

ARBITRATION DECISION NO.:

625

UNION:

OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:

Department of Rehabilitation and Correction
Marysville Reformatory for Women

DATE OF ARBITRATION:

November 20, 1996
December 4, 1996

DATE OF DECISION:

January 9, 1997

GRIEVANT:

Janice Thomas

OCB GRIEVANCE NO.:

27-19-(96-04-17)-0805-01-03

ARBITRATOR:

Mollie H. Bowers

FOR THE UNION:

George Yerkes, Staff Representative

FOR THE EMPLOYER:

Pat Mogan, Advocate

KEY WORDS:

Abandonment of Work Area
Commensurate Discipline
Criminal Investigation
Department Regulations or Guidelines
Disparate Treatment
Inmate Fraternization
Inmate Testimony
Just Cause
Progressive Discipline
Removal

ARTICLES:

Article 24 - Discipline
 § 24.01 - Standard
 § 24.02 - Progressive Discipline

FACTS:

The grievant was employed as a correction officer at the Ohio Reformatory for Women. The State discharged the grievant on April 8, 1996 for allegedly having an inappropriate relationship with an inmate, abandonment of the grievant's post, and interfering with an investigation involving inmate use and distribution of marijuana and Valium. On January 19, 1996 four inmates were locked in a room with an open window. The inmates were wearing only light cotton gowns. The grievant expressed concern about the inmates' condition and possible abuse. The grievant spoke briefly to the one inmate in question and asked how she was doing.

On January 21, 1996, the grievant accepted a telephone call from the inmate's parent's telephone number. The grievant later called the inmate's parents about possible mistreatment of the inmate. The institutional investigator later learned of this incident from another corrections officer. This information was originally supplied by an inmate being investigated for drug use. The investigator conducted an interview with the grievant on January 27, 1996. When the investigator asked about the nature of her calls to the inmate's parents, the grievant asserted her fifth amendment right against self incrimination. The grievant said she would answer the question after consulting an attorney. The investigator charged her with violating Rule 26 for interfering with or failing to cooperate in an official investigation or inquiry.

EMPLOYER'S POSITION:

The employer argued that it had just cause to terminate the grievant for violating the rule against unauthorized relationships, because the grievant had called the inmate's parents without authorization. The state claimed that the grievant failed to cooperate in an official investigation by invoking the right against self-incrimination. The State contended the grievant could no longer be considered trusted to ensure the safety and security of the institution. By acting outside the chain of command, the grievant compromised her ability to perform the duties of a correction officer because of the perception that she could be swayed by an inmate with a sad story.

UNION'S POSITION:

The Union argued that the state failed to show by clear and convincing evidence that the grievant's removal was for just cause and that she should be reinstated to her position and made whole for all lost wages and benefits. The state failed to prove that the grievant had a personal relationship with the inmate. Additionally, the union claimed that the investigator was overzealous in his interviews with witnesses. He coerced the responses he wanted and fabricated parts of the responses to support the conclusion he wanted to reach. Also, the investigator was the person who ordered that the inmates should be treated in the potentially abusive manner which started the chain of events leading to the grievant's removal.

The Union also noted that the investigator became irate when the grievant rightly refused to answer some questions and asked to speak to an attorney. This refusal to answer questions occurred after the employee was told that the Highway Patrol had been alerted about this incident.

The Union also pointed out that the other CO's who were similarly situated were not charged with violations of orders pertaining to search procedures. The grievant, on the other hand, was charged with failing to perform a proper search of the inmate in question. Additionally, the Union argued that the grievant did not abandon her post when she walked to the upper range to silence noisy inmates and briefly spoke to the inmate in question during that time. The grievant's actions were "not out of line" and did not constitute a violation of the rule forbidding her to leave her post temporarily and a failure to follow orders was not part of the allegations of her removal.

Finally, the Union argued that the grievant had no intention of calling the inmate's parents. However, the grievant did so only as a result of her jealous husband's insistence.

ARBITRATOR'S OPINION:

The Arbitrator held that the employer had failed to meet its burden of proving that there was just cause for the grievant's termination. There was insufficient evidence that the grievant had a personal relationship with the inmate and the employer did not prove that the grievant had a personal relationship with the inmate. The employer also did not prove that the grievant violated Rule 26 for failing to cooperate in an official

investigation. The investigator became intimidating and had become irate in the interview. Therefore it was not unreasonable, under such circumstances, for the grievant to request a conference with legal counsel, before proceeding further with an interview which might involve criminal charges. The record does support a finding that the grievant engaged in misconduct on January 21 by violating Rule 46 (a) and (e) for unauthorized relationships. That misconduct did not, and could not, have jeopardized the safety or security of the institution, its staff and inmates; nor did it demonstrate that the grievant is unable to properly perform the duties of a correction officer. Under principles of progressive discipline and just cause, such misconduct warrants a lengthy disciplinary suspension to illustrate that lapses in judgment cannot be tolerated and may lead to termination.

AWARD:

The grievant's termination was not for just cause for the reasons stated above. The removal shall be rescinded and replaced by a thirty day suspension commencing on April 8, 1996. The grievant shall be reinstated to her former position with appropriate benefits, seniority and back-pay (minus any interim earnings) commensurate with the thirty day suspension. The Arbitrator retained jurisdiction for sixty days from the date of the award to resolve any controversies that may arise over implementation of this award.

TEXT OF THE OPINION:

IN THE MATTER OF ARBITRATION
BETWEEN:

**OHIO DEPARTMENT OF
REHABILITATION and CORRECTION**

-and-

OCSEA/AFSCME, Local 11

Grievant:

Janice Thomas

Griev. No.:

27-19-960417-0805-01-03

ARBITRATOR:

Mollie H. Bowers

APPEARANCES

For the State:

Pat Mogan, Management Advocate

For the Union:

George Yerkes, Staff Representative

The OCSEA/AFSCME LOCAL 11, (the Union) brought this matter to arbitration challenging the February 28, 1996, decision of the State of Ohio Department of Rehabilitation and Correction (the State, the Employer)

to terminate Correction Officer Janice Thomas (the Grievant) as without just cause in violation of the parties' collective bargaining Agreement (Agreement). The hearings in this case were held November 20, and December 4, 1996. Both parties were represented. They stipulated this grievance is properly before the Arbitrator. The parties had a full and fair opportunity to present evidence and testimony in support of their case and to cross-examine that presented by the other party. At the conclusion of the hearings, the parties agreed to submit written post-hearing briefs postmarked by December 20, 1996, in support of their respective positions. Those briefs were received in a timely manner. The entire record has been carefully considered by the Arbitrator in reaching her decision.

ISSUES

The parties agreed the issues in this case are:

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

RELEVANT CONTRACT PROVISION

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. ...

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) ...
- B. one or more written reprimand(s);
- C. a fine ... ;
- D. one or more day(s) suspension(s);
- E. Termination.

Relevant Standards of Employee Conduct

Rule Violations and Penalties

Rule 26. Interfering with or failing to cooperate in an official investigation or inquiry.

[First offense written reprimand/removal; Second offense - three to five day suspension/removal; Third offense - five to ten day suspension/removal; Fourth offense - removal]

Rule. 46 Unauthorized Relationships

a. The exchange of personal letters, pictures, phone numbers or information with an inmate ... without the express authorization of DR&C. [First offense - written reprimand/removal; Second offense - five to ten day suspension/removal; Third offense - removal]

e. Engaging in any other unauthorized personal or business relationship(s) with inmates or family or

friends of same (nexus required) . [First offense - five to ten day suspension/removal; Second offense - removal]

BACKGROUND

On February 28, 1996, then Warden Christine Money issued the Grievant a written Notice of Disciplinary Action terminating her from the position of Correction Officer (CO) at the State's Marysville Reformatory for Women, effective April 8, 1996. The Notice provided, among other things:

"You engaged in misconduct that constituted an inappropriate relationship with an inmate. You also engaged in misconduct that constituted threats to the security of the institution including, but not limited to, abandoning your post, interfering with an investigation, neglect of duty and preferential treatment to an inmate.

This is a violation of the Standards of Conduct Rule: 26 - Interfering with or failing to cooperate in an official investigation or inquiry; 46a - The exchange of personal letters, pictures, phone calls or information with an inmate, furlough, etc.... ; 46e - Engaging in any other unauthorized personal or business relationship with inmates"

Warden Money testified that she based the removal primarily on Kenneth Bonnell's investigation report concerning the alleged misconduct. Money considered the Grievant's conduct to be an extremely serious violation of the applicable rules, thus destroying the trust necessary for the CO position. She said personal relationships between inmates and staff were the "largest" problem she faced as a Warden at the facility. She believed the Grievant's behavior "crossed the line of professionalism" expected of a CO. On cross-examination, Money acknowledged that she did not cite a rule violation for the alleged abandonment of post in the termination notice. Money considered the Grievant's eleven years' service in making her decision.

This termination arises out of alleged misconduct by the Grievant with respect to inmate Laura Lassiter on January 19 and 21, 1996. The parties stipulated that the Grievant was hired as a CO on July 23, 1984, and had never experienced any break in service since that time. She worked an 8:00 a.m. to 4:30 p.m. shift on January 1-8, 19, 20, and 21, 1996, for which she reported for roll call and received roll call pay. On January 21, she worked overtime from 4:30 p.m. to 10:46 p.m. in building Arn 4 on the suicide watch. There is no evidence that the Grievant attempted to contact inmate Lassiter on January 20. In addition, there is no evidence the Grievant had been disciplined previously for any reason.

The parties also stipulated to the following:

The Grievant placed a phone call to the home of Mr. and Mrs. Charles Ernst, parents of inmate Laura Lassiter at 11:14 p.m. on January 21, 1996. The call lasted 0.82 minutes. A subject of the conversation was the alleged mistreatment of inmate Lassiter while she was detained for disciplinary investigation in room 10 of the hospital on January 18 and 19, 1996.

The record reflects the alleged misconduct was discovered by the Employer in the course of a drug investigation. However, there is no evidence that the Grievant was charged with or guilty of any drug related offense. Inmates Tina Howard, Alisha Lindsey, Michelle Sexton, and Lassiter were suspected of conduct relating to marijuana and Valium being brought out of the Visiting Hall and sold to inmates in the Washington Cottage portion of the facility. Those four inmates were placed in detention overnight on January 18, in room 10 of the hospital. Apparently, at sometime after the events here in question, Lassiter was found not to have engaged in the drug related activity.

Institutional Investigator Kenneth Bonnell testified he was advised by another officer investigating the drug charges that inmate Gilbert provided a written statement, which asserted "CO Thompson's ^[1] son recently was busted on drug charge [and] Thompson" told Lassiter should get her family to use the lawyers in her son's case to help against the way inmates in the drug investigation were being treated. Based upon

that information, Bonnell said the Warden authorized him to investigate whether the Grievant had engaged in misconduct involving an "inappropriate" relationship with an inmate. Bonnell identified his February 9, 1996, twenty-five page investigation report with over thirty attached documents. As part of that investigation, Bonnell interviewed Gilbert, Lassiter, the Grievant and twenty-six other persons, many of whom signed form voluntary statements, which were attached to his report.

Bonnell testified that Lassiter was not properly searched by the Grievant when exiting the visitors' hall on January 18. He believed it was significant that the Grievant sought out and spoke to Lassiter twice during the time in question. He interviewed^[2] Lassiter twice and attached her two statements to his report. Lassiter testified, identifying the statements she gave to Bonnell. Lassiter's January 24, statement reported the Grievant coming to her cell on Sunday January 20^[3], and asking if Lassiter was "okay and if there was anyone I wished to contact on my behalf." That statement also noted Lassiter wrote her parents telephone number on a piece of paper the Grievant provided and asked her to have them contact Lassiter's attorney. In response to Bonnell's question to describe her relationship with the Grievant, Lassiter reported:

"For about two years or so, I have enjoyed a good rapport with Ms. Thomas, confiding in her about my parents, daughter, or problems I may be experiencing in prison. She has been very easy to talk to and gives me encouragement and positive input. We do not discuss her private life, mostly my visitors, whoever may be to see me. I would consider her the friendliest of all officers I've ever associated with in the 5 1/2 yrs I've been here."

When asked by Bonnell, in the course of her statement, if the Grievant searched her "by the rules"^[4] Lassiter replied: "No, CO Thomas does not search me out in visiting hall by the rules. She does not make me undress completely, shake out my socks, or tap my shoes out. I do flip my bra, and do a "squat" with my clothes partially down."

Bonnell asked Lassiter for a second statement on January 25. In that statement, Lassiter said that the Grievant shared "personal information" regarding her son's "previous trouble with the law" and recommended to Lassiter lawyers in Marysville. Lassiter reported that she was the last to leave the visiting hall on January 19. She noted that the Grievant "Searched me out. I was not required to completely undress. We spoke of my parole hearing which is coming up this month. Over the years Officer Thomas and I have developed a friendship." Lassiter reported that on the morning of January 19, the Grievant came to room 10, and spoke to her^[5] and "indicated she was upset about what was happening in that room and recommended I write the Central Office about the matter, warning me the mail and phone calls would probably be monitored." Lassiter repeated her earlier statement about the Grievant's providing her with paper for her parents' phone number, as well as, her lawyers' phone number. In addition, Lassiter reported the Grievant telling her that her property had been returned to her cell.

Lassiter testified, while in room 10, she and the other three inmates were stripped naked, given only a cotton gown to wear, and told not to talk to each other. She said there were mattresses on the floor and it was "freezing cold", because the window was open. According to Lassiter, the four inmates "begged" for the window to be shut; and everyone who went by commented the situation was "some more Bonnell shit". Lassiter stated that the Grievant was one of many staff and inmates "shocked" and in "disbelief" about the conditions in room 10. She said writing Central Office was done whenever inmates have a problem, so the Grievant's saying it "was the normal thing to say" under the circumstances.

Lassiter characterized her relationship with the Grievant, whom she only saw on occasion at the visiting room and on the days in question, as a "typical relationship" she would have with any CO at the facility; it was "totally professional", not "personal". She said the four inmates were not told they could not talk to COs and they talked to every CO that came through the area near room 10. Lassiter recalls the Grievant giving her the name of some attorneys, but she did not think the Grievant mentioned her son had a drug problem. According to Lassiter, it was common knowledge phone calls and mail were monitored.

The parties stipulated that the Grievant was assigned a post at the visiting hall January 18 through 21. The record reflects that she worked January 21, on the suicide watch with another CO beginning at 4:30

p.m. The log for the Grievant's watch has her making written inmate observations at 4:30, 5:00 and thereafter every fifteen minutes. Bonnell believed the initial half hour gap between the 4:30 and the 5:00 observations is another indication of the Grievant's "inattention" to her job. The Employer's Suicide Watch Post Orders provide -- "Suicide watch: Continual visual observation, once every five (5) minutes. Documentation will be completed every fifteen minutes...." That printed order also emphasizes that **"OFFICERS ARE NOT PERMITTED TO LEAVE THIS POST WITHOUT PROPER RELIEF. SOMEONE MUST RELIEVE YOU TO GO TO THE BATHROOM, ETC."**

Bonnell discussed his interview of the Grievant on January 27, at which time Charles Cook was her Union Representative. [6] According to Bonnell's report, the Grievant said she and another CO performed full body strip searches, with the assistance of CO Sinclair, on inmates Lassiter and Howard January 18, when they left the visiting hall. He reported that the Grievant first said that she went to the hospital on the morning of January 19, to deliver legal mail to an inmate, and that such mail was not delivered because the inmate had moved to Arn 10. Bonnell reported the Grievant then said she had stopped at hospital room 10 and spoken to the posted CO, but could not remember the CO's name. According to Bonnell's report, the Grievant at first denied speaking to any inmates in that room, then admitted to asking Lassiter "how she was doing". His account indicated that the Grievant denied telling Lassiter to write Central Office or to her lawyer, and that she denied warning Lassiter that her mail or telephone calls were monitored. Bonnell reported that the Grievant was "very hesitant to answer any questions" about talking with Lassiter on January 21, in Arn 4, but she did acknowledge asking Lassiter "how she was doing". According to Bonnell, the Grievant refused to answer his questions about taking any phone number from Lassiter and about calling her parents. Bonnell said that he repeated the questions and that the Grievant response was that she "refused to answer [these questions] on the grounds that the answer may incriminate me", but she would answer after conferring with her lawyer, whom she requested to speak to at that juncture. Based upon the position taken by the Grievant, Bonnell then terminated the interview and placed her on administrative leave.

Union Representative Cook, on January 27, reported to the Warden that the Grievant told him, after the interview with Bonnell, she did call Lassiter's parents and told them to contact Lassiter. Cook testified that he was intimidated by Bonnell into writing his statement. Cook also said that Bonnell threatened to bring in the Ohio State Patrol, when Grievant stopped answering his questions. According to Cook, it is customary for the Patrol to be called when criminal charges are involved. He also stated that he was unaware of any personal relationship between Lassiter and the Grievant.

Bonnell interviewed CO Leslie Heckert, who worked with the Grievant on the suicide watch. In her statement, Heckert was asked a series of leading questions by Bonnell, to which she responded that the Grievant left her post on the evening of January 21, and later commented to CO Draper about four inmates who had not been fairly treated. Heckert testified confirming that recollection of her statement was accurate.

The Bonnell report also contained CO Pamela Burden's statement, identifying her as the CO on duty at room 10 in the hospital on the evening of January 21. She stated that she was instructed by CO Jill Draper, whom she relieved, that the four inmates in room 10 were not allowed to talk to each other, and had to be watched, when they used the rest room. She recorded the fact that the Grievant stopped to talk to her at approximately 9 p.m., and asked what was the "story" with respect to the four inmates, to which Burden replied that she did not know. Burden believed the Grievant was there for approximately ten minutes. According to Burden, Lassiter asked the Grievant:

"if this should be something she should write up on the inside or should she send it to Central Office? CO Thomas told her it was something to write to Central Office. She [CO Thomas] then told Lassiter to watch it because the mail could be intercepted. CO Thomas then told Lassiter to send it [the mail] to her family and then have them send it to Central Office. CO Thomas then told Lassiter to watch it because her phone calls can be monitored. CO Thomas then left the area.

...

[The Grievant was] concerned the inmates didn't have any blankets [and] asked me why they didn't have anything. ..."

Burden testified that her statement was accurate. She said it was "cold" in room 10 and in the hallway, and, thus, that she wore a coat while on duty at that post. This witness said that the inmates wrapped toilet paper around their feet to try to keep them warm. She further testified that the inmates could not talk to one another, but there was no prohibition (or gag order) on their speaking with COs. Burden denied making the statement contained in Bonnell's written report, to the effect that she was surprised the Grievant "said these things to Lassiter" prior to their being medically examined. Burden testified that she did not believe the Grievant's actions were "inappropriate" and, therefore, never reported them. She also said that she did not know of any personal relationship between Lassiter and the Grievant.

In her testimony, CO Christine LaLa denied telling Bonnell that the Grievant was in room 10 "about fifteen minutes", as he represented in his report. LaLa said she saw the Grievant talking to CO Burden for "5 to 10 minutes". She also said that she was unaware of any personal relationship between the Grievant and Lassiter.

Bonnell reported that it was CO Draper who had been told originally by inmate Gilbert about the drugs. Draper testified that Gilbert knew something about the drugs and volunteered that information to get time off her sentence. According to Draper, Gilbert never said anything to her about the Grievant. Draper denied that portion of Bonnell's report wherein it is stated that she told him about her being surprised about how upset the Grievant was about the conditions in room 10. Draper confirmed Burden's testimony about there being no gag order on the four inmates in room 10 talking to COs, the inmates wearing night gowns with toilet paper on their feet, and it being so cold that she had to wear a coat when posted at this location. Also with respect to that event, Draper said the Grievant reacted like many other COs who were exposed to that circumstance, by expressing concern and/or curiosity by asking her "what was going on" regarding the four inmates?

With respect to the suicide watch, Draper confirmed the Grievant's testimony that this was the first time she had served such duty. Draper said COs could leave that post to help quiet inmates, so long as someone could cover their absence at the assigned post. Corroborating testimony provided by other COs and inmates, Draper said she had no knowledge of any personal relationship between the Grievant and Lassiter.

Inmate Michelle Sexton was a cooperative interviewee, according to Bonnell, in his report. Therein, Bonnell said that two marijuana cigarettes were found on her [Sexton's] person and four in her cell. Sexton also tested positive for marijuana and Valium, which she said she bought from inmate Howard on January 18. This inmate told Bonnell that she had been buying drugs from Howard since August of 1995. Based upon that information, she was charged with drug abuse and the matter has been investigated by the Ohio State Highway Patrol and forwarded to the County Prosecutor. Sexton testified that Bonnell intimidated her, and "more or less told" her what to say in the interview, by asserting that he had "pull" with the Warden, and by saying that he could make things easy for her. She stated that the window in room 10 was open one foot. She also testified that Lassiter did not mention the Grievant and that she knew of no personal relationship between these two individuals.

Inmate Acree testified she was Lassiter's roommate for over two months before January of 1996. She said that she knew of no personal relationship between Lassiter and the Grievant, and added that Lassiter never mentioned the Grievant. No objection was made to Acree's entering into the record her opinion that the Grievant respects inmates, but always kept "her professionalism". She stated, in a general sense, that when leaving the visiting hall, there were COs who did not require full strip searches. Again, without objection, Acree testified that it was her general observation that COs were aware of those inmates who regularly went to the visitors' hall, which were "trouble" or potential trouble, and that these inmates were treated accordingly by the COs when they exited the hall.

The Grievant's husband testified that they have been married forty years. He acknowledged searching the Grievant's pockets while she was changing after work, and said, when he found a paper with a phone number in her pocket January 21, he confronted her about this number as a jealous husband. He further admitted that jealousy was an on-going frailty of his, but not because the Grievant had given him any substantive reason to support his illusions. The husband acknowledges that the Grievant told him to throw the phone number away because it was unimportant. He stated that, because of his jealousy, he "pushed

the issue", and that the Grievant explained to him that an inmate had given her this number and that she had no intention of making any call to the number indicated. The Grievant's and her husband's testimony is in agreement that he was not satisfied with this explanation, but rather that he essentially 'forced' the Grievant to call the number on the paper, once again acting out his jealousy. In his testimony, the husband said he gave no quarter, although he understands and is involved in the correction system in Ohio, to anything less than the Grievant's compliance with his 'demand' to call the number he found in her uniform; even though the Grievant and her husband both testified that she told him it was a number given to her by an inmate. The husband said he doubted this explanation because he knows inmates can make phone calls on their own.

There is no dispute that the Grievant called Lassiter's parents on the evening of January 21. The Grievant's husband corroborated her testimony that he listened in on this call, which it is undisputed, was to Lassiter's parents.

The Grievant testified that the January 27, investigatory interview was the first such interview she ever had during her eleven years' service with the Employer. She said that she asked to speak to an attorney after being intimidated by Bonnell, who told her that the investigation could lead to criminal charges and that the State Highway Patrol could be brought into this matter. According to the Grievant, Bonnell became "irate", raised his voice and spit, while he spoke to her. She then said he cut her off when she tried to speak to Shop Steward Cook. As discussed below, the Grievant explained that this interview occurred the "first thing" upon her return from being off sick for approximately a week.

The Grievant said that her relationship with Lassiter was not personal, but rather the same as that which she had with any other inmate. According to the Grievant, she began work January 18, in the mail room, and by 10 a.m., she was working the visiting hall. Near the 4:20 p.m., she acknowledged "cutting corners" by using "modified" searches to save time because the visiting hall was closing and inmates had to be back for their scheduled count.

On January 19, the Grievant said she again started her day working in the mail room. She testified that she delivered legal mail to the LC, which is in the back of the hospital. She explained that in order to get to the LC she went by hospital room 10, where she noticed it was cold, and she saw the four inmates in gowns, with toilet paper on their feet, and the window open. She said that she saw CO Burden at the door to room 10, asked if she was going to get blankets for the inmates, and was told by Burden that she had tried. According to the Grievant, she asked Lassiter, who was closest to the door, how she was. The Grievant could not recall being instructed not to speak to the four inmates. Thereafter, the Grievant said that she attempted to deliver the legal mail to the inmate in the LC, found the inmate was no longer there, and returned it to her Supervisor because it was cold outside, she was not warmly dressed, and had been experiencing flu symptoms.

The Grievant worked on January 20, and the parties stipulated that she had no contact with Lassiter on that date.

With respect to January 21, the Grievant's testimony is un rebutted that she did not choose to work overtime in Arn 4 on suicide watch. She said that she had an aversion to suicide watch and had never performed this work before. She acknowledged that she went to the upper range, where she saw Lassiter, who gave her the telephone number in question. The Grievant said that her husband found the phone number, after she came home, but he did not believe her explanation of receiving it from Lassiter and he made her call the number and listened in to the conversation.

According to the Grievant, she did not have an opportunity to report what had transpired with Lassiter because she was off sick after January 21, until she returned to work on January 27, when Bonnell interviewed her first thing in the morning. She denied intending to violate any Employer rule. On cross-examination, the Grievant acknowledged refusing to answer some of Bonnell's questions, but only because he refused her request and became irate when she requested consultation with an attorney. She also acknowledged her bad judgment in taking the phone number from Lassiter and in making the phone call to Lassiter's parents in violation of Rule 46 a and e.

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Parties' Positions

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Employer Position:

The Employer contends that the termination was for just cause and should be sustained. It maintains that the Grievant violated Rule 46 e based upon the parties' stipulation that she called inmate Lassiter's parents about alleged mistreatment and the fact to which she admitted that she had no authorization to make that call. The Employer further contends that the Grievant violated Rule 46 a by not reporting receipt of the phone number from Lassiter.

According to the Employer, the Grievant violated Rule 26 by invoking "an ersatz fifth amendment right against self incrimination" to Bonnell's question about her telephoning Lassiter's parents. In support of this assertion, the Employer relies upon Cook's written statement that the Grievant "refused to answer [Bonnell's] questions".

The Employer maintains termination was the appropriate penalty for these transgressions because the Grievant cannot be considered trustworthy having violated three work rules, which ensure "the safety and security of the Institution, the staff, and the inmates". According to the Employer, the Grievant chose to discredit the Employer and the Institution by not using the chain of command to air her objections to the four inmates' treatment, but rather engaged in inappropriate conduct with an inmate. Such intentional conduct, the Employer asserts, has severed irreparably the employment relationship and compromised the Grievant's ability to perform her duties because of the perception that she was "bought and owned by an inmate with a sad story".

The Employer also stresses that the Grievant's personal relationship with Lassiter caused her to overreact to the situation. It contends that the Grievant's conduct during the period Lassiter was in detention is indicative of her personal interest in Lassiter and, thus, warranting termination. In support of this conclusion, the Employer cited Arbitrator Jonathan Dworkin's decision in Virginia M. Marcum, (*27-17-0094-01-09) . According to the Employer, the defense that the Grievant's husband forced her to make the phone call to Lassiter's parents is not credible. It also rejects the Union's attempt to portray the Grievant as a victim in the interview with Bonnell by arguing that he acted professionally and conducted an appropriate investigation and, thus, should not be made the subject of criticism for the Union's self-serving purposes.

Union Position:

The Union maintains that the Grievant's termination was not for just cause, and that she should be reinstated to her position and made whole for all lost wages and benefits. One of the Union's defenses is that the Employer failed to prove that the Grievant had a personal relationship with Lassiter. In support thereof, the Union asks that the Arbitrator carefully consider the record which provides no substantive proof of such a relationship.

Additionally, the Union claims that Bonnell was not only "over zealous" in his interviews with witnesses, the point that he coerced the responses he wanted, but also fabricated parts of their responses in his investigative report so that it would support the result the Employer wanted -- the Grievant's termination. As evidence, the Union points out, first, that Bonnell used Cook as the Union Representative, even though a more experienced Steward was available. Second, it notes Bonnell reported that COs Burden and Draper said they were "surprised" by the Grievant's conduct involving Lassiter, but both COs denied making such statements. Third, the Union stresses that Bonnell was the person who ordered both that the window open in room 10 be open, and intimidated and threatened Sexton. Fourth, it was Bonnell who threatened the Grievant by claiming that criminal charges could be filed and that the State Highway Patrol had been alerted, but was irate when the Grievant, who had never been in an investigative interview during her long service with the Employer, "rightly refused to answer" some questions and asked to speak to an attorney. If Bonnell was professional in conducting such investigations, then the Union maintains that he should have known, once the Grievant indicated she wanted to seek counsel, that he should have postponed the interview and continued it at a time when the Grievant could have such representation.

The Union further contends that the Employer did not refute testimony that the visiting hall search performed by the Grievant, on all inmates at busy times at the closure of hours and with inmate count impending (therefore, not just for Lassiter), compromised the security of the institution or could, in any way, be distinguished from the behavior of other COs similarly situated. In this regard, the Union also points out

that there was no evidence of favoritism to Lassiter and that the Grievant was not charged with violation of orders pertaining to search procedures.

According to the Union, the Grievant went by room 10 as part of her assigned mail delivery duties on January 19. It stresses that many witnesses said room 10 was cold that night and inmates wore light clothing. The Union contends that Bonnell was responsible for such "inhumane" treatment of inmates. It is the Union's position that the Grievant's speaking to CO Burden and to the inmates was out of concern for inmates welfare and did not "impede any investigation, breach any security measures, or cause the inmates to lose respect" for her. Note should be taken, the Union claims, that the only "gag order" pertaining to the January 19 incident, applied narrowly to the four inmates not talking among themselves. The Union also emphasizes the fact that the Grievant did not contact Lassiter on January 20, to undermine the Employer's argument that a personal relationship existed between these two individuals.

Other significant facts in favor of it's case, the Union argues, are that the Grievant's overtime assignment on January 21, was against her wishes and was the first time she worked the Arn 4 suicide watch. The Union maintains that it was "not out of line" for the Grievant to briefly leave that post and stresses that failure to follow posted orders was not part of the cause of action for removal. According to the Union, the Grievant was unfamiliar with the noise in Arn 4, causing her to walk up range to quiet the inmates.

The Union concedes that the Grievant then had a "fleeting" conversation with Lassiter and "made the mistake of her career" by taking Lassiter's parent's phone number. It contends, however, that the Grievant had no intention of calling Lassiter's parents and only did so as a result of her jealous husband's insistence. The Union notes it was a fifty second conversation as stipulated.

ANALYSIS

As Article 24 of the Agreement makes clear, it is the Employer's burden of proof to establish the termination was for just cause. That Article also provides that disciplinary action shall be commensurate with the offense. Additionally, the Employer is required by the Agreement to follow the principles of progressive discipline.

It is understandable that the Employer is concerned about COs engaging in personal relationships with inmates. Obviously, such relationships could easily compromise a CO's effectiveness to perform her/his duties properly, and, under certain circumstances, may cause a breach of security injurious to the safety and well being of the institution, it's staff and inmates. That concern is reflected in the range of discipline attached to violations of Rule 46 a and e, consisting of a written reprimand to removal depending upon the circumstances involved in accordance with just cause principles as required by the Agreement. The only unauthorized relationships misconduct prohibited by Rule 46 for which removal is the only recognized disciplinary penalty for a first offense involves sexual acts between inmates and employees under Rule 46 d.

Based upon the record, there is insufficient evidence that the Grievant had a personal relationship with Lassiter. This case is dissimilar factually from the close personal relationship involved in the award of Arbitrator Dworkin and in the cases cited therein involving extremely egregious misconduct. These cases therefore cannot be relied upon by the Employer to sustain this termination. At most, during the time in question, the record reflects that the Grievant had been responsible for searching Lassiter on January 18, speaking to her briefly on January 19 and 21, and calling Lassiter's parents using a telephone number Lassiter provided. Careful examination of such conduct separately, or in combination, does not constitute evidence of a personal relationship between the Grievant and Lassiter.

The Employer did not rebut the testimony that the Grievant's January 18, modified strip search of Lassiter and of other inmates to save time in order to meet the scheduled inmate count was contrary to accepted procedure nor show that such conduct violated a specific work rule. Under such circumstances, that search hardly can be considered as evidence of a personal relationship between the two.

Nor did the Grievant's conduct at room 10 on January 19, provide evidence of a personal relationship with Lassiter. There was no gag order prohibiting COs from speaking to the inmates in that room, according to the unrebutted testimony of COs Burden and Draper, who were assigned to that room and who said other COs had expressed their concern about the inmates in that room. The window in room 10 was open and it

was so cold that the COs posted outside that room wore coats, while the inmates wore only a light night gown. Under such circumstances, the Grievant's expression of concern about the inmates' conditions is understandable and hardly unprofessional. Likewise her asking Lassiter, who was nearest to the door, "how she was doing" does not warrant a finding that the Grievant engaged in inappropriate behavior or demonstrated that she somehow had a personal relationship with Lassiter.

The fact that the Grievant worked January 20, but had no contact with Lassiter that day, further undercuts the Employer's position that a personal relationship existed between the two.

The most serious misconduct the Grievant engaged in involved the circumstances in which she accepted from Lassiter her parent's phone number on January 21, and later called the parents about Lassiter's treatment. That conduct, alone or even in the context of the aforementioned facts, still does not rise to the level of evidence of a personal relationship. At most, it was in part a reflection of the Grievant's continued concern over the inmate's well being and, in part, poor judgment in accepting the phone number and later calling Lassiter's parents.

There is no evidence that the Grievant knew Lassiter would be in Arn 4 on January 21, when she was scheduled to perform overtime that day. Moreover, the Grievant did not request the suicide watch in Arn 4 to which she was assigned. That work was a new experience to her, and while that largely explains her temporarily leaving her post, it does not totally exonerate her for doing so. It would be stretching the facts to conclude that the Grievant abandoned her post, and this is not a rule violation with which she was charged. However, leaving her post, even though there was another CO on duty with her, to walk to the upper range, and then to see and to speak to Lassiter was not in keeping with the Grievant's responsibilities to observe inmates on suicide watch every five minutes and to report her observations every fifteen minutes.

The fact also remains that the Grievant accepted from Lassiter her parents' phone number and called them the evening of January 21. Such conduct on its face violates Rule 46 a and e. Instead of treating that conduct as a technical violation of those Rules, the crucial question involves determining the significance of that conduct. The Employer's contention that the Grievant made the call to "discredit the Institution" and the Employer "under the cloak of anonymity" is highly speculative and unsupported by the facts of record in this case. There is no evidence or suggestion that this misconduct undermined the security or safety of the Institution, its staff, or inmates. While it is perhaps indicative of a lapse of judgment on the Grievant's part, it is not indicative of an inability to carry out her duties properly and effectively.

The Grievant has worked for the Employer approximately eleven years with no evidence of previous discipline or similar lapses in judgment. The acceptance of the telephone number, in itself, is of little significance. Had she thrown it away or otherwise disregarded it, the violation of Rule 46 a would be no more than a technical one. It was the Grievant's calling that number, the Union concedes, which constituted her big mistake in this matter. The circumstances under which that call was made, as testified to by the Grievant and her husband, cannot be automatically disregarded as not credible or "contrived" as the Employer maintains simply because of their marital status. While the source of such evidence may effect the weight given it, there is no denying the fact that this testimony was not given easily, considering its embarrassing content. However, the fact remains that the Grievant made the call, whether under duress or not. The substance of that call is significant. It was not to discredit the Institution or the Employer. As the parties stipulated, the call was a brief (.82 minute) explanation of Lassiter's detention situation.

The Grievant's misconduct on January 21, cannot be disregarded. Calling Lassiter's parents was unauthorized conduct impermissible under Rule 46 e. It was more than an insignificant violation and cannot be tolerated in this work environment. Based upon the circumstances of this case, however, it does not warrant the most extreme penalty of removal, which is only one of the options available for the first offense of such misconduct.

The remaining Rule 26 violation regards the Grievant's alleged interfering with and/or failing to cooperate in an official investigation conducted by Bonnell. The Employer's contention that Bonnell's conduct in the Grievant's interview is somehow immaterial to that alleged violation misses the point. It is true that the Grievant is obligated to cooperate with such investigations to the extent required by applicable law. Likewise, Bonnell must be mindful in conducting interviews of those limits and of his obligation to act responsibly and reasonably.

Bonnell received authority to investigate the Grievant's alleged improper personal relationship with Lassiter based upon information obtained from inmate Gilbert. As Arbitrator Dworkin stated in the award cited by the Employer:

"As Management knows all too well, prisoners are as likely to lie as tell the truth. Their exclusive motivations are their self-interests, and their unsupported statements, whether or not they are given under oath, cannot be considered valid."

Gilbert's credibility is highly suspect. She did not testify in this proceeding. After providing her statement to Bonnell, she was paroled and there is currently a warrant out for her arrest for unspecified reasons. CO Draper testified, although Gilbert knew something about the drugs, she provided that information to Draper to get time off her sentence, but Gilbert never said anything to Draper about misconduct by the Grievant.

Nevertheless, Bonnell aggressively investigated the Grievant's alleged personal relationship with Lassiter, interviewing twenty-nine witnesses and compiling an investigation report twenty-five pages long with numerous attachments, even though as discussed above, evidence of such a relationship does not exist. In her interview, the Grievant answered Bonnell's questions regarding searching Lassiter, how she came to be at room 10 and asked Lassiter how she was doing, and speaking to Lassiter in Arn 4.

In fact, in his report Bonnell noted that at the Grievant answered all his questions until he asked her "if she had taken numbers from Inmate Lassiter, and had she called Lassiter's parents". It was at that time, the Grievant refused to answer apparently claiming fifth amendment rights against self-incrimination, but she also said she would answer that question after speaking to her attorney. Bonnell never said why that response was unacceptable to him. The fact remains he terminated the interview without reconvening it after the Grievant had the opportunity to obtain legal counsel.

The Grievant's fifth amendment claim is not frivolous as the Employer maintains. There is no question that the underlying investigation of Lassiter and other inmates involved possible drug related crimes and that the State Highway Patrol was involved in the entire matter. The Grievant never had been in such an interview before and Bonnell cut her off from getting advise from Union Representative Cook. She felt Bonnell was intimidating and had become irate in the interview. Therefore, it was not unreasonable under such circumstances, for the Grievant to request a conference with legal counsel, before proceeding further with an interview which might involve criminal charges. Based upon this analysis, the Arbitrator finds that the Employer failed to prove that was a violation of Rule 26 warranting discipline.

For the aforesaid reasons, the Arbitrator finds that the Employer has failed to meet its burden of proving that there was just cause for the Grievant's termination. There was insufficient evidence that the Grievant had a personal relationship with Lassiter and the Employer did not prove that the Grievant violated Rule 26. The record does support a finding, however, that the Grievant engaged in misconduct on January 21, which violated Rule 46 a and e. That misconduct did not and could not have jeopardized the safety or the security of the Institution, it's staff and inmates; nor did it demonstrate that the Grievant is unable to properly perform her duties. Under principles of progressive discipline and just cause, such misconduct warrants a lengthy disciplinary suspension of thirty days to illustrate that lapses in judgment cannot be tolerated and may lead to termination.

AWARD

The Grievant's termination was not for just cause for the reasons stated above. The removal shall be rescinded and replaced by a thirty day suspension commencing on April 8. The Grievant shall be reinstated to her former position with appropriate benefits seniority and back pay (minus any interim earnings) commensurate with that thirty day suspension. The Arbitrator shall retain jurisdiction for sixty days from the date of the award to resolve any controversies that may arise over implementation of this award.

DATED: January 9, 1997
MOLLIE H. BOWERS, Arbitrator

[1] Gilbert did not testify in this proceeding. The record reflects she had been paroled sometime after the events in question and there is currently a warrant for her arrest for undisclosed reasons.

It was Bonnell's belief that Gilbert's use of "Thompson" was an error, and she actually meant Grievant's name. The statement Gilbert provided to the drug investigator is a two page document. However, there is a partially reproduced statement on the back of the first page of that document asserting Thompson "does not search" Lassiter after a visit. It is also noted therein, Thompson visited Lassiter Sunday evening saying she would call her parents, because she "felt the inmates were violated. Body search, physical medical search, left in a room, no clothes, blankets, etc. with an open window on the floor."

[2] Upon Bonnell's request, Lassiter volunteered to take a lie detector test, which she took and was graded as responding truthfully.

[3] This is contrary to the parties' stipulation that the Grievant did not contact Lassiter on January 20.

[4] Those rules were not made part of this record.

[5] In her testimony, Lassiter said the Grievant may have been addressing all four inmates detained in room 10.

[6] There is no dispute that the Grievant was apprised that criminal charges could result from the interview.