

ARBITRATION DECISION NO:

678

UNION:

OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:

Ohio Department of Rehabilitation and Correction

North Central Correctional Institution

DATE OF ARBITRATION:

April 24, 1997

DATE OF DECISION:

June 14, 1998

GRIEVANT:

Russell Castle

OCB GRIEVANCE NO.:

27 30 (97 07 09) 0517 01 03

ARBITRATOR:

Robert Brookins

FOR THE UNION:

Butch Wilie, Staff Rep.

FOR THE EMPLOYER:

Joseph P. Shaver, Chief Bureau of Labor Relations

Jerry Ballenger, Labor Relations, NCCI

Lou Kitchen, Labor Relations, OCB

KEY WORDS:

Credibility of Witnesses

Insubordination

Just Cause

ARTICLES:

Article 24 – Discipline

§24.01 – Standard

§24.02 – Progressive Discipline

FACTS:

The Ohio Department of Rehabilitation and Correction (DR & C) employed Mr. Russell Castle (the grievant) for approximately 10 years. He worked at the North Central Correctional Institution (NCCI) from November 1994 until his termination in July of 1997, for violating two NCCI work rules: insubordination and sexual harassment.

First, the grievant was placed on administrative leave pending an investigation of sexual harassment. While on administrative leave, the grievant was ordered to remain at home and available from 8:00 a.m. until 4:00 p.m. The grievant was also required to call in daily for instructions from his captain. Subsequently, the grievant failed to call in on five separate days, and he was charged with insubordination.

Additionally, the grievant is charged with sexual harassment. The grievant was accused by a co worker of making unwanted sexual comments, making unwanted sexual advances, and brushing the co worker's breasts.

EMPLOYER'S POSITION:

The Employer asserted that the grievant had been insubordinate by disobeying written orders. Furthermore, the Employer holds that the grievant sexually harassed another employee. Based on the grievant's discipline history of insubordination and sexual harassment, just cause existed to remove the grievant.

THE UNION'S POSITION:

The Union holds that the grievant's failure to call in was the result of confusion over the call in requirement that was caused by the medication the grievant was taking and the alcohol he was consuming. The grievant asserted that he believed he was required to call in only ever 2 to 3 days. On another occasion, the grievant attempted to call in, but ended the long distance call when the grievant's captain was delayed in coming to the phone. The grievant claimed that another officer took his call in, and therefore, he was not in violation of policy. Finally, the grievant did not call in on the day of his investigatory interview because he believed that there was no need to call in because he would be at the interview.

The Union held that the grievant did not sexually harass the accuser. The Union provided testimony by other employees that rebutted the accusers testimony of the incident of harassment that lead to the grievant's administrative leave and subsequent removal.

ARBITRATOR'S OPINION:

The Arbitrator rejected the arguments that the grievant presented to explain his failure to follow the call in procedure. The Arbitrator asserted that to relieve an employee of his duty to follow procedure because he had altered the affects of his medication by consuming alcohol would create a loophole that could be used to circumvent his employment duty. The Arbitrator also noted that the Union failed to present sufficient evidence to support the grievant's claim that he had called in to another officer when his captain was delayed. The arbitrator found no evidence to support the grievant's defense. Finally, the Arbitrator found that the grievant's belief that he was not required to call in on the day of his investigatory interview was incorrect. The Arbitrator noted that the grievant's position required an elevated degree of responsibility, and the claim of ignorance and confusion was not an acceptable defense.

Addressing the issue of sexual harassment, the Arbitrator found the accuser's testimony to be less than credible. He observed that based on the written and oral testimony presented by the Employer, the accuser had changed her story several times in an effort to embellish the facts. Furthermore, the accuser's testimony was frequently contradicted by the testimony of other witnesses that had no motive to provide inaccurate testimony. Finally, the Arbitrator noted that because of the stigma associated with sexual harassment the State bore a greater burden of proving that the grievant had sexually harassed the accuser. The Arbitrator set the standard of proof at clear and convincing evidence. Based on the conflicts within the accuser's testimony, the credible rebuttal testimony, and the heightened standard of proof, the Arbitrator concluded that the Employer could not support the sexual harassment accusations brought against the grievant.

The arbitrator found that the grievant had been insubordinate and that his actions required discipline. Additionally, the Arbitrator pointed out that the grievant had on several other occasions disregarded orders and work rules. However, the arbitrator also noted that the grievant had been a long time employee for the State and ad performed his job reasonably well. Accordingly, the Arbitrator overturned the removal.

AWARD:

The Arbitrator overturned the removal on the grounds that the Employer had not adequately shown that the grievant sexually harassed another employee. Nevertheless, the Arbitrator decided that the longest possible suspension was appropriate for the grievant in a "last ditch effort" to reform the grievant. The grievant was awarded back pay less the time of the suspension.

TEXT OF THE OPINION:

* * *

OPINION AND AWARD

**IN THE MATTER OF THE ARBITRATION BETWEEN
Ohio Department of Rehabilitation and Correction, North Central Correctional Institution**

AND

OCSEA/AFSCME, Local 11

APPEARANCES

For the State

Joseph P. Shaver, Chief Bureau of Labor Relations
Jerry Ballenger, Labor Relations, NCCI
Lou Kitchen, Labor Relations, NCC1
Sherri Duffy, Captain
Shiela Goodwin, Personnel Officer 11
Melissa Rucker, StoreKeeper 11
John Morgan, Warden
Margaret, S. Lee, Deputy Warden

For the Union

Butch Wilie, Staff Representative
Pat Howell, Correction officer
James Seckel, Correction Officer 11
Daryl Slusher, Correction Officer II
Kevin Flake, Correction Officer
Ron Shambaugh, Correction Officer
Russell Castle, Grievant
Carla S. Black, Records Clerk

Case Specific Data

Hearing Held
April 24, 1997

Grievance #
27 30 (7/9/97) 517 01 03

Case Decided
June 14, 1998

Arbitrator: Robert Brookins, J.D., Ph.D.
Subject: Termination

* * *

I. Initial Facts

Virtually all of the allegations in this case are stoutly disputed. Therefore, instead of being presented at the outset of this opinion, most of the factual findings emerge through the subsequent discussion of the allegations,

Nevertheless, some initial facts are clear and will be set fourth here. The Ohio Department of Rehabilitation and Correction has employed Mr. Russell Castle (the Grievant) for approximately 10 years. He was initially hired on August 24, 1987 as an Activity Therapist for the Madison Correctional Institution in London, Ohio and was promoted to Correction Officer there on August 27, 1989. Then, as a Correction Officer, the Grievant transferred to the North Central Correctional Institution (NCCI) on November 11, 1994 where he remained until terminated on July 1, 1997 for violating two NCCI work rules

II. The Issue

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

III. Relevant Work Rules

Rule 6 -insubordination disobedience or inappropriate delay in carrying out a direct order of a supervisor.

Rule 13b discrimination sexual harassment.

IV. Position of the Parties

Management's Position

5. The Grievant's failure to follow specific call in instructions while on administrative leave constitutes insubordination.

6. The Grievant sexually harassed Ms. Rucker with a continuing stream of unwelcomed sexual comments and suggestions, thereby creating a hostile work environment for her. **2**

Union's Position

I. The Grievant is not guilty of insubordination because he did not intentionally disobey his call in

instructions. His failed to call in as ordered because he misplaced the instructions and was otherwise confused.

- 2, The Grievant denies sexually harassing Ms. Rucker and lacked any knowledge of her allegations until the latter part of March 1997.

V. Discussion and Factual Findings
A. Insubordination

On April 11, 1997, NCCI placed the Grievant on administrative leave to investigate charges that he sexually harassed a female coworker. When placing him on administrative leave, NCCI specifically ordered the Grievant in writing: (1) to remain at home and available from 8:00 a.m. to 4:00 p.m. Monday through Friday; and (2) to call in at 8:00 a.m. each work day for instructions from the First shift Captain.¹

Nevertheless, the Grievant disobeyed these orders by failing to call in at all on April 14 17, 1997 and on May 1, 1997. During the hearing, the Grievant offered un rebutted testimony of the circumstances that caused him to miss the designated call ins. He did not call in April 14 16 because he became upset when NCCI placed him on leave and, consequently, misplaced the call in orders. Also, he claimed that during this time, he was heavily medicated and consuming alcohol. This behavior contributed to his confusion about the call in policy be assumed the policy required him to call in every 2 3 days instead of every day. Eventually Officer Flake informed the Grievant of his duty to call in every work day. The Grievant called in on April 17 but could not get through because the NCCI line was disconnected. He called in a second time on April 17 but could not locate a supervisor. Because he was calling long distance, the Grievant had Officer Flake to take his call in.

¹ Employer exhibit 2.

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In an apparent attempt to substantiate this explanation, the Union offered Union Exhibit 2, a statement by Officer Scantlin, stating that in April 1997 Officer Scantlin received a telephone Call from the Grievant. However, it required approximately 5 minutes elapsed before Officer Scantlin could reach the First Shift Captain. By that time, however, the Grievant was no longer on the line. NCCJ properly objected to Union Exhibit 2 as hearsay. Because the record lacks independent corroborating evidence to support the statement in Union Exhibit 2, the Arbitrator must discount its probative value. Moreover, on its face, the statement lacks probative value because rather than specifying the day the Grievant called in, Officer Scantlin merely declared that the Grievant called in on " April of 1997." Finally, on May 1, 1997, the Grievant again failed to call in because he was scheduled to attend an investigatory interview regarding the sexual harassment charges and reasoned that the interview somehow relieved him of his call in duty.

Even though these explanations are un rebutted presumed to be true 4bey do not excuse the Grievant's failure to call in as ordered. He must be held accountable for his actions in this instance. To excuse his dereliction of duty because he was upset or because he heightened the effects of medication by consuming alcohol is to create a loophole through which many if not most could skirt their duties with relative impunity. Moreover, even though he misplaced the written orders, it is reasonable and fair to charge him with constructive knowledge of those orders. Otherwise, NCC1 imay find it difficult to hold any employee responsible for even carefully drafted, explicit orders. Finally, as a Corrections Officer, the Grievant apparently gives orders to others while fully expecting his orders to be followed, Employees who hold such positions of authority are properly held to a higher standard of conduct, including their ability to follow orders themselves. Consequently, the Grievant's reasons for failing to follow explicit and direct orders might

explain **4**

but hardly justify his conduct, Because the Grievant failed to follow direct orders and offered no acceptable reason for doing so, some discipline is warranted.

H. Sexual harassment

A Storekeeper II (Ms. Melissa K. Rucker) claimed that the Grievant subjected her to pattern of sexually harassing conduct for approximately 5 6 months. The first official record of that allegation was a report by an Equal Employment Opportunity Officer (Ms. Shiela A. Goodwin). Ms. Goodwin recorded the essence of her conversations with Ms. Rucker in March 1997 and on April 7, 1997. Also, on April 7, 1997, Ms. Rucker filed the first of two Incident Reports, alleging that the Grievant was sexually harassing her.² On April 11, 1997, she filed a second Incident Report, further accusing the Grievant of sexual harassment. On April 11, 1997, Warden John D. Morgan placed the Grievant on administrative leave pending a full investigation of Ms. Rucker's allegations.³

Captain Duffy conducted the investigation and obtained a statement from Ms. Rucker during an interview on April 24, 1997 (Captain Duffy's Interview).⁴ Captain Duffy also interviewed the Grievant, Sargent Slusher. OJT Hollen, Mr. Berry, Mrs. Majoros, as well as Officers Pryor, Ridenour, Seckel, and Shambaugh. On May 1, 1997, Captain Duffy submitted her report to Warden Morgan, who notified the Grievant, on May 15, 1997, that a pre disciplinary conference would be held on May 22, 1997. On June 5, 1997, a hearing officer found the Grievant guilty of violating Rules 6 and 13b and, therefore, found just cause for discipline, which turned out to be discharge.⁵

² Employer exhibit 5.

³ Employer exhibit 2.

⁴ Employer exhibit 1.

⁵ Joint Exhibit 4.

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The Union grieved the dismissal, on July 1, 1997; the parties were unable to settle it and ultimately resented it to the undersigned on April 24, 1998.

Because of the nature of their jobs, the Grievant and Ms. Rucker regularly encountered each other on the job. Ms. Rucker drove a truck and made daily deliveries to an area where die Grievant was also assigned. Part of his. responsibilities involved securing the steering wheel of Ms. Rucker's truck with a "Club," which fits across the steering wheel and locks it in one position, thereby defeating unauthorized use of the vehicle. Occasionally, the Grievant rode in the truck with Ms. Rucker, and for approximately the first 2-3 weeks they engaged in ordinary conversation about their lives and job.

This normal interaction was shattered during the 1996 Christmas season when the Grievant allegedly began making unwelcomed sexual comments and suggestions to Ms. Rucker. The hearing record reveals

that on April 7, 1997, Ms. Rucker made the following allegations in her first Incident Report:

Over a period of four months, Officer Castle has repeatedly made unwanted comments to me in reference to my address, my appearance, my phone number, and our going on a date. *At first, because I was on probation and did not want to cause unnecessary waves, I would laugh him off and walk away.* As time progressed and he continued the unwanted comments I began to verbally let him know that I was uncomfortable,

On or about March 5, 1997, Co. Castle asked me, "What would be the chances that I could give you a small kiss on the cheek without you knocking me out." *I replied, "None. " At that time I advised C.O. Castle that he had gone too far.*

Upon returning to the warehouse, I called Sheila Goodwin in Personnel. She gave me the paperwork to file an Informal Discrimination Complaint. She called me the next week to do a follow up and I advised her that Castle had backed off.

After approximately one week, CO. Castle began his advances again. This time he was even bolder. I continued to try to avoid him by going into the Staff Dining Hall while my truck was being unloaded. I also began calling out the number on the club for the truck so he would not have to get in the truck with me. As a final attempt to avoid a bad situation, I asked him to step away from the truck until I got

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out.

Today after backing into the dock, *I told C. O. Castle the club number that I had, which was "491." He (MAR) responded, "473 491, what is the last digit?" I responded don't you ever give up? " and walked away. About 5 minutes later he made a comment about my looks and compared it to the beautiful day.* I gave him a dirty look and walked away. Standing at the back doors to Food Service, I began talking to Officer Shambaugh when *Officer Castle walked over and started playing with my radio which was located in my left breast pocket. He reached across my body and brushed his arm across my breast. I told him to leave me alone and walked into Food Service.* When I came back out, *Officer Castle began to stare at me in a way that made me feel very uncomfortable. When I asked him why he was staring at me "that way ", he told me because he could.* Officer Shambaugh witnessed some of the situations.⁶

Sometime between April 4 and 11, 1997, Ms. Rucker filed an informal EEO complaint against the Grievant. On or about April 11, she learned that he knew of the complaint, was upset, and planned to confront her about having filed it, On April 17, Ms. Rucker encountered the Grievant again and, on April 11, 1997, offered the following Incident Report which details her confrontation with him:

I went into to Food Service today to make my scheduled delivery. After parking in the dock, I placed the Club on the truck, got out and moved away from the truck so that Officer Castle could lock the club. I went to the back of the truck to get a box for the Pharmacy. *When I went into Maintenance to call Mr. Cochran, Officer Castle followed me in and glared at me. I tried to ignore him, I walked out and met Mr. Cochran on the dock. Once again Officer Castle followed onto the dock and glared at me.* Still attempting to ignore him I finished the paperwork with Mr. Cochran and went into the Staff Dining Room from there I went to Mrs. Buchanan's office where I spoke with Mrs. Buchanan and Mrs. Majoros about Officer Castle's actions. An inmate came to get me for a problem with the order on the truck. After that situation was taken care of I stayed on the dock while Mr. Berry loaded steamers from Food Service. I noticed that Officer Castle was talking to Officer Shambaugh. I started talking and Officer Castle then came and

stood between me and the Officer. When I saw Mrs. Buchanan, Mrs. Majoros and Mrs. Rush, I walked over and started speaking to them. After my truck was loaded, I unlocked the passenger side door for the rider. I then unlocked the driver side door and went to the front of the truck to wait for Officer Castle to unlock the truck and move away. He unlocked the truck and stood there. I waited a few minutes and went UAR to get in the truck. *Officer Castle grabbed the door and told me that he wanted to talk to me. I told him that I no longer wanted to talk to him and got in the truck.* He then asked if I had filed an

[6](#) Emphasis added.

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EEO complaint. I once again told him that I did not want to talk to him. He then told me that if I did file an EEO complaint that he could prove to me that I was a *"Fucking Liar" pulled the door shut, locked it, cranked up the truck and began to drive away. Officer Castle continued to yell, "You're a Fucking Liar."*^{[7](#)}

In addition to her Incident Reports, Ms. Rucker offered two other statements. One in an interview with Captain Duffy (Captain Duffy's Interview) and her testimony during the arbitral hearing before the undersigned. During her interview with Captain Duffy, on April 24, 2997, Ms. Rucker recalled the following details. The italicized passages are most relevant to the point here because none appears in her Incident Reports:

1. When she first started making deliveries in the truck, the Grievant *"would jump up on the cab of the truck and place the club on the steering wheel, while she was sitting in the driver's seat."*^{[8](#)} When the Grievant asked Ms. Rucker for a kiss, *"[S]he informed him that he made her real uncomfortable, and she did not like that and she does not play that way. She states he asked her if that was his warning. She told him to take it for what it was worth, She states he again asked her if that was his warning, and she told him yes, Ms. Rucker states he said fine, I won't say anything to you, I've been here before."*^{[9](#)}
3. Matters so deteriorated that *Officers Sambaugh and Ridenour offered "to take care of the truck so she could getaway."* ^{[10](#)}
4. The Grievant *allegedly brushed against her breast twice while attempting to play with her radio.* According to her Incident Report, the brushing and reaching occurred but once. *Moreover, she tried to stop him by making, "a slapping motion and told him to go awy."*
5. When she returned to her loaded truck, the Grievant was not simply staring at her but was *"looking her up and down, as if he was undressing her with his eyes."* ^{[11](#)}
6. In addition to saying that he was looking at her because he could, the *Grievant volunteered*

[7](#) Emphasis added.

[8](#) Employer exhibit I at 2.

[9](#) In her incident Report of April 7, 1997, she gave the following account: "On or about March 5, 1997, Co. Castle asked me, "What would be the chances that I could give you a small kiss on the cheek without you knocking me out." I replied, "None." At that time I advised C.O. Castle that he had gone

too far."

[10](#) Employer exhibit at 3.

[11](#) Employer exhibit I at 3.

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that, "She could do something about him touching or talking to her, but she could not do anything about him looking at her."^{[12](#)}

7. On April 11, 1997, Ms. Rucker made several—apparently superfluous telephone calls in order to avoid confronting the Grievant who was standing around stating at her.

8. While Ms. Rucker was talking with OJT Hollen, Officer Shambaugh walked over and announced that the Grievant wanted to speak with her.^{[13](#)} She refused and was "scared an nervous.

9. In addition to calling her a "fucking liar" at the scene by the truck, the Grievant actually "hit the truck, "presumably with his hand.

When testifying before this Arbitrator, Ms. Rucker again included details that she omitted in her Incident Reports and/or interview with Captain Duffy. For example, she added or embellished the following events relative to her Incident Reports:

1. The Grievant offered to pick up a six pack and come to her home and she replied, "Yeah, Right. " When the Grievant offered to visit her and bring some video tapes, she asked if she should set an extra plate for her husband?

2. In her interview with Captain Duffy and in her Incident Reports, Ms. Rucker said she initially declined to file an informal EEO Complaint because the Grievant had "backed off," and because she was on probation.^{[14](#)} In contrast, she testified that she did not initially file the Complaint because *she knew the Grievant had experienced some problems in the mailroom, and she felt guilty about increasing his woes.*

3. She testified for the first time that someone -- presurnably the Grievant *drew hearts on some boxes in the warehouse.*

During the "truck Scene," Ms. Rucker's Incident Report (4/11/98) mentions a *third party* only to the extent that she opened the passenger side door of the truck for "the rider." She testified that *OJT Dave Berry was in the rear of the truck when the Grievant called her a "Fucking liar."* Subsequently, Mr. Berry alighted from the truck and asked "What the hell was that all about?"

a. During his interview with Captain Duffy, Mr. Berry testified that he heard the Grievant say "Liar " *twice before he [the Grievant] rode away on his bicycle.* Mr. Berry never mentioned either talking to or questioning Ms. Rucker about the incident.

These internal consistencies hardly enhance Ms. Rucker's credibility. For example, other matters equal, one would expect the Incident Reports to be the most thorough and accurate because

[12](#) *Id.*

[13](#) Employer exhibit I at 4.

[14](#) Employer exhibit I at 3.

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Ms. Rucker recorded them on the day of the alleged events. Clearly that is not the case, however. Ms. Rucker's recall seemed to improve rather than dim over time, exactly the opposite of what one would reasonably expect.

Although the inconsistencies adversely affect Ms. Rucker credibility, the "Radio incident" is even more problematic, not so much because of internal inconsistencies, but because of the substantial discrepancies between her three accounts -taken as a whole and the testimony of Officer Shambaugh.¹⁵ First, Ms. Rucker acknowledges that Officer Sharnbaugh was present during the "Radio incident" and personally observed the Grievant's behavior,

Nevertheless, her testimony conflicts with Officer Shambaugh's. Ms. Rucker stated that the Grievant approached her from her left, stood facing her, and reached across her body to manipulate the radio knobs. On the other hand, Officer Shambaugh testified that the Grievant stood facing Ms. Rucker and almost squarely in front of her, instead of to her right. Officer Shambaugh also testified that the Grievant manipulated the knobs with his right hand. As demonstrated during the hearing, from that position, the Grievant -who is right handed-- not reach across Ms. Rucker's body and therefore could not have brushed across either of Ms. Rucker breasts as she alleged. Also, Officer Shambaugh neither saw nor heard Ms. Rucker say anything to the Grievant about touching the radio knobs. Nor did he observe Ms. Rucker making a slapping or pushing motion with her hands when the Grievant touched the radio knobs. Officer Shambaugh stood approximately 4 feet from Ms. Rucker and the Grievant and to her left. From there, he commanded an almost perfect view of her chest, the Grievant's hands, and the radio knobs.

Although it does not independently discredit Ms. Rucker, the discrepancy between her and

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Officer Shambaugh's testimony deeply concerns the Arbitrator. This testimonial conflict is crucial for several reasons. First, the resolution of this dispute turns almost entirely on Ms. Rucker's and the Grievant's credibility. Nevertheless, at the end of the day, Ms. Rucker -and not the Grievant -has the burden of proving hostile environment sexual harassment. If the evidence in the record as a whole is equivocal as to the alleged sexual harassment, then the Grievance must be sustained on that particular charge. Second, given the substantial stigma attached to a charge of sexual harassment and the likely damage to the life and reputation of anyone found guilty of such misconduct, an alleged victim should and in this instance must prove sexual harassment by clear and convincing evidence rather than by the usual preponderance of the evidence.¹⁶ Third, and most important, the "Radio incident" is one of two incidents that third parties witnessed and, thus, is not simply a matter of Ms. Rucker's word against the Grievant's. Substantial and relevant segments of Ms. Rucker's account were refuted by Officer Shambaugh, who had a closer relationship with Ms. Rucker than with the Grievant.¹⁷ This refutation not diminishes Ms. Rucker's credibility regarding both the "Radio incident" and other alleged incidents. Comparing Officer Shambaugh's account with Ms. Rucker's reveals that she seems to have exaggerated certain aspects of the Grievant's behavior, such as whether he brushed against her breast, how she responded to his manipulating the radio knobs, and where he stood when he reached for the radio knobs. Clearly, these discrepancies

16 The Union asked for a "beyond a reasonable doubt" standard. However, the Arbitrator believes that the "Clear and convincing" standard assures that doubts are adequately resolved in the favor of the accused and, thus, adequately diminishes the risk that the accused will be wrongfully disciplined for sexual harassment.

17 The other refutation came from the statement of Mr. Berry who was present when the Grievant allegedly called Ms. Rucker a "Fucking liar." But Mr. Berry only heard the Grievant say "Liar."

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cause concern about the extent to which she exaggerated the Grievant's behavior in the unwitnessed episodes of their interactions.

In addition, at least two reasons suggest that Officer Shambaugh is more credible in this situation. First, neither reason nor evidence in the record suggests that he had anything to gain from misrepresentations. Second, he showed no signs of favoritism inasmuch as he also contradicted the Grievant's testimony where he denied having called Ms. Rucker a "Fucking liar." In contrast, Officer Shambaugh testified that the Grievant told him that he called Ms. Rucker a "Fucking liar."

This is not to suggest that the Grievant's account is wholly credible. He denies having made any sexual comments to Ms. Rucker. He admits only to carrying on normal conversations with her and agreeing to accompany her to a dinner she won at the Red Lobster restaurant. The Grievant claims he was unaware of Ms. Rucker's allegations until he heard them through rumors. With respect to the "Radio incident," the Grievant offered the following account: earlier on April 11, Ms. Rucker attempted to contact the Grievant on her radio. She tried to contact him on 3 or 4 occasions, and he apparently responded each time but she apparently she did not hear him. Later when he saw her on the loading dock, he noticed that volume on her radio was turned completely off, so he walked over and turned it up once and left. Nonetheless, relative to Ms. Rucker's version of this particular event, the Grievant's is more compatible with Officer Shambaugh's. Finally, the Grievant also denies having called Ms. Rucker a "Fucking liar." He says he called her a "Damn liar." In effect, the Grievant denies taking any impermissible actions toward Ms. Rucker. This too is an incredible account. The difference is that NCCI -and not the Grievant -has the burden of proof in this dispute, a burden that NCCI simply cannot satisfy with a credibility cloud hanging over its chief witness Ms. Rucker.

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Nor does the Arbitrator mean to suggest that nothing occurred between the Grievant and Ms. Rucker. Clearly something did occur as evidenced by other aspects of the case such as the detailed nature of Ms. Rucker's accounts. Still, at some point, the credibility generated by detail must yield to internal inconsistencies and external refutations by eye witnesses. Even though something happened between Ms. Rucker and the Grievant, evidence in the record as a whole does not clearly and convincingly indicate what that something was.

Because the basic facts which NCCI deemed to have constituted sexual harassment have not been established, there is no need to venture into an analysis and application of the substantive rules that govern

sexual harassment. Accordingly the Arbitrator will dispense with that portion of the opinion in this case.

V. The Remedy

As mentioned above, the Grievant's failure to call in as specifically and clearly directed constitutes insubordination and justifies the imposition of some disciplinary measure. In assessing that quantum of discipline, one must balance mitigating factors against aggravating factors. Mitigating factors include the Grievant's ten year tenure with the Ohio Department of Rehabilitation and Correction and NCCCL In addition, he has apparently performed his job reasonably well during this period.

The major aggravating factors include the Grievant's disciplinary record and the seriousness of his insubordinate behavior. Excluding the present termination, the Grievant has been disciplined four times in four years, and two of those four disciplinary measures were taken in 1996. On November 17, 1992, he received a 5 day suspension for insubordination and failure of good behavior. NCCI suspended him again on June 6, 1994 for insubordination and failure to follow post

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orders, administrative regulations and/or written procedures. Again on February 7, 1996, the Grievant received a written reprimand for being AWOL and leaving his work area without permission, Finally, on September 16, 1996, he received 3 day suspension for making obscene gestures or statements or false or abusive statements towards other employees and for sexually harassing fellow employees.

The Grievant seems resistant to the rehabilitative force of progressive discipline. And the only reason the Arbitrator refrains from sustaining his termination is that NCCI did not prove half of its case as discussed above. Moreover, NCCI apparently based its decision to terminate the Grievant on both charges - insubordination and sexual harassment -rather than on either charge individually. Indeed, NCCI did not contend that the insubordination charge alone warranted the discharge. Even so, the Grievant's disciplinary record together with proof of insubordination clearly warrants serious discipline in a 1st ditch effort to rehabilitate him.

The Grievant desperately needs to recognize that he is treading on the thinnest of ice and that in all likelihood there will be no more "chances." With these factors in mind, the Arbitrator imposes the following disciplinary measure: (1) The termination shall be reduced to the *maximum suspension* (without pay) that NCCI may impose pursuant to its table of penalties and the contracts; (2) except for the back pay lost during this suspension, the Grievant shall receive all back pay to which he is entitled; (3) The Grievant's seniority is to remain in tact; (4) If the Grievant engages in any misconduct prohibited by the contract or NCCI's work rules within one calendar year from the date that he returns to work, NCCI shall be relieved of this Arbitrator's reinstatement order and may summarily terminate the Grievant.

The Arbitrator retains jurisdiction of this matter should the parties have any questions
or

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concerns about the implementation of this remedy. For all the foregoing reasons, the Grievance is

SUSTAINED in part and **DENIED** in part.

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[1](#) Employer exhibit 2

[1](#)

[2](#) Employer exhibit 5

[3](#) Employer exhibit 2

[4](#) Employer exhibit 1

[5](#) Joint exhibit 4

[2](#)

[3](#)

[4](#)

[5](#)

[6](#) Emphasis added.

[6](#)

[7](#) Emphasis added.

[8](#) Employer exhibit 1 at 2

[9](#) In her incident Report of April 7, 1997, she gave the following account: "On or about March 5, 1997, C.O. Castle asked me, "What would be the chances that I could give you a small kiss on the cheek without you knocking me out." I replied, "None." At that time I advised C.O. Castle that he had gone too far."

[10](#) Employer exhibit at 3.

[11](#) Employer exhibit 1 at 3.

[7](#)

[8](#)

[9](#)

[10](#)

[11](#)

[12](#) *Id.*

[13](#) Employer exhibit 1 at 4.

[14](#) Employer exhibit 1 at 3.

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[16](#) The Union asked for a "beyond reasonable doubt" standard. However, the Arbitrator believes that the "Clear and convincing" standard assures that doubts are adequately resolved in the favor of the accused and, this adequately diminishes the risk that the accused will be wrongfully disciplined for sexual harassment.

[17](#) The other refutation came from the statement of Mr. Berry who was present when the Grievant allegedly called Ms. Rucker a "Fucking liar." But Mr. Berry only heard Grievant say "Liar."

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