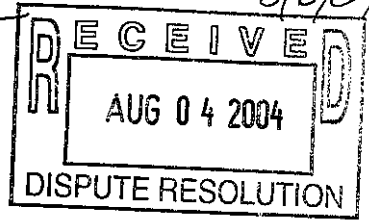


Decision 875

cl 8/5/04



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:** Joel Glass

**Case No.** 27-09 (20031125) 1025-01-03

**Date of Hearing:** June 23, 2004

**Place of Hearing:** Grafton, Ohio

**APPEARANCES:**

**For the Union:**

Advocate: George L. Yerkes

**Witness:**

Joel Glass

**For the Employer:**

Advocate: Dave Burris  
2<sup>nd</sup> Chair: Joel Trejo

**Witness:**

Eddie Young

**ARBITRATOR:** Dwight A. Washington, Esq.

**Date of Award:** August 3, 2004

## INTRODUCTION

The matter before the Arbitrator is a grievance pursuant to the Collective Bargaining Agreement ("CBA"), in effect March 1, 2003, through February 28, 2006, between the State of Ohio - Department of Rehabilitation and Corrections ("DR&C") 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 removal of the Grievant, Joel Glass ("Glass"), for violating Rule 37 – actions that could compromise or impair the ability of an employee to effectively carry out his/her duties, and Rule 46 – unauthorized relationships with any individual under the supervision of the department.

The removal of the Grievant occurred on October 31, 2003 and was appealed in accordance with Article 24 of the CBA. This matter was heard on June 23, 2004, and is properly before the Arbitrator for resolution. Both parties had the opportunity to present evidence through witnesses and exhibits. The parties performed oral arguments, post-hearing, with the record being closed as of June 23, 2004.

## BACKGROUND

The Grievant, Joel Glass, was employed by DR&C as a Corrections Officer ("CO") at Grafton Correctional Institution ("GCI") at the time of his removal. The Grievant was initially employed in February 1989 at the Mansfield facility. Due to staff reductions at Mansfield, the Grievant transferred to Grafton based upon his seniority in 2002.

The Grievant worked the first shift and was assigned to housing unit A-2. On October 7, 2003, on his off-duty hours, the Grievant was stopped by a Huron County Deputy Sheriff, and drug paraphernalia was discovered in his possession. On October 8, 2003, the Grievant notified GCI by preparing an incident report. (Joint Exhibit ("JX") 3, p.22). In lieu of the Grievant's arrest, he received a summons for possession of drug paraphernalia. A newspaper

article that was printed indicated that the Grievant, a CO, had been cited for possession of drug paraphernalia and further, had admitted to the officer that he had a marijuana pipe underneath his seat.

As a result of the summons and the newspaper article, staff and inmates became aware of the incident. On October 20, 2003, the Grievant plead no contest and the court's journal entry indicated that the Grievant was found guilty, sentenced to 30 days in jail and imposed a fine of \$250.00. The court suspended the jail sentence conditioned upon two (2) years of probation, proof of substance abuse counseling, and payment of the fine within forty (40) days of the date of the journal entry.

DR&C also received allegations that the Grievant had been or was involved in an inappropriate relationship with an inmate under his supervision in violation of Rules of Conduct numbers 37 and 46. Eddie Young ("Young"), an investigator with over fourteen (14) years experience at GCI, conducted the investigation and submitted a written report to Carl S. Anderson ("Anderson"), Warden, dated October 16, 2003. (JX3, pp.8-24). Part of the investigation included an interview with the Grievant on October 16, 2003, with his union steward present.

Young asked the Grievant if he had any contact with inmates currently housed at GCI or inmates under the supervision, i.e., probation, of the DRC. The Grievant admitted that he had received a phone call from an inmate who was on parole on September 22, 2003. The investigation revealed that the Grievant had given the inmate his cell phone number even though as a long-term CO, he knew it was not permitted.

At the hearing, the parties stipulated that the Grievant was in receipt of the Standards of Employee Conduct which included a section on personal conduct that all DR&C employees will conduct their activities both on and off-duty in a manner that will not adversely affect their ability to perform their duties.

On October 31, 2003, Anderson issued a notice of removal for violation of the Standards of Employee Conduct, numbers 37 and 46 (A).

At the pre-disciplinary conference, the hearing officer concluded that the investigation indicated that an inmate made contact that was inappropriate and no nexus report was filed by the Grievant. Also, the Grievant admitted sharing personal information with the inmate including the fact of the drug summons issued on October 7, 2003.

The removal was based solely upon the inappropriate relationship with the inmate<sup>1</sup>, as opposed to the October 7, 2003, summons matter. The Grievant was removed and the Union filed this grievance alleging a violation of Article 25 in that the penalty was not commensurate with the offense.

### ISSUE

Was the Grievant, Joel Glass, removed for just cause? If not, what shall the remedy be?

### RELEVANT PROVISION OF THE CBA AND DR&C RULES 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 37 and 46 (A)

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<sup>1</sup> At the hearing, the parties entered a written stipulation that the 'no contest' plea is irrelevant to this hearing. As a result, the Grievant's summons and no contest plea will have no effect upon this matter.

**Rule 37:** Actions that could compromise or impair the ability of an employee to effectively carry out his/her duties as a public employee.

**OFFENSE**

<b>1<sup>st</sup></b> 2 or R	<b>2<sup>nd</sup></b> 2 or R	<b>3<sup>rd</sup></b> 5 or R	<b>4<sup>th</sup></b> R	<b>5<sup>th</sup></b>
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**Rule 46 (A):** Unauthorized Relationships  
A. The exchange of personal letters, pictures, phone calls, or information with any individual under the supervision of the Department or friends or family of same, without express authorization of the Department.

**OFFENSE**

<b>1<sup>st</sup></b> 2 or R	<b>2<sup>nd</sup></b> 5 or R	<b>3<sup>rd</sup></b> R	<b>4<sup>th</sup></b>	<b>5<sup>th</sup></b>
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**POSITION OF THE PARTIES**

**POSITION OF THE UNION**

The alleged rule violations, i.e., Rules 37 and 46 (A), carry penalties ranging from a written reprimand, two-day fire, suspension and/or removal on the first offense. In other words, DR&C failed to properly consider the extenuating circumstances offered as mitigation.

The Grievant had no active discipline at the time of his removal and his annual performance evaluation from the late 1980's thru 2002 were favorable. (JX5, pp.9-53). The Grievant has also received several letters of commendation for his role at Mansfield ("Mansfield") Correctional Institution as part of the accreditation team in 1991 (JX5, p.2), and for a job well done on Unit 4 at Mansfield regarding a visit by auditors. (JX5, p.3).

In addition, the Grievant had successfully completed First Responder Training in 2002, (JX5, p.5) and had recently completed the Crisis Negotiation Training in July 2003 (JX5, p.6).

Another area that DR&C failed to properly consider were the events that were occurring in the Grievant's personal life. The Grievant indicated at the hearing that due to his financial assistance to his children, his own personal finances had suffered, resulting in the foreclosure of his home. The Grievant's marriage was challenging, resulting in a separation around March 2003. Moreover, his wife had become ill and an aunt had died from cancer around this time as well. Simply, the Grievant, testified that the significant stress he was under resulted in his choice to use an illegal substance to cope.

The Grievant admits he made a mistake by giving his phone number to the inmate on the day of his release from GCI. The Grievant admitted at the hearing that he was aware of the prohibition in Rule 46 (A), but failed to report the phone conversation with the inmate.

Finally, the Union submits that a fifteen (15) year employee, whose records indicate that he was an excellent employee, should not be removed for using bad judgment over a short period of time. DR&C failed to consider all of the mitigating circumstances independently or collectively in determining appropriate discipline. The Union seeks reinstatement, back pay less interim earnings, a return to work drug test, reinstatement of seniority and leave balances.

## **POSITION OF THE EMPLOYER**

CO's are required, by training and written policy, to exhibit behavior on and off-duty that will not "affect their ability to perform their duties as public employees for the Department." (JX4, p.2 emphasis added).

Furthermore, the Standards of Employee Conduct prohibits the use, possession, conveyance or distribution of illegal drugs, narcotics or controlled substances at all times. (JX4, p.2).

DR&C is responsible for the confinement and supervision of offenders in the thirty-three (33) facilities operated with the State of Ohio. Public confidence and trust of co-workers is extremely important for CO's to operate effectively.

The Grievant, as a fifteen-year CO, not only started an inappropriate relationship with an inmate while incarcerated within GCI, but also continued the relationship after the inmate's release. The investigatory interview conducted by Young on October 16, 2003, with the Grievant, indicated that the Grievant was looking for a friend and during the phone call, they discussed football, getting together for a drink, and the Grievant's October 7, 2003 incident. (JX3, pp.15-17).

The Grievant used horrific judgment as a long-term CO, even though DR&C recognized that the only reason the Grievant gave his cell number was for the inmate to contact him once he was released. The institution received a tip, and fortunately for DR&C, the October 7, 2003, incident brought the unauthorized relationship to the forefront. Prior to the investigation, the Grievant did not act voluntarily to self-correct this matter.

The public notoriety of his October 7, 2003, summons further eroded and compromised his ability to effectively perform his duties as a CO.

The facts are not in dispute and DR&C took into account the factors advanced by the Union as mitigation, but consistent with past practice and to maintain trust and public confidence, removal was the only option.

### **BURDEN OF PROOF**

It is well accepted in discharge and discipline related grievances, the Employer bears the evidentiary burden of proof. See, Elkouri & Elkouri – "How Arbitration Works" (5<sup>th</sup> 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's burden to prove that the Grievant was guilty of wrongdoing. Due to the seriousness of the matter and the Article 24 requirement of "just cause", the evidence must be sufficient to convince this Arbitrator of (the Grievant's) guilt. See, J.R. Simple Co and Teamsters, Local 670, 130 LA 865 (Tilbury, 1984).

### **DISCUSSION AND CONCLUSIONS**

After careful consideration of this matter, including all of the testimony and evidence of both parties, I find that the grievance must be denied. My reasons are as follows:

The Grievant as a CO was responsible for the monitoring of contraband among the inmates' population at GCI. Another key function of a CO is the supervision and direction of inmates regarding their daily activities. Although the parties agreed that the October 7, 2003 off-duty incident is not the predicate for the Standards of Conduct Rule 37 and/or Rule 46 (A) discipline, it is noted by the Arbitrator that the tipping point regarding the Grievant's removal and the investigation generated from the October 7, 2003 incident.

As demonstrated by the evidence at the hearing, the underlying relevant facts are not in dispute. Namely, the Grievant admitted giving his cell phone number to an inmate while under his supervision; engaged in a phone conversation with the inmate while the inmate was under the supervision of DR&C; and failed to inform his supervisor of the phone contact from the parolee, all violations of work rules that the Grievant admitted he was aware of.

Clearly, DR&C had provocation to discipline the Grievant, based upon his own admissions under Article 24 of the CBA. Given the application of the Standards of Employee Conduct and the 'clarity' of Rules 37 and 46 (A), to this fact pattern, I will now address whether or not removal was the appropriate discipline.



In reality, the Union's only argument was that DR&C failed to properly consider the myriad of issues of mitigation<sup>2</sup> evidence at the hearing. The Grievant admitted, at the hearing, that the stress and personal problems at home contributed to drug use and poor judgment regarding the inmate. However, since October 2003, he's straightened his life around and the brief period of 'poor judgment' should not overshadow fifteen solid years of good work. The Union contends that good evaluations, no active discipline, fifteen years of service and stress surrounding one's personal life are issues to mitigate against the Grievant's removal. I disagree.

As a veteran CO, the Grievant was aware that inmate supervision/control is one of the key responsibilities of a CO. DR&C mandates the provision of a safe and efficient rehabilitation/corrections system for inmates, requiring even-handed treatment, and removal of any preferential treatment of any nature from a CO to an inmate. Simply, without express permission, no unauthorized relationship can exist between a CO and an inmate if consistency of treatment is the benchmark.

The evidence supports removal for violation of Standards of Employee Conduct Rules 37 and 46 (A) and the issues of mitigation did not convince the Arbitrator that a lesser penalty should be imposed. The range of discipline for the first offense under both Rules were properly weighed, and further support for the Grievant's removal is found in the integrity/trust requirement in that staff not be perceived by inmates as compromised, supports the discipline imposed.

A review of the record as a whole indicates that the Grievant's conduct was in direct conflict with his duties as a CO, and I cannot find that the penalty is excessive, arbitrary or unreasonable.

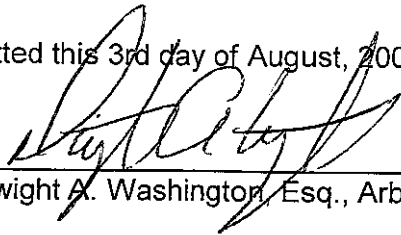
Therefore, for all the reasons cited above, the grievance is denied.

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<sup>2</sup> In its closing argument, the Union submitted the following issues warranting mitigation: (1) good performance evaluations; (2) problems at home; (3) crisis team member; and (4) completion of a court ordered drug program.

**AWARD**

Grievance denied. Respectfully submitted this 3rd day of August, 2004.



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Dwight A. Washington, Esq., Arbitrator