#783

REVIEWED BY
11/20/01
NOV 20 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 # 28-07-00515-0037-01-14
Harold Miller, Grievant

Advocate(s) for the UNION:

Mark Linder, Esq.
Steve Lieber, Staff Representative
OCSEA Local 11, AFSCME, AFL-CIO
390 Worthington Rd. Ste. A
Westerville OH 43082-8331

Advocate for the EMPLOYER:

David Burns, DRC Labor Relations Representative
Shirley Turrell, OCB
Office of Collective Bargaining
107 N. High St., 7th Floor
Columbus OH 43215

INTRODUCTION

A hearing on the above referenced matter was held on August 15 and August 31, 2001, in Westerville, 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 closed on October 5, 2001. The Arbitrator's decision is to be issued within forty-five (45) calendar days or no later than November 19, 2001.

ISSUE

The parties agreed upon the following definition of the issues (See Tr. 8):

Was the Grievant, Harold Miller terminated for just cause? If not, what should be the remedy?

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

ARTICLE 24 DISCIPLINE

BACKGROUND

The issue in dispute in this matter involves the termination of Parole Board Hearing Officer, Harold Miller. Mr. Miller was terminated for violation of rule 1: any violation of ORC 124.34, specifically dishonesty, malfeasance, and failure of good behavior, and rule 38: actions that could compromise or impair the ability of the employee to effectively carry out his duties as a public employer.

The Employer terminated Mr. Miller's employment with DRC in May of 2000 for acting in collusion with inmate Lynn Moore and another individual, Ray Patton. According to the Employer, Mr. Miller, Mr. Moore and Mr. Patton devised a pay-for-parole scheme that resulted in at least two inmates, Haywood Gary and William McMillan, being inappropriately placed on parole. The Grievant, Harold Miller, was the Parole Hearing Officer for these two inmates. The Employer claims the scheme dates back to 1996, and it took several months of investigation following a tip from an inmate for the DRC to undercover the scheme.

The case received considerable media attention and served to tarnish the image of the DRC and the Ohio Parole Board, argues the Employer. The Employer removed Mr. Miller, an employee of DRC since 1991, and the Union filed a grievance.

EMPLOYER'S POSITION

The Employer rejects the procedural objections raised by the Union. It contends that the Union was provided an opportunity by the Employer to delay the arbitration proceeding after receiving information from the Employer just before the start of the

hearing on August 15, 2001. It contends it provided the Union with requested information after going through the State Highway Patrol as expeditiously as possible, and the Union declined the arbitrator's offer to the Union to extend the hearing if it needed time to analyze the documentation.

In summary, the Employer's position in this matter is provided through replication of its closing argument contained in its brief. It states as follows:

Argument of the Employer

If I did not know better I would say that the facts of this case read like an HBO movie. The mere suggestion that an inmate can obtain a release from prison by paying for it rocks the integrity of the entire penal system. Well, this goes beyond mere suggestion. It happened.

The Grievant has argued that what happened was a simple mistake on his part and that he has never or would ever be involved in any pay-for-parole scheme. Perhaps that would be believable if these incidents had occurred in a vacuum but they did not. So let us examine what has led management to the conclusion that Harold Miller was the key player in the scheme.

Inmates tend to talk about many things while they are locked up. Rumors about staff are started and perpetuated in every facility of the Department, but one rumor that is both rare and would cause management to take keen notice would be the one about a parole board member being on the take and inmates paying for parole. Investigator Young from the Grafton began to immediately investigate the rumors and as the investigation began to ring true he immediately notified the Ohio State Highway Patrol.

Lt. Wernecke, a seasoned investigator for the Patrol began to conduct an in-depth investigation into the allegations. Inmate telephone calls were monitored which led him to interview various other inmates. The central theme in these interviews was that one could indeed gain a release from prison by paying money and an individual know as the "lawyer", was the key player on the outside. As the investigation continued it became known that the "lawyer" had a name, and it was Miller. Could it be coincidence that Mr. Miller just happens to be a graduate of law school? I think not.

Lt. Wernecke further discovered that another individual named Ray Patton was also involved in the scheme. As any good investigator would, Wernecke secured search warrants for the residences of Ray Patton and the other player, Lynn Moore. It was as a result of these warrants that evidence in the form of letters and lists of names were discovered which detailed plans on how one could pay for release from prison. Now, if such a scheme was not in place why would this evidence exist? And let us not forget, it points to the key player, "the lawyer", a.k.a.... Harold Miller.

In order to corroborate the validity of what was discovered in the search the cellular phone records of Ray Patton were obtained. Examination of these records revealed that extensive contact was going on between Patton and Miller to the tune of approximately 140 telephone calls being placed in the eighteen-month period beginning in June of 1996. Lt. Wernecke testified during his interview that Miller maintained he only had approximately ten telephone conversations with Patton. In contrast with the approximately 140 telephone calls from the phone records either Mr. Miller's recollection or credibility is in question. While many of the phone calls are of a short duration does that mean conversations did not take place? I do not think so. After all, if one were

conducting such a scheme would you hold in depth conversations over a cell phone subject to open monitoring?

Now, Mr. Miller testified that he has known Ray Patton for years allegedly because Patton's mother managed a political campaign he was involved in. Whether that is true or not is of little consequence to the issue at hand except for the fact it does tie the two together, (along with 140 telephone calls).

Furthermore, let us not forget where Ray Patton currently resides. Testimony established that both Lynn Moore and Ray Patton are currently incarcerated as a result of their involvement in this scheme. Wernecke testified that Patton pled guilty to bribery and received a five-year sentence for his involvement. From a reasonable person point of view, why would anyone plead guilty and accept a five year prison sentence unless they were indeed guilty? They gained nothing by implicating Mr. Miller in the scheme. Yes, it would have been advantageous to management if Patton would have agreed to testify at this proceeding but the fact of the matter is the evidence stands on its own and the Department does not engage in a pay for testimony practice.

Now let us turn to the cases of McMillan and Gary. The evidence obtained by Wernecke indicated that these two individuals participated in the scheme. McMillan was made eligible for release by a manipulation of the Risk Assessment filled out by Mr. Miller. The form is not a complicated one to complete. You look in one of several files for the information and fill it in. Or, as Mr. Schneider testified, you can look at one previously filled out and use much of the same information because it does not change. If for some reason the person completing the form cannot find the appropriate information it was established that a continuance would be appropriate.

The Gary case is another issue. It simply smacks of Mr. Miller purposefully using his authority in an inappropriate manner. In his interview with Wernecke he admitted that he routinely would assess a one-year continuance given the set of facts as presented in this incident, yet in his testimony at this proceeding he stated he routinely gives less than a year. Which is it?

Mr. Schneider testified that it was the practice and policy of the parole board to give a one-year continuance in cases such as this. This practice was a subject at various staff meetings the Grievant and others attended. The Grievant asserted that there were other hearing officers and parole board members who routinely gave less than a year but there was no corroborating evidence submitted on this issue. Certainly, if this were true the union would have added the appropriate Risk Assessments to their discovery list. Mr. Schneider added that it was permissible to go outside of the guidelines in unusual cases but an explanation had to be provided. No such explanation was provided in this instance.

While some of the evidence in this case is circumstantial, the direct evidence of the telephone records, and risk assessment instruments corroborates its credibility. Certainly the telephone records tie Mr. Miller to the convicted felon, Ray Patton. The letters, interviews and telephone conversations led investigators to the risk assessment instruments, which clearly demonstrate that Mr. Miller improperly recommended these two inmates for release. At the risk of having the arbitrator perceive that the advocate is attempting to educate him on the issue of circumstantial evidence I will defer to his experience in examining and evaluating it in terms of its context and conclusiveness. In

support of the evidence the State offers the decision rendered by Arbitrator Stein in Case # 27-12(000824) 1176-01-09, Aileen Randall, Grievant.

The case winds down to determining whether it is an example of gross incompetence and ineptitude or a well-developed scheme? If it is the incompetence angle the Grievant should be removed for an inability to do his job. The evidence however does not suggest this.

The issue of Mr. Miller's criminal culpability was briefly raised during this proceeding. For the record it needs to be noted that this is a de novo hearing with a much different standard of evidence than what must be met for a criminal conviction.

Employment with the Department of Rehabilitation and Correction carries an inherent level of trust between the employee, the employer, and not least of all, the citizens of the State of Ohio. While this level of trust exists in all positions, some, by their very nature must carry a higher level than others must. Considering the mission of the Department it can be reasonably argued that any employee in a position to release an inmate from custody must be held to the highest level. The Grievant occupied a position that permitted him to exercise judgment, and more importantly, discretion, in making recommendations about whether or not a felon was to be released from confinement. The entire system of releasing inmates in accordance with the laws of the State of Ohio was relying upon the integrity and honesty of Harold Miller and he failed us all. The evidence clearly demonstrates the Mr. Miller purposefully misused his authority to release convicts from confinement who had absolutely no legal right to be free. His actions cast a pall upon the Department through the media coverage of this investigation as is reflected in Joint Exhibit #2 pp. 45-50.

On the basis of the evidence and testimony and in consideration of the gravity of the grievance's actions, the State requests that the grievance be denied in its entirety.

UNION'S POSITION

The Union flatly states that DRC has allowed itself to be duped by a *"collection of thieves, robbers, and hustlers"* in this matter. It asserts the charges that the Grievant was involved in a pay-for-parole scheme are unsubstantiated in this matter. The Union contends that DRC is more concerned with its *"own self-serving public image"* and is unconcerned with justice for the Grievant. The Union points out that Mr. Miller has been exonerated by a jury of his peers in court and that he is innocent of any of the charges brought by DRC in this proceeding.

In the Conclusion section of its closing brief, the Union summarizes its position in this matter.

Conclusions of the Union

The DR&C is acutely aware that all inmate parole cases are randomly distributed to parole hearing officers. A parole hearing officer such as Mr. Miller has absolutely no knowledge of which inmate will be in front of him regarding a parole hearing until the moment he arrives at the institution. As such, it is undisputed that it was impossible for Mr. Miller to predict or have prior knowledge of if or when inmate Gary or inmate McMillan would be in front of him regarding a parole hearing.

Further, the evidence presented at arbitration demonstrated that both Mr. Miller and Ms. Jones, a parole board member, either incorrectly scored a section of a risk assessment, which inadvertently resulted in Inmate McMillan receiving a lower aggregate

score making him eligible for release, or more likely that the necessary document to properly score his risk assessment was not contained in the file at the time both Mr. Miller and Ms. Jones conducted their hearing.

In addition, the evidence established that at the time of this investigation, the DR&C did not have a written policy governing the length of time or continuance an inmate should receive when he has a positive drug test. Rather, the hearing officer and parole board member has significant discretion when issuing such a continuance based upon a variety of mitigating factors. As a result, Mr. Schneider unequivocally testified that Mr. Miller did not violate any written policy, procedure or regulation of the agency regarding the scheduling of a continuance concerning inmate William McMillan.

More importantly, significant and key differences existed between the parole of inmate Gary and inmate Shaw, and as a result of those significant and key differences, the panel properly recommended that inmate Gary be furloughed and inmate Shaw's case be continued. Inmate Gary was a guideline #4 inmate and therefore eligible for parole whereas Inmate Shaw was a guideline #5 inmate and thus not eligible for parole. Inmate Gary had made and was continuing to make a good institutional adjustment whereas Inmate Shaw's institutional adjustment and risk to the community had significantly deteriorated from his last Risk Assessment evaluation. As a result of these key differences, a different recommendation resulted and was attained.

Mr. Miller has at all times herein conducted himself professionally and within the rules and regulations outlined by his Employer. A parole hearing officer simply makes recommendations, only the parole board has the power to release. Here, Mr. Miller is only one step in the process regarding an inmate's parole, certainly not the final step.

Instead of admitting their ignorance and culpability for allowing itself to be taken in by a collection of thieves, burglars, robbers and hustlers regarding the uncorroborated allegations of bribery, the Employer has sought to persecute Mr. Miller, an innocent victim rather than admit fault. In doing so the Employer's conduct has brought embarrassment and discredit upon itself. The unethical and dishonorable actions of the DR&C of intentionally asserting false and malicious allegations against Mr. Miller, which they know to be untrue, merely to protect its already tarnished image has compromised and impaired the ability of all its employees to carry out their duties. Here, the Employer's total lack of any clear and convincing evidence to support its position including the testimony of officer Werenke, Mussio and Schnieder substantiate that the Employer has not met its burden of proof in this case. There is no physical evidence, no eyewitness, and no supportive documents against Mr. Miller. The Employer's case is based upon complete fiction rather than fact and that is simply not the proper standard to terminate a ten-year employee with absolutely no prior discipline. It is time to put Harold Miller back to work and clear his name by reinstating him to his prior position with full back pay, including loss of overtime, holiday pay, longevity pay, interest, seniority and all appropriate benefits such as PERS and health benefits to make him whole as well as expunging these proceedings.

DISCUSSION

The Employer contends that the preponderance of the evidence supports its actions to terminate the Grievant. While a preponderance of evidence burden is widely

accepted as the threshold of proof in most cases of contract interpretation, a threshold of a clear and convincing evidence is more often aligned with the requirements applicable in meeting a "just cause" standard. In cases involving accusations of criminal conduct or moral turpitude, it is almost a certainty that the clear and convincing evidence standard will be applied by a majority of arbitrators (See R. M. Kelly, *The Burden of Proof in Criminal Offenses or "Moral Turpitude" Cases*, 46 Arb J. 45 (Dec 1991)). Such is the case in the matter of Mr. Miller's discharge.

Mr. Miller is charged with committing a very serious offense. A Parole Hearing Officer is to be held to a high standard of conduct given his/her level of responsibility to the Department of Corrections and more importantly to the citizenry. A great deal of trust is placed in such a position to make sound recommendations about the release of convicted felons back into society. Parole Hearing Officers work hand in hand with Parole Board members, and these members rely heavily upon their advice and counsel in arriving at decisions to grant parole. An accusation of being involved in selling paroles to inmates by a Parole Hearing Officer is a charge that attacks the central purpose of the Parole Hearing Officer's duty. It cannot be taken lightly, and because it involves a serious question of moral turpitude, it cannot be sustained without substantial proof.

I find through the evidence and testimony presented by the Employer that the Grievant placed himself in a position to be compromised by Ray Patton and was not forthright in his contact with Mr. Patton. As stated above, a parole hearing officer, not unlike a police officer, must conduct himself/herself in such a manner to avoid even the appearance of being compromised. Mr. Miller did not do this by the evidence contained in Management Exhibit 1, the telephone records of Mr. Patton. Mr. Miller knew Ray

Patton (See MX 12), and as he stated, East Cleveland is a small community. Mr. Miller said he thought Mr. Patton was active in politics.

Mr. Miller, a former President of City Council, was a well-known figure in the community and it is reasonable to believe he knew many people in the community. Mr. Miller is also well educated, and it can be assumed his legal training taught him to be a critical thinker. Mr. Patton's cell phone records demonstrate that he and Mr. Miller had frequent contact over a relatively short period of time. There were some 140 calls made to his residence over an 18-month period (June 1996 through December 1997). This is an average of almost 8 calls per month. Yet, when asked about these telephone contacts, Mr. Miller indicated he might have talked with Mr. Patton *" 10 or 20 times"* in the past two years (MX 12). Mr. Miller stated that Mr. Patton *"wasn't a personal friend."* It seems implausible that a person who repeatedly called at least on 140 occasions does not have some type of relationship with the person he is calling. I find Mr. Miller's statements regarding his relationship with Mr. Patton to be evasive at best.

If a Parole Board Hearing officer engages in a pattern of activity that has the potential of casting suspicion upon his professional responsibilities, he risks discrediting the Department of Corrections. The evidence and testimony do not delineate the true nature of the Greivant's relationship with Mr. Patton. It does, however, point to the fact that he was not forthright about its nature. Is it possible he was involved in Mr. Patton's alleged prostitution or gambling activity, or was he a key player in arranging for the parole of inmates in a pay-for-parole scheme? As the Employer stated in his brief, *"...is it an example of gross incompetence and ineptitude or a well developed scheme?"* I find the evidence inconclusive in this regard. The Employer provided evidence to

demonstrate that Mr. Miller was not forthright in explaining his relationship with Mr. Patton, now a convicted felon, but it failed to provide clear and convincing evidence that Mr. Miller was directly involved in a pay-for-parole scheme.

The only person who stated he spoke on the phone to Mr. Miller directly was Lynn Moore, and this was part of a three way call initiated by Mr. Patton. However, the day he claims this call was initiated to Mr. Patton (and then subsequently turned into a three-way call to Mr. Miller) was not conclusively verified by the telephone record for telephone number 291-4486. Mr. Patton's cell phone record (MX 1) shows a call of one minute in duration was made to 291-4486 on his cell phone at 7:15 p.m. It seems implausible that a two-way call and then a three-way call could have taken place in such a short duration. Once again, it is unclear what this proves. There is no way of verifying that Ray Patton talked to Mr. Miller or simply deceived Mr. Moore into believing he was speaking to Mr. Miller.

Circumstantial evidence can be sufficient to prove guilt if one is left with no other plausible explanation at the end of the evidence than that which is being purported by the Employer. This is not the case. There could have been several reasons for the calls, others of which may also have compromised Mr. Miller's reputation. For example, if he admitted he was a customer of Mr. Patton's alleged prostitution business, this could have caused him, a well-known community leader, or even his former wife some difficulty. It may also have impacted his job.

There appears to be little question that Mr. Patton is an individual capable of lies and deceit. This makes him a questionable witness against Mr. Miller without corroborative evidence. What was not ruled out in this case is the possibility that Patton

could have leveraged what relationship he had with Miller to dupe inmates into thinking he was arranging paroles for them. As the evidence states, if an inmate would not get parole, the money he paid would be paid back (MX 3a). If an inmate comes up for parole, there is always a chance he could be paroled, and if he was, Mr. Patton could claim his influence caused it to happen whether that was true or not. How would the inmate know any differently? For example, in the case of Mr. Moore, Patton stated to him after he was paroled that Mr. Moore owes him $7,000 that he paid to Mr. Miller. How do we know this was ever paid? There are no bank records to indicate a deposit of this sum to Mr. Miller.

It is unclear why the Employer never produced a witness to substantiate the statements submitted into evidence. Testimony from key witnesses Moore and Patton that stands up to the scrutiny of cross-examination is far more reliable and carries considerably more weight than statements taken from an investigator. There is no meaningful way to discern the relationship between Patton and Moore without further in-person examination. Through the Union Mr. Miller should have the right to test the validity of the key testimony that is being used by the Employer to prosecute this case.

As Arbitrator, I have the opportunity to judge the demeanor of the witnesses and make a judgment about their veracity on the witness stand. The Employer argues that Moore and Patton have no reason or motive to lie about Mr. Miller's alleged participation in the pay-for-parole scheme. However, the matter of plea-bargaining can always be part of any criminal proceeding, and it is not clear whether this may have been a factor in the statements of Patton and Moore. Secondly, it is also plausible that Mr. Patton fabricated Mr. Miller's involvement as a way to bring credibility to his scheme.

In addition to the above, there were other problems with the Employer's case. For example, Mr. Moore stated that Mr. Miller specifically mentioned Ray Patton's name during Mr. Moore's parole hearing held on August 19, 1996. This is potential powerful evidence. Without Mr. Moore's direct appearance at the arbitration hearing, there is no way to test the validity of this statement. However, Mr. Moore also testified that another hearing officer was in the room. Why didn't the Employer produce this witness to corroborate Mr. Moore's statement?

Mr. Moore also stated that Mr. Patton, without asking him, unilaterally paid Mr. Miller $7,000 for Moore's payroll (MX 3a). This does not comport with a later statement by Mr. Moore about Mr. Patton. He said, *"The guy's a stingy guy, man."* It appears unlikely that a "stingy guy" would unilaterally pay Mr. Miller $7,000 for Mr. Moore's payroll without first getting a commitment from him for this payment. What assurance did he have he would ever collect it? There may be a logical explanation for this that would support the Employer's position, but without the direct testimony of Mr. Moore or Mr. Patton this unexplained discrepancy serves to undermine the Employer's case.

This case relies primarily upon circumstantial evidence that has not been corroborated by any testimony other than that provided by the investigator. This Arbitrator has recently ruled in DRC cases involving circumstantial evidence that was sufficiently conclusive to prove the Grievants violated rules that justified their termination. In both those cases DRC also provided real evidence (goods taken which were in the possession of the Grievant) or credible testimony by an independent eyewitness (seasoned Corrections Officer), who had no relationship with the Grievant. In each of these cases, the events and the circumstances provided an unbroken chain leading

to a reasonable conclusion of guilt. The well-respected Arbitrator Clair Duff states that when an arbitrator uses circumstantial evidence he:

> *"...must exercise extreme care so that by due deliberation and careful judgment he may avoid making hasty or false deductions. If evidence producing the chain of circumstances pointing to [guilt] is weak and inconclusive, no probability of fact may be inferred from the combined circumstances (South Penn Oil Co., 29 LA 718, 721 (1957).*

The Employer presented a case that suggested the Grievant's involvement in a pay-for-parole scheme. However, without substantiation by his accusers or real evidence of the Grievant deliberately "rigging" a parole, the Employer's case is inconclusive. The two parole hearings involving Haywood Gary and William McMillan may strongly imply that the Grievant's work lacks thoroughness and consistency, but without more of a direct link to the pay-for-parole scheme of Mr. Moore and Mr. Patton, they do not clearly point to a conclusion of guilt.

The one exception to this finding is what the Employer was able to demonstrate in Management Exhibit 1. The Grievant placed himself in a position of being compromised by Mr. Patton by this long-term association, and he was not truthful about the number of calls made to him during this 18-month period. The suspicion that surrounded this volume of calls could have compromised Mr. Miller in the performance of his duties as a Parole Hearing Officer.

AWARD

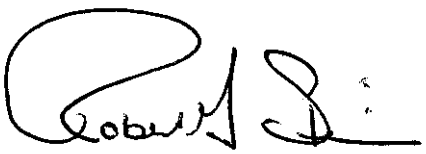
The grievance is sustained in substantial part.

Mr. Miller is to be returned to his position and his seniority shall be bridged within thirty (30) days from the date of this Award. His personnel record shall be cleared of all violations concerning this matter, with the exception of Rule 38. Because Mr. Miller allowed himself to knowingly be compromised by his long-term telephone contacts with Mr. Patton, his termination shall be reduced to a ten (10) day suspension. His return to work is to be with back pay, less the ten (10) days of suspension, the deductions for earned W-2 income and any unemployment paid during this period. All lost benefits (vacation, personal days, PERS contributions, etc.) that he would have earned during this period (less the suspension period) of time shall be restored to the Grievant upon his return to employment.

Mr. Miller is to refrain from any personal association, friendship, or business relationships with persons known to be engaged in criminal activity for the remainder of his employment with the Department of Corrections. It is recognized that it is possible for a person who is known to be engaged in criminal activity to initiate a contact with the Grievant. If this should occur during the remainder of Mr. Miller's tenure with the Department, he is to report this contact to his superiors at the Department of Corrections as soon as possible. Failure to report any such contacts shall be grounds for disciplinary action.

By agreement of the parties, the Arbitrator shall maintain jurisdiction over this Award for a period of 90 calendar days.

Respectfully submitted to the parties this 19th day of November, 2001.



Robert G. Stein, Arbitrator