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REVIEWED BY
C 5/23/01
MAY 23 2001

GRIEVANCE COORDINATOR

IN THE MATTER OF ARBITRATION
BETWEEN
THE OHIO DEPARTMENT OF CORRECTIONS
AND
THE OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION/AFSCME-AFL-CIO

Before: Robert G. Stein

PANEL APPOINTMENT

CASE # 27-12(00-08-24) 1176-01-09
Aileen Randall, Grievant

Advocate(s) for the UNION:

Mike Hill, Field Staff Representative
OCSEA Local 11, AFSCME, AFL-CIO
390 Worthington Rd. Ste. A
Westerville OH 43082-8331

Advocate for the EMPLOYER:

Wendy F. Davis, Advocate, DRC
Pat Mogan, 2nd Chair, OCB
Office of Collective Bargaining
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Columbus OH 43215

INTRODUCTION

A hearing on the above referenced matter was held on March 15, 2001 in Lima, Ohio. The parties stipulated to the fact that the issue was properly before the Arbitrator. During the hearing the parties were given a full opportunity to present evidence and testimony on behalf of their positions. The parties submitted briefs in lieu of closing arguments. The hearing was closed on April 2, 2001. The Arbitrator's decision is to be issued within forty-five (45) calendar days or no later than May 17, 2001.

ISSUE

The parties agreed upon the following definition of the issues:

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

RELEVANT CONTRACT LANGUAGE
(Listed for reference, see Agreement for language)

ARTICLE 24 DISCIPLINE

BACKGROUND

Prior to her removal on 8-24-00 the Grievant, Aileen Randall, held the position of Library Assistant 2 with the Lima Correctional Facility (hereinafter referred to as "LCF"), a facility operated by the Ohio Department of Corrections (hereinafter referred to as "Employer" or "Department"). She was removed from employment for violation of rule #46 Unauthorized Relationships. She was charged with having an unauthorized relationship with an Inmate Smith who worked in the Library. Ms. Randall began her employment with the Department on 3/31/97. She held the position of Correctional Officer until 5/23/99 at which time she took a voluntarily demotion to the position of Library Assistant 2.

In April of 2000, the Employer discovered a quantity of marijuana that been placed in two rolled up Toledo Blade newspapers that were mailed to the LCF library. This discovery led to an investigation in an attempt to track the source of the mailing and to individuals in LCF who may be involved. Numerous people were interviewed including inmates who worked in the Library. Inmate Smith was one of the inmates who was interviewed. During his interview on April 13, 2000, he stated that he thought the Grievant might be carrying on a personal relationship with Inmate Richmond. Two weeks earlier he had approached the Correctional Officer assigned to the Library, Wade Smith, complaining that the Grievant was passing "post-it notes" to Inmate Richmond, who worked in the Library.

Captain Bovona, who conducted the interview with Inmate Smith, subsequently found post-it notes in one of Inmate Smith's tennis shoes in addition to a quantity of marijuana. However, Inmate Smith denied having a relationship with the Grievant.

Ironically, the prior Library Assistant, whom the Grievant replaced, had been terminated for having an unauthorized relationship with an inmate.

On April 14, 2000, Mr. Cluster interviewed the Grievant; she denied having a personal relationship with any inmate. The post-it notes found in Inmate Smith's tennis shoe were analyzed by a handwriting expert, and it was determined that the post-it notes were written by the Grievant. Based upon its investigation, the Employer removed the Grievant. Ms. Randall filed a grievance claiming she was unjustly removed from employment.

EMPLOYER'S POSITION

The Employer argues it produced prima facie evidence (hand writing analysis of the post-it notes showing the Grievant as the author) that the Grievant had established a personal relationship with someone within the confines of LCI. The testimony of witnesses Bivona and Cluster and the evidence strongly point to Inmate Smith as the object of the Grievant's affection, asserts the Employer. The Employer points out that only when presented with the results of the BCI&I analysis did the Grievant admit that she "could have" written the post-it notes. This flip-flop in her recollection of notes that she had written herself is enough to impeach her credibility, contends the Employer.

The Employer rejects the Grievant's confession during the Pre-disciplinary hearing that she wrote the notes to a fellow married staff member. The Employer dismisses the Grievant's confession and labels it a "spurious alibi" for which there is no proof. Removal is warranted in this case. The Employer points out that personal relationships do not have to be verbatim and that any familiarity with an inmate is strictly

forbidden. It cites awards of Arbitrators Nelson and Keenan to reinforce the serious nature of such a relationship and its impact upon security.

Based upon the above, the Employer requests that the grievance be denied.

UNION'S POSITION

The Union firmly states the Employer did not provide a single witness who could give direct testimony as to an unauthorized relationship between Ms. Randall and inmate Smith 358-103, or any other inmate. It argues the Employer's case is based entirely upon innuendo, hearsay, and double hearsay and that the only evidence that exists is several anonymous post-it notes addressed to no one.

The Union cites the testimony of Mr. Custer. He testified that he had no personal knowledge that Ms. Randall violated Rule #46a nor did he see Ms. Randall give the post-it notes in question to inmate Smith or any other inmate. Mr. Custer testified that no letters or pictures were found, and that no phone calls or any other incriminating evidence listed in Rule #46a, linked Ms. Randall in an unauthorized relationship with inmate Smith or any other inmate, contends the Union. The Union points out that Mr. Custer also testified that he never saw any conduct on the part of Ms. Randall to suggest that Ms. Randall was in an unauthorized relationship with inmate Smith or any other inmate.

The Union argues that Inmate Smith, who when investigated by Mr. Custer and Captain Bivona, stated twice that he dug the post-it notes from the trash and denied ever seeing Ms. Randall "pass any sort of notes to anyone period." (Management Exhibit #1, pp.2)

The Union asserts that the documents provided by management regarding Inmate

Smith's testimony were authored by staff members and signed by Inmate Smith. The first was the report written by Captain Bivona and the second was included in Management Exhibit #3, (Disposition of Rules Infraction Board). The Union points out that the Rules Infraction Board (RIB) wrote, "Although the inmate contends he didn't know how to plea he does admonish that he did receive the notes from the staff member." This is different from what Inmate Smith told Captain Bivona twice and told Mr. Custer during the investigation, asserts the Union. The Union argues that when Inmate Smith had to face the RIB, he was in a forum that could harm his future, i.e., the chance of being denied parole. He had everything to lose by maintaining the truth and everything to gain by changing his story to what management wanted to hear. He had a strong motive to lie, contends the Union.

Based upon the above, the Union requests the grievance be granted.

DISCUSSION

The post-it notes are the key pieces of evidence in this case (MX 2). I find that the measures taken by the Employer to determine that the Grievant authored the notes were reasonable, deliberate, and credible. I am convinced the Grievant wrote the notes. Even to the untrained eye the notes and other samples of the Grievant's handwriting in MX 4 look remarkably similar. The Union refers to these notes "as anonymous post-it notes addressed to no one." While it is true they do not contain a signature and are not addressed to a particular person, their content is revealing, especially when analyzed in the context of the relevant and conclusive circumstantial evidence presented by the Employer. Evidence, be it direct or circumstantial, must be judged as to whether it

“...reasonably tends to prove or disprove the fact at issue or facts closely related to the point at issue (“Problems of Proof in the Arbitration Process”, proceedings of the nineteenth annual meeting, National Academy of Arbitrators, edited by Dallas Jones. Washington C.C.: BNA, 1966). In this case the circumstantial evidence reasonably proved the fact at issue.

I find that the post-it notes represent one side of a conversation (the Grievant’s) that very likely took place in the Library. In the notes identified as # 1 and 2, the Grievant writes:

“The Black guy at the CD-Rom was the one that I had to cuss out last week because he said to me I had been hearing things about you up here in the library...” [emphasis added]

This half of the conversation makes reference to an individual at the CD-ROM, which places it in the Library. The Grievant was speaking to someone who knew what the CD-ROM was and who was in the Library at the time. In Joint Exhibit 3 the Hearing Officer, Captain Jerry Hunt stated, *“Staff Officers are not permitted use of the inmate library facilities.”* This is a significant piece of information that the Union did not refute. Therefore, I must conclude that through the post-it notes the Grievant was having this conversation with a person other than a staff member. And most likely it was someone with whom she was physically close enough to pass notes.

In notes #3 and #4 the Grievant writes:

“As for you I’m mad because you was smiling in Fat Ass’s face and looking at me. You know it would piss me off. You know she wants you. I know I don’t have a right to be mad but I can’t help it.”

In this part of the conversation the Grievant is referring to another female and expresses her jealousy regarding the conduct of the person with whom she is conversing.

This strongly suggests a personal relationship between the Grievant and the intended recipient of the post-it notes.

Post-it notes #5 and #6 leave no doubt about the personal relationship and take it to a romantic level. They state:

"It goes beyond confused certain things bother me yes. But, that doesn't change how I feel about you. I love you more today than I did yesterday. And when I go home I trip yes, yes, yes But, when I see you I feel in my heart mind + soul yes this is what I want."

Once again, the beginning of these notes indicates a response to a statement from another person. When she states, *"It goes beyond confused..."*, she is responding to someone. The following additional circumstantial evidence indicates it most likely was in the Library and the other party was most likely an inmate.

C.O. Smith testified he observed the Grievant and Inmate Smith spending a great deal of time talking and walking with one another. Inmate Smith began working in the Library on 6/6/99. Although Officer Smith testified he never heard the content of their conversations and never observed any physical touching, he made a telling observation regarding the conduct of the Grievant and Inmate Smith. He stated:

"It looked like a big party was going on all day long in the library"

This level of familiarity is at best suspicious, and Officer Smith made it clear in his testimony he was uncomfortable with it. Officer Smith also stated to investigator Cluster that he would often observe Inmate Smith coming to the Library early and on more than one occasion he went into the office where the Grievant was having supper. Officer Smith said he had to chase him out of the office. Under cross examination he was asked what he meant by the fact that the conversations they (the Grievant and Inmate Smith) were having every day was leading to a personal relationship. He stated without

hesitation, *"yes, I have to say it was."*

C.O. Smith also stated he had conversations with Inmate Smith regarding the Grievant. C.O. Smith stated that Inmate Smith told him *"I thought Ms. Randall might be coming on to me."* C.O. Smith is an officer with many years of experience and his testimony appeared credible. He expressed his concerns about the Grievant's conduct to Ms. LaPoint, Librarian II, to whom he believed the Grievant reported in the Library. He appeared to have no apparent reason to lie.

Another circumstantial factor in this case is the physical layout of the Library itself and the proximity of the Grievant's work station to that of Inmate Smith's. They were just feet apart and worked in a relatively small space. This is a space in which communications could have easily occurred through the passing of post-it notes. A direct observation of this area made this clear to the undersigned Arbitrator.

The third piece of relevant evidence is the place where the post-it notes were found. They were found in Inmate Smith's tennis shoe. Smith's credibility in this matter is highly suspect; it is difficult to determine if and when he was being truthful. However, the significance of the location of the found notes cannot be ignored. There was no evidence presented to establish another plausible way Inmate Smith would have been in a position to intercept or find notes intended for a staff member. But when one considers the fact that the notes represent one half of a conversation it is reasonable to assume that the other party would have received them or at least was in a position to be close enough to read them.

The fact that this was a written conversation between two people means it took longer than a few minutes. While in the Library, the Grievant and Inmate Smith had the

time. There was no indication from the Grievant that she spent this amount of time somewhere else in LCF to have this type of exchange with a staff member. The finding of the notes in Inmate Smith's shoe strongly suggests he was the person who was on the other end of a post-it notes conversation(s) that took place in the Library. It is possible that MX 2 represents more than one conversation. If it does, the fact that Inmate Smith has all the notes is further evidence that there was a relationship between the Grievant and Inmate Smith.

It is also interesting that in his shoe along with the notes was a quantity of marijuana. The Employer conducted an investigation of the Library personnel because it intercepted quantities of marijuana being smuggled into the Library through Toledo Blade newspapers. It is also noted that the Greivant stated during the hearing, "*When he (Inmate Smith) first got hired he worked in the newspaper and magazine section.*" There is no indication that the Grievant was involved smuggling drugs into the LCF, yet the events in this case create that suspicion.

At first the Grievant denied writing the notes and later stated she was having an affair with a fellow worker and authoring notes, but she could not remember which notes. I find this evasiveness on the part of the Grievant damaging to her credibility. The lateness of her explanation regarding an affair with another married staff person also appears to be suspect. She never mentioned this affair during the investigation phase of this situation, yet she had to be aware of the serious consequences of being accused of having a personal relationship with an inmate.

Investigator Cluster also used an informant in this case. There is no question that at times informants are necessary for Employers to use (particular for employers in law

enforcement) in order to maintain a level of security in the workplace (See Burger Iron Co., 92 LA 1100 (Dworkin 1989). However, in this matter, evidence and testimony regarding the role of the informant were not considered.

The Employer met its burden of proof through a combination of direct evidence and circumstantial evidence. The content and authenticity of post-it notes indicate a personal conversation between the Grievant and an Inmate in the Library. The evidence of the Grievant's continuously overly- friendly association with Inmate Smith based upon the observation of a seasoned Officer creates the probability it was Inmate Smith. The location where the post-it notes were found increases the probability that it was Inmate Smith.

If the Grievant was having an affair with another staff member, instead of an inmate, where are the details that provide a credible alternative explanation for what the Employer uncovered? And why was this situation not mentioned until months after the Employer began its investigation? Even without revealing who this staff member is, the Grievant's testimony could have contained sufficient detail to make her story plausible. Instead the implausibility of the Grievant's explanation of her conduct was the final straw that helped the Employer prove its case. I find the Grievant violated Rule #46A. Given the safety and security implications of such a violation in a correction institution, the Employer was justified in taking action to remove the Grievant from service.

AWARD

The grievance is denied.

Respectfully submitted to the parties this 16th day of May, 2001.

A handwritten signature in black ink, consisting of a large, stylized initial 'R' followed by a series of connected, cursive letters that appear to be 'G. Stein'.

Robert G. Stein, Arbitrator