct (Joint Exhibits 7 and 8), notice was deficient because training was not provided. Training was essential in light of the changeover to a corrections site. In fact, more recently, individuals have been sent to the Correction Training Academy for extensive weeks of training. A significant portion of the training program involves a critical, and in depth, analysis of these Standards of Employee Conduct (Joint Exhibit 7), with special attention placed on unauthorized relationships.

The imposed penalty was too severe and unrelated to the proven offense. The Grievant's conduct does not expose any security risk. The Grievant's prior disciplinary record and performance reviews (Joint Exhibit II) do not evidence a potential security risk if the Grievant was returned to work.

The discipline grid (Joint Exhibit 7) provides the Employer with a range of penalty alternatives. Clearly, a removal decision, within the context of the present circumstances, was excessive and not related to the proven offense.

THE ARBITRATOR'S OPINION AND AWARD

From the evidence and testimony presented at the hearing, a complete review of the record including pertinent contract provisions, this Arbitrator finds the Employer did have just cause to remove the Grievant. She did have an unauthorized relationship with Inmate Collier in direct contravention of Rule 46. The Union was unable to support its notice arguments. Also, testimony and various transcripts introduced at the hearing adequately support the notion that a meaningful and prolonged relationship involving the Grievant and Inmate Collier had taken place. As such, a series of testimonial conflicts indicate the Grievant's version of the events lacks credibility which exacerbates the charge, and this further supports the removal decision. Her actions, moreover, raise certain security risks which cannot be condoned because they jeopardize the safety and health of the institution, fellow employees and inmates.

The Grievant was provided with proper foreknowledge of the work rule in question, and the possible consequences associated with any wrong-doing. Proper notice concerning the Department of Rehabilitation and Corrections Standards of Conduct (Joint Exhibit 7), was provided directly to the Grievant. She received the document on February 28, 1994 as evidenced by the signature page (Joint Exhibit 8). Her uncertainty regarding the import of this document, and its impact on Department of Mental Health employees, seems far fetched and incredulous. The document clearly indicates... "I understand that these Standard's are effective June 17, 1990."

Constructive notice regarding the unauthorized relationship policy was also provided the Grievant. A reading of the Department of Rehabilitation and Correction Policy (Joint Exhibit 7), with the former policy labeled the Oakwood Forensic Code of Ethics - Rule "R" (Employee Exhibit 3), indicates a virtual identical admonition for unauthorized relationships with an admitted or discharged patient/inmate. As a Union official and Union Steward she had to know the ramifications of such a charge. The investigatory interview transcript underscores the dubious notice argument offered by the Union and Grievant:

Shewalter: How can you represent someone if you don't know the Standards of Conduct?

Musto: I know the Standards for the Department of Mental Health.

(Joint Exhibit 4)

Other statements made by the Grievant further support this finding. She knew accepting the phone calls could cause a problem because she asked the Grievant to write:

Inmate: It's Christmas and I'm - so I don't got a right to know, huh? So. I don't have a right to know?

Musto: I'm not gonna go into it on the phone.

Inmate: Well how we gonna get into it then?

Musto: When, I get time I'll sit down and write.

(Joint Exhibit 6)

During the January 1, 1995 conversation the following exchange took place:

Inmate: So how you doin'?

Musto: Fine

Inmate: What's the matter?

Musto: You aren't supposed to call here?

Inmate: Here we go with that again

Musto: Well you could've wrote, you aren't supposed to call - I tell you that and I tell you not and I tell you that, but you just ignore it.

(Joint Exhibit 6)

The Grievant acknowledged she accepted collect calls from the Grievant and never reported these exchanges to the appropriate authority. By definition, her actions and admissions constitute an unauthorized relationship. Any attempt to clothe this relationship as therapeutic goes beyond any rule of reason. The following exchanges, and the explicit language used, clearly disclose the personal nature of the relationship, unless the Grievant was using some form of implosive therapy.

Musto: Maybe I'm tired of some of the bullshit, maybe I'm tired of some the bullshit, I am tired of - like I said.

Inmate: What bullshit?

Musto: It always has to be your way and if not you're upset.

(Joint Exhibit 6)

Another exchange not only underscored the non-therapeutic nature of the relationship but the true depth and extent of the relationship:

Inmate: Well, you haven't wrote.

Musto: I been thinkin.

Inmate: Oh ... cool. So is it good or bad?

Musto: I don't know.

Inmate: You know, I can't understand. I mean, I'm not gonna argue with you or nothin'; I didn't call for that. But I can't understand-I mean, you claim you love me and everything...

Musto: Yeah, well, I can't understand why you don't listen, either, all you do is what you want to do, that you can't ever fucking listen.

(Joint Exhibit 6)

This Arbitrator is convinced that this case represents a clear incident of a soured relationship and the individual negative consequences which may result. It also represents the perilous institutional risks that may result if these relationships are not surfaced and dealt with. No reasonable person can equate this relationship with the cards and contacts received by care givers at the facility. In fact, several Union witnesses, who held or presently hold Union positions, remarked relationships with inmates represent clear and present security risks. This Arbitrator agrees with this conclusion.

The Grievant's credibility was drastically weakened by a series of inconsistent statements regarding the circumstances surrounding the dispute. During the investigatory interview the Grievant was asked if Collier ever asked her to copy anything out of his master file. Her response was no (Joint Exhibit 4). And yet, on two occasions during the January 5, 1995, conversation Collier asked her to copy his FBI jacket because he needed information for the parole authority (Joint Exhibit 6).

She also revealed during the interview that Collier never asked her to quit her job (Joint Exhibit 4). On December 23, 1994, however, the transcript indicates Collier made the following statement.

Inmate: No, I haven't. One thing I have ever asked out of you is to please get you another job. That's the only thing I asked. Any you've been lying about that right along like a lot of other things.

(Joint Exhibit 6)

Finally, and likely the primary reason for implementing a policy of this type deals with potential blackmail and its potential ramifications. An interesting exchange took place between Collier and the Grievant indicating some sort of threatening behavior had taken place.

Inmate: I'm gonna have your fucking job and not only that, I will take everything you got.

Musto: Take it, take it.

Inmate: I will put a lawsuit on your ass.

Musto: Take it, take it.

Inmate: I don't -----

Musto: Face it, you ain't gonna blackmail me.

Inmate: Who's trying - there you ...

Musto: You do this all the fucking time and then you wonder why I feel like I do. Every time you can't have your way, you threaten me. Do it.

Here, Collier appears to be threatening the Grievant with blackmail to gain or sustain his social relationship. Such threats, however, are not that far removed from threats leading to the conveyance of drugs or other contraband within a corrections facility.

Nothing in the record indicates to the Arbitrator that the penalty should be mitigated. The violation here is very severe, and the Grievant was less than forthright at the arbitration hearing. The imposed discipline is therefore reasonably related to the proven offense and shall not be adjusted.

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AWARD

The grievance is denied.

June 2, 1996

Dr. David M. Pincus
Arbitrator