

REVIEWED BY

MAY 27 2003
Cl. 5-27-03
GRIEVANCE COORDINATOR

832

IN THE MATTER OF ARBITRATION

BETWEEN

STATE OF OHIO – DEPARTMENT OF REHABILITATION AND CORRECTIONS

AND

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

Grievant: Walter Fairman

Case No. 27-35 (020715) 0141-01-03

Date of Hearing: March 25, 2003

Place of Hearing: Toledo, Ohio

APPEARANCES:

For the Union:

Advocate: Mike Hill
2nd Chair: Jack Lay

Witnesses:

David Sealscott
Michelle Denny
Walter Fairman

For the Employer:

Co-Advocate: Richard G. Corbin
Co-Advocate: Ruth Ritticher

Witnesses:

Cynthia San Pedro
Betsy Tyson
Marshall Klavinger

ARBITRATOR: Dwight A. Washington, Esq.

Date of Award: May 21, 2003

INTRODUCTION

The matter before the Arbitrator is a grievance pursuant to the Collective Bargaining Agreement ("CBA") in effect March 1, 2000 through February 28, 2003, between the State of Ohio and the Ohio Civil Service Employees Association AFSCME Local 11, AFL-CIO ("Union").

The issue before the Arbitrator is whether just cause exists to support the removal of the Grievant, Walter Fairman ("Fairman"), for violating the Department of Rehabilitation and Correction ("DR&C") Standard of Employee Conduct Rules 18 and 19 by threatening, intimidating or coercing another employee and/or striking another employee. The discipline was issued because the Grievant allegedly assaulted a co-worker on the job fueled by a personal off the job relationship.

The removal of the Grievant occurred on August 10, 2002 and was appealed in accordance with Article 24 of the CBA. This matter was heard on March 25, 2003 and both parties had the opportunity to present evidence through witnesses and exhibits. Post hearing briefs were received on April 15, 2003 at which time the record was closed. This matter is properly before the Arbitrator for resolution.

BACKGROUND

Fairman worked for DR&C as a correction officer ("CO") for over four (4) years and at the time of removal had a written warning as active discipline of record. On March 30, 2002, the Grievant was working at Toledo Correctional Institution ("ToCI") on first shift. The normal first shift hours are from 7:00 a.m. until 3:00 p.m. Roll call for the first shift begins at 6:45 a.m. for COs to check-in, obtain post assignments and discuss other matters related to institutional security.

During roll call around 6:40 a.m., Fairman and co-worker Cynthia San Pedro ("Pedro") were seated on a bench together. Pedro recalls that the Grievant voluntarily sat beside her, while the Grievant states that Pedro motioned him with her hand to come sit by her. Pedro and

the Grievant had previously lived together for about six (6) months until February or March of 2002. It appears that a portion of the roll call conversation centered upon Pedro removing her remaining belongings from the Grievant's home. The break-up caused severe bitter feelings and both parties blamed each other of either being abusive and/or jealous. Pedro stated that she felt threatened and that the Grievant was physically and verbally abusive, which led to their break-up. According to the Grievant, their relationship became increasingly combative due to Pedro's fits of jealousy. It appears that the Grievant wanted to talk with Pedro about the status of their friendship, and requested that she step into the hallway. Upon refusing to go into the hallway, the Grievant allegedly stated "if we can't be friends then we will be enemies, fuck you".

Upon rising from the bench the Grievant hit Pedro with his right fist on her left thigh and waited for her in the hallway to continue the discussion. Part of the conversation between Fairman and Pedro as well as the hit on the thigh was witnessed by CO Betsy Tyson ("Tyson"). A follow-up conversation occurred as Pedro was going to her post assignment resulting in the Grievant interfering or blocking Pedro's ability to proceed to her assignment. The Grievant denies that any conduct occurred on March 30, 2002 that involved striking, threatening or coercing Pedro.

The Grievant indicates that Pedro was the aggressor and was abusive to him during their romantic relationship resulting in a police report being filed against her due to threats and property damage (Joint exhibits "JX"). It appears that Fairman's sister and CO Michelle Denny ("Denny") moved in with the Grievant shortly after Pedro moved out; triggering Pedro's rage and jealousy towards Fairman and Denny. The Grievant and Denny had known each other for a long time and they were only friends, according to Denny.

During the investigation COs Tyson, Marshall Klavinger ("Klavinger") and David Sealscott ("Sealscott") provided written statements and subsequently testified at the March 25, 2003 hearing regarding what occurred at roll call and the main sally port entry area. The employer, in an effort to ensure a safe work environment in its operations of a correctional facility,

has a policy against workplace violence (JX-9) of which the Grievant was aware of and had received training regarding this policy (JX-10).

Regarding the instant discipline, the employer submits that based upon the violation of Rules 18 (Threatening, intimidating...) and Rule 19 (Striking, fighting...), as well as considering previous discipline(s) issued on April 10, 2002, (written warning-Rule 20) and December 4, 2002 (oral reprimand-Rule 12), removal is proper. On the other hand, the union contends that the evidence taken as a whole fails to support just cause and the employer's key witness Pedro's credibility is non-existent due to her abusive behavior. Therefore, reinstatement with appropriate damages is required for the Grievant.

ISSUE

Was the Grievant, Walter Fairman, removed for just cause? If not, what shall the remedy be?

RELEVANT PROVISION OF THE CBA ARTICLE 24 – DISCIPLINE

24.01 – Standard

Disciplinary action shall not be imposed upon an employee except for just cause. The Employer has the burden of proof to establish just cause for any disciplinary action. In cases involving termination, if the arbitrator finds that there has been an abuse of a patient or another in the care or custody of the State of Ohio, the arbitrator does not have authority to modify the termination of an employee committing such abuse. Abuse cases which are processed through the Arbitration step of Article 25 shall be heard by an arbitrator selected from the separate panel of abuse case arbitrators established pursuant to Section 25.04. Employees of the Lottery Commission shall be governed by O.R.C. Section 3770.02(i).

DR&C STANDARDS OF EMPLOYEE CONDUCT RULE 18 & RULE 19

Rule 18: Threatening, intimidating or coercing another employee or a member of the general public.

Rule 19: Striking, fighting or otherwise engaging in a physical altercation with another employee or member of the general public.

POSITION OF THE PARTIES

POSITION OF THE UNION

The Grievant worked for several correctional institutions prior to ToCI and had a good disciplinary record prior to his removal. The Grievant and Pedro were ending a romantic relationship at the request of the Grievant, which caused Pedro to become upset and taints her credibility regarding the March 30, 2002 incident.

Fairman admitted at the pre-disciplinary conference as well as the arbitration hearing that incidental contact with Pedro occurred as he got up from the bench, but denies striking Pedro. The witnesses' (Pedro and Tyson) versions of the striking incident belies reality in that Tyson's testimony that Fairman was standing when he struck Pedro would have made it impossible for him to have hit her on the leg.

The Grievant testified that Pedro's conduct required her to move out in early March 2002, and she was extremely jealous always accusing him of other relationships, i.e., cheating. After Pedro moved out, the Grievant's sister and Denny moved into his house. Pedro accused Denny of being involved with the Grievant, which, constantly triggered Pedro's jealousy and outrage. Denny and the Grievant were only friends who had known each other for over ten (10) years. Denny testified that she and Fairman had no romantic relationship and were old family friends. Pedro became obsessed with Denny resulting in stalking charges being filed against her. As an example, on March 19, 2002 an incident occurred at the Grievant's house, which resulted in a complaint being filed against Pedro by Denny, when Pedro was not allowed to enter the home. Pedro became verbally abusive and damaged the screen door and Fairman's car. Despite her abusive nature Pedro visited the house after the move-out, so when Pedro motioned for the Grievant to sit with her at roll call on March 30, 2002, the Grievant thought everything was okay.

The Grievant testified that during roll call, he was not angry but Pedro cursed at him and told him to go and be with that whore Denny among other things. Upon exiting roll call the Grievant was on his way to his assignment when he heard Pedro's voice behind him in the hallway at which time he attempted to talk to her about removing her remaining items from his home. While in the main entry area, Pedro bumped into the Grievant even though space existed for her to physically go around him. The written reports and testimony of witnesses Sealscott and Klavinger support the Grievant's version. Moreover, other than Pedro's testimony, no evidence was presented to support the charges of threats and/or intimidation. If the Grievant hit Pedro in the leg, why did she wait until the second shift to inform a supervisor and seek medical intervention?

Regarding certain letters written by Fairman to Pedro, the documents were written prior to March 30, 2002 and their significance is minimal, if at all. (Management ("M") 1).

Due to the above the employer has failed to satisfy it's burden and the grievance should be granted.

POSITION OF THE EMPLOYER

On March 30, 2002, a verbal confrontation initiated by the Grievant occurred at roll call with Pedro. The Grievant was upset because Pedro did not speak to him upon passing him in the hallway. The Grievant sat next to Pedro on the bench and became upset when Pedro refused to go into the hallway to continue the discussion. According to Pedro's testimony, the Grievant wanted to see her and was asking if they could still be friends?

Pedro told Fairman to leave her alone and that she didn't want to be his friend either. At this time, Fairman became angry and stated, "if we can't be friends, we'll be enemies", he stood up and hit her on the leg with his fist and said, "Fuck you". Officer Tyson was sitting approximately five (5) feet from the bench and corroborates Pedro's version. Tyson also heard the Grievant say "...then we will be enemies" and saw Fairman hit Pedro on her left thigh and

walk out of the roll call room. (JX-2). Furthermore, after the Grievant had exited the roll call room Tyson asked Pedro if she was okay. (JX-2).

Upon exiting roll call the Grievant was waiting for Pedro who refused to talk to him, wherein the Grievant used a racial remark to describe his displeasure with Pedro's willingness to talk to certain employees and not him. Pedro testified that the Grievant was blocking her way and she had to tell him "to get the fuck out of the way" so she could go to her assignment. COs Tyson and Klavinger observed some of this interaction.

Pedro's written investigatory statement (JX-2) and her testimony indicated that Fairman would do something within the next few weeks for them to both lose their jobs. Due to the abusive relationship, Pedro felt threatened and as a result of their recent break-up she believed that he would do something to cause her to lose her job.

CO Tyson testified that the Grievant was stepping in front of Pedro as they walked out of the master control area and Pedro was attempting to avoid the Grievant. CO Klavinger testified upon observing Pedro and the Grievant outside the main entry; the Grievant was facing Pedro and he heard Pedro tell the Grievant "...get the fuck out of my way". COs' Tyson and Klavinger are disinterested witnesses who are not social friends or closely acquainted with either the Grievant or Pedro.

The intimate relationship was based upon the abusive and sometimes violent conduct of the Grievant. Pedro testified as to several incidents of physical assaults and threats during their six (6) month relationship. The Grievant sought counseling to assist in his anger management and his own letters to Pedro admitted that his conduct was the reason for the relationship's failure. (M-1).

The victim is Pedro and her fear of Fairman was justified based upon his past conduct. As a result of the threat of reprisals by Fairman, Pedro did not share this incident with a supervisor until almost eight (8) hours after it occurred and was medically evaluated thirteen (13) hours after the hit to her leg. Finally, the union failed to investigate or even interview Pedro

regarding what happened on March 30, 2002 and refused to seek any balance in representing both bargaining unit member's interests.

No evidence was offered to refute the first hand testimony of CO's Tyson and Klavinger. Pedro was the victim and violations of Rules 18 and 19 were proven warranting denial of this grievance.

BURDEN OF PROOF

It is well accepted in discharge and discipline related grievances, the employer bear the evidentiary burden of proof. See, Elkouri & Elkouri – "How Arbitration Works" (5th ed., 1997)

The Arbitrator's task is to weigh the evidence and not be restricted by evidentiary labels (i.e. beyond reasonable doubt, preponderance of evidence, clear and convincing, etc.) commonly used in the non-arbitable proceedings. See, Elwell- Parker Electric Co., 82 LA 331, 332 (Dworkin, 1984).

The evidence in this matter will be weighed and analyzed in light of the DR&C burden to prove that the Grievant was guilty of wrongdoing. Due to the seriousness of the matter and Article 24 requirement of "just cause", the evidence must be sufficient to convince this Arbitrator of guilt by the Grievant. See, J.R. Simple Co and Teamsters, Local 670, 130 LA 865 (Tilbury, 1984).

DISCUSSION AND CONCLUSIONS

After careful consideration of all the testimony, exhibits and post hearing briefs of both parties, I find that the grievance is denied. My reasons are as follows:

Fairman and Pedro as COs are public guardians and are required to exhibit the highest degree of integrity required in this position. Due to the standards required of a CO and the necessity to guard the public trust, my analysis will be centered upon the facts, with an overriding concern as to the stark conflicting evidence primarily between former lovers whose job duties requires honesty and trustworthiness. Both Fairman's and Pedro's overall conduct

regarding their personal relationship, which carried over into the workplace can only be described as abysmal.

The Grievant denies striking Pedro on the leg at roll call and questions Pedro's credibility, pointing out that her supervisor on the first shift was not informed and asking why medical attention was not sought for almost thirteen (13) hours after the alleged occurrence? The time lapse by Pedro in bringing this matter to management's attention or seeking medical treatment was not probative on whether the hit to the leg occurred. The Grievant's version of the roll call incident fails to adequately address Tyson's testimony, who actually witnessed the hit. The union offered a theory at the hearing that the Grievant could not have struck Pedro's leg if he was standing up and moving away from her, as testified by Tyson. Hence, the union opined, that an inconsistency between Tyson's written statement and her testimony tainted the testimony of the only eyewitness. I disagree.

Tyson's version of what she saw is at issue, not whether or not she can properly model the conduct of the Grievant as he struck Pedro. No credible evidence was offered to indicate that Tyson's view was obstructed or she did not see what she saw. Pedro testified that she was struck by Fairman and coupled with the credible evidence thru Tyson; the inference that Pedro was struck by Fairman is affirmative. The evidence supports a violation of Rule 19 in that the Grievant struck Pedro in the leg with his fist on March 30, 2002.

The verbal altercation on March 30, 2002 that began during roll call and continued thereafter must be analyzed in three (3) separate stages to obtain an overall assessment: (1) what happened during roll call; (2) what happened after roll call and prior to the main entry sally port; (3) what happen outside the main entry sally port.

What happened during roll call? Pedro's and the Grievant's version of how the verbal exchange started differs widely. Who initiated the conversation and what actually was stated between the parties is a matter of considerable dispute between Fairman and Pedro. The evidence suggests that an argument occurred in front of other COs about whether Pedro

wanted to be Fairman's friend, as well as other topics. Upon exiting roll call CO Tyson at least heard the Grievant state then "we will be enemies". (JX-2). The Grievant denies saying those words to Pedro. Pedro stated that Grievant added "fuck you" in an angry tone prior to hitting her. (JX-2). The evidence supports that the Grievant stated in an angry manner to Pedro that they would be enemies at roll call. The evidence at this point is insufficient to support a Rule 18 violation of conduct that rises to the level of threats or intimidation.

What happened after roll call prior to the main entry sally port? Pedro testified that the Grievant waited in the hallway and began an unwanted conversation regarding her talking to black COs and not to him. The Grievant indicated that he heard Pedro's voice behind him, denies making any racist comments and when he engaged Pedro he was trying to find out when she was going to remove her other belongings from his house. A conversation occurred but is void of any threatening or intimidating conduct by the Grievant. The content of the conversation between Fairman and Pedro, even if viewed as culturally offensive, is superfluous as to whether or not Fairman was threatening, intimidating or coercing Pedro at this time. Once again, evidence offered up to this point is insufficient for a finding of a Rule 18 violation and the testimony of Pedro alone fails to support a finding.

What happened outside of the main entry sally port? CO Tyson indicated that she saw Fairman engaging in unwanted conversation with Pedro and he was walking in front of her and then to the opposite side of the walkway as Pedro was trying to avoid Fairman. (JX-2). The inference being, and I find, that Fairman was blocking Pedro's path. At some point, Pedro tells Fairman "to get the fuck out of her way", and this portion of the conversation was heard by CO Klavinger. CO Sealscott saw Pedro brush pass the Grievant and bump his shoulder as she walked away. A sorting of the evidence indicates that the Grievant placed himself in front of Pedro to impede her ability to go to her post based upon the Grievant's desire to continue a conversation that Pedro did not welcome.

In light of the fact that Pedro and Tyson testified that the Grievant was angry at roll call his timing of confronting Pedro at that time demonstrates a hostile/intimidating reaction by the Grievant. COs Tyson, Klavinger and Sealscott versions taken together allow a reasonable inference that the Grievant blocked Pedro's path and attempted to mandate a conversation when he was upset without her consent. Standing alone, this conduct, surely would not rise to the level of removal. However, based upon the record as a whole, the evidence supports a Rule 18 violation for the conduct viewed as being intimidating at the minimum, when the Grievant sought Pedro out after roll call and continued the conversation until they were outside the main entrance. As for the threats by the Grievant, a threat must be specific and in the Grievant's power to carry out. See, Walker Mfg. Co., 60 LA 645 (Simon, 1975). The evidence was inconclusive that any of the words or conduct of the Grievant was threatening, but clearly intimidating.

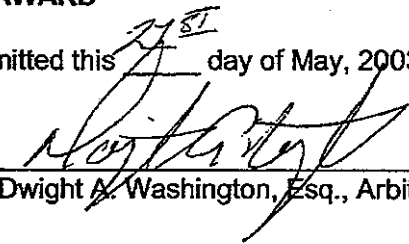
The romantic relationship between The Grievant and Pedro occupied a considerable portion of the hearing and rightly so. It's important to understand if a witness is motivated by biases or prejudice based upon relationships or friendship. The fiery relationship and ill will was a by-product of both personalities and required this Arbitrator to discount evidence offered by Fairman and Pedro that wasn't corroborated or admitted in the form of joint exhibits or stipulations.

The infamous "love letters" (M-1) penned by the Grievant provided a slitter of the overall relationship between Fairman and Pedro, and Fairman's desire for redemption is evident. The "love letters" did suggest that the Grievant was less than credible when he placed all the abusive behavior onto Pedro's shoulders. Neither the Grievant nor Pedro convinced this Arbitrator that either one was a victim, but simply a bad external relationship made its way within ToCI. On March 30, 2002, the disciplinary conduct was demonstrated by the Grievant not Pedro. The quid pro quo being, that if Pedro had engaged in similar conduct the result would have been similar in my viewpoint.

As suggested earlier, the credibility of COs must be protected at all cost, and due to the evidence to support what occurred on March 30, 2002 by the Grievant-no mitigation exists to lessen the discipline.

AWARD

Grievance denied. Respectfully submitted this ^{27th} day of May, 2003.


Dwight A. Washington, Esq., Arbitrator