

#922

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In the Matter of the Arbitration

- between -

The State of Ohio  
Department of Rehabilitation and Corrections  
Mansfield Correctional Institution

- and -

The Ohio Civil Service Employees  
Association, Local 11

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OCSEA-OFFICE OF  
GENERAL COUNSEL

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Arbitrator: John J. Murphy  
Cincinnati, Ohio

For the Union: James McElvain  
OCSEA, Local 11  
1108 Woodville Road  
Mansfield, Ohio 44907

Also Present: Linda Boyd  
Former Employee  
Kenneth Feagin  
Grievant

For the Department: David Burrus  
Ohio Department of Rehabilitation  
and Corrections  
1050 Freeway Drive North  
Columbus, Ohio 43229

Also Present: Travis Ryan  
Parolee (Under subpoena)  
Dustin Harr  
Correction Officer (Under subpoena)  
David Blake  
Investigator for Department

FACTUAL BACKGROUND:

This case involves the removal of the Grievant, a Correction Officer formerly employed by the Department at Mansfield Correctional Institution. The Grievant was initially hired as an interim employee on January 20, 2004, and was appointed to a full-time position as Correction Officer on August 22, 2004. The Grievant received on May 23, 2004 a Notice of Disciplinary Action stating his removal as a Correction Officer.

The Notice of Disciplinary Action based the Grievant's removal on the alleged violation of three rules found in the Standard of Employee Conduct. The Notice stated as follows:

**NOTICE OF DISCIPLINARY ACTION**

You are to be served this **REMOVAL** for the following infraction(s):

**Officer Feagin failed to complete a Staff Nexus following his brother's conviction, December 2004. This is in violation of DRC Policy 31-SEM-07-Unauthorized Relationships. On March 27, 2005, Officer Feagin entered Pod 2D, approached Inmate Ryan and intimidated him with abusive statements and threatened to "kick his ass". The officer on duty (Harr) was concerned enough with this situation, to ask Feagin to leave and notified the Shift Commander.**

This is clearly a violation of **Rule 7, 44, and 38** of the Standards of Employee Conduct Pursuant to the AFSCME/OCSEA contract, Article 25.07, you may choose to grieve this disciplinary action. . . .

The Grievant grieved the removal, and the parties stipulated that the grievance was properly brought to arbitration.

ISSUE:

The parties stipulated the following issue: Was the Grievant's removal for just cause? If not, what shall the remedy be?

RELEVANT RULES IN THE STANDARD  
OF EMPLOYEE CONDUCT:

The Grievant acknowledged receipt of the Standard, and there was no challenge at the arbitration hearing as to the validity of the Standard or the following rules in and of themselves. The conflict centered on the application of the rules to the evidence.

The record included the recitation of the three rules involved in this case, Rules 7, 38, and 44. The record also included the disciplinary grid showing the scope of potential punishment for an offense under each rule. The disciplinary grid was part of the Standard of Employee Conduct.

The three rules and disciplinary grid in relation to each rule are as follows:

**Rule 7: Failure to follow post orders, administrative regulations, policies or directives**  
1<sup>st</sup> Offense WR/1 Day; 2<sup>nd</sup> Offense 2 Day; 3<sup>rd</sup> Offense 5 Day; 4<sup>th</sup> Offense Removal

**Rule 38: Any act or commission not otherwise set forth herein which constitutes a threat to the security of the facility, staff, any individual under the supervision of the Department, or a member of the general public.**  
1<sup>st</sup> Offense 2/Removal; 2<sup>nd</sup> Offense 5/Removal; 3<sup>rd</sup> Offense Removal

**Rule 44: Threatening, intimidating, coercing, or use of abusive language toward any individual under the supervision of the Department**  
1<sup>st</sup> Offense 2/Removal; 2<sup>nd</sup> Offense 5/Removal; 3<sup>rd</sup> Offense Removal

OPINION AND AWARD:

A.) The Alleged Rule 7 Violation

The text of Rule 7 incorporates by reference "post orders, administrative regulations, policies or directives . . ." This case involves the incorporation of a particular policy issued by the Department dealing with "Unauthorized Relationships."<sup>1/</sup> The policy applies to persons employed by the Department, such as the Grievant, independent contractors, and volunteers who provide a service to the Department. An Unauthorized Relationship is a relationship by a person, such as the Grievant, with "any individual under the supervision of the Department . . . which has not been approved by the (warden)."

The policy continues by imposing a duty upon current employees, such as the Grievant. This duty has two elements:

- a) "The employee becomes aware of the existence of a personal . . . relationship with an offender."
- b) "Due to the . . . incarceration of a relative . . ."

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<sup>1/</sup> The record contains one such policy with an effective date of December 18, 2001 and another such policy dated October 17, 2004. As the text above notes, the facts relevant to Rule 7 and the policy concerning Unauthorized Relationships occurred between December 27, 2004 and March 31, 2005. Therefore, the policy that became effective October 17, 2004 was operative.

What is said in the text above about the policy effective October 17, 2004 does not differ in any significant way from the text of the preceding policy that had been effective December 18, 2001.

If both of these elements are present, then the employee must file a Nexus Form with the warden who then determines the parameters upon which any personal interaction may be authorized.

The rationale for this policy appears self-evident, it is stated in the text of the policy.

It is the policy of the Ohio Department of Rehabilitation and Corrections that department employees, independent contractors, and volunteers will maintain appropriate authorized relationships with offenders in order to ensure fairness, integrity, credibility, and security in the work place.

By stipulation of the parties, the record included a Nexus Form filed by the Grievant on November 17, 2003. The stipulation stated that the Form was completed by the Grievant at the time of his original hiring as a contract employee in November 2003. The Form noted that the Grievant had one brother on parole from a federal penitentiary, and another person described as a half-brother, Marco, also on parole but under the jurisdiction of the Department. The Form concluded with a sentence appearing immediately above the signature of the Grievant:

I understand that should I become aware of any additional such relationships due to sentencing or incarceration, I must notify (warden).

The facts that triggered the controversy under Rule 7 began on December 27, 2004. On that date, Marco described by the

Grievant in 2003 as his half-brother, was incarcerated for thirty years for murder. He began his incarceration at a State prison other than Mansfield, but it appears that he was transferred to Mansfield on March 31, 2005 and kept in Security Control until he could be further transferred out of Mansfield. The record also includes a Nexus Form signed by the Grievant and dated March 31, 2005 noting his relationship with Marco currently incarcerated at Mansfield. The relationship in this Nexus Form states Marco as the Grievant's brother in contrast to the relationship stated in the Nexus Form filed by the Grievant on November 17, 2003.

The position of the Department was that when the Grievant's brother was newly incarcerated on December 27, 2004 and that this incarceration needed to be reported in a Nexus Form. The Form regarding Marco was not completed and submitted "until 3/31/05, three months after his (Marco's) incarceration, and is in violation of the policy." (Employer's closing argument at 2).

The problem for the Department under the policy concerning unauthorized relationships is the first element of the policy. The Grievant must have been aware of the circumstances that would trigger his duty to submit the Nexus Form sometime prior to March 31, 2005. The Department claimed, "No argument was made that the Grievant was not aware of these circumstances."

(Employer's closing argument at 2). On the other hand, it is the Department's duty to supply the evidence necessary to trigger the employee's duty to file the Nexus Form. The Department had to show that the Grievant knew or reasonably should have known about the circumstances concerning Marco's incarceration prior to March 31, 2005--the date that he appeared temporarily at the prison in which the Grievant worked. With one exception discussed below, there was absolutely no evidence on whether the Grievant actually knew of Marco's incarceration at any time prior to March 31, 2005. While the Grievant was present during the entire arbitration hearing, neither the Union nor the Department saw fit to call him as a witness. Moreover, there was no evidence in the record of any residential or communication ties between the Grievant and Marco.

There was only one bit of evidence relating to the awareness by the Grievant of Marco's incarceration, but this evidence is insufficient to establish Grievant's awareness of Marco's incarceration prior to March 31, 2005. The Employer notes (Employer's closing argument at 2) that a parolee witness at the arbitration hearing testified that the Grievant sought him out in his cell to harm another inmate in retaliation for Marco's conviction. This contact was supposed to have occurred sometime after March 9, 2005,<sup>2/</sup> thereby establishing awareness by the Grievant of Marco's incarceration prior to March 31, 2005.

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<sup>2/</sup> See parolee witness's personal statement in the record.

This evidence is insufficient to sustain the Department's burden of proof on the "awareness" element of the policy concerning Unauthorized Relationships. This testimony by the parolee was totally uncorroborated<sup>3/</sup>--by contrast with his other testimony as explained below. Again, the record is left with a parolee's claim of an offer by the Grievant to a conspiracy to injure another inmate. And, again, the record does not include any testimony by the Grievant on this matter offered by either the Department or the Union.

This analysis leads to the conclusion that the Department failed in its burden of showing that the Grievant was aware of the circumstances that would otherwise trigger his duty to file a Nexus Form concerning Marco prior to March 31, 2005--the date in which the Grievant did file such a Form.

B.) Rules 38 and 44

Rules 38 and 44 have one common element which is at issue in this case. Rule 38 prohibits a "threat to the security of . . . any individual under the supervision of the Department. . ." Rule 44 prohibits "threatening . . . any individual under supervision of the Department."

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<sup>3/</sup> The Department investigator did testify that he interviewed another inmate at Mansfield who had, indeed, testified against Marco. This information, however, does not directly support the parolee's claim that the Grievant proposed a conspiracy with the parolee to injure another inmate.



The facts relevant to the application of both of these rules center on an incident that occurred on March 27, 2005 at residential Pod 2D. At the time of this incident, the Area Correction Officer in this Pod was an officer of five years of service, Dustin Harr. He was assisted by a probationary Correction Officer, Linda Boyd, who began her probation approximately four months prior to the date of the incident. Boyd was serving at Mansfield as a relief officer with a different assignment at each shift.

The incident on March 27 concerns what happened between the Grievant and an inmate in Pod 2D, Travis Ryan. There was no dispute that the inmate was an "individual under the supervision of the department"--a prerequisite under both Rule 38 and 44. The question, therefore, in this case is whether the Department sustained its burden of showing a "threat" by the Grievant to inmate Ryan on March 27, 2005. Whether there was such a threat is, therefore, at the core of the application of Rules 38 and 44 in this case.

Three witnesses to the incident offered testimony of what happened in Pod 2D between the Grievant and inmate Ryan. Inmate Ryan, now on parole from Mansfield, and the Area Correction Officer, Harr, testified under subpoena. Finally, probationary Correction Officer Boyd presented her testimony. As noted

above, the Grievant, while present during the entire arbitration hearing, did not testify.

1.) Inmate Ryan

Ryan testified that at approximately 5:40 p.m., the Grievant pulled his cell door open and said, "I will smash you." Ryan responded by saying he wanted to talk to a whiteshirt (a superior over Correction Officers).

Ryan then proceeded down the stairs from the cell area to the desk where the Area Correction Officer was located and requested a whiteshirt. Again, the Grievant said "I can smash you." The Grievant then asked the Area Correction Officer to open up the center vestibule so he (the Grievant) could kick his (Ryan's) ass. Upon the refusal by the Area Correction Officer to open up the center vestibule, the Grievant asked that the back area be opened so he could kick the ass of Ryan. Again, the Area Correction Officer refused.

Ryan then returned to his cell with the Grievant following him, again threatening to smash Ryan.

All of this testimony presented at the arbitration hearing at December 16, 2005 was consistent with a written report submitted by Ryan to the prison on March 27, 2005. Ryan testified that he had another inmate type the 3-page report. Ryan reviewed the report at the arbitration hearing and

testified that it was truthful. He then restated the essential elements of the report in answer to questions.

If this testimony and report by the inmate were the sum of the Employer's case, it would be difficult to conclude the Department sustained its burden under Rules 38 and 44. This would be true even in the face of the failure of the Grievant to testify.

As noted above, however, there were other witnesses to this incident. The Department introduced the testimony of the Area Correction Officer--also a member of the bargaining unit, but testifying under subpoena. The Union offered the testimony of the probationary Correction Officer who was assisting during the shift in which the incident occurred.

As explained below, the Area Correction Officer, Harr, was reluctant to testify, but he corroborated the essential elements of inmate Ryan's testimony. The testimony of the probationary Correction Officer was difficult to accept and was insufficient to contradict the corroborated evidence that the Grievant did indeed threaten inmate Ryan several times during the incident on March 27, 2005.

2.) The Area Correction Officer,  
A Reluctant Witness

Harr testified that the Grievant entered the Pod and stated that he was here to talk to an inmate. The Grievant then walked upstairs to Ryan's cell, and a few minutes later Ryan came down

to the desk to say that he wanted a whiteshirt because he had been threatened by the Grievant. Harr also testified that the Grievant said that he would "smash your mouth," referring to Ryan.

Harr stated that he was standing in front of the desk and that the Grievant and Ryan were right in front of him.

Harr also testified that the Grievant requested that Harr open the center vestibule area, saying that the Grievant was going to kick Ryan's ass. Harr testified that he told the Grievant that he would not do so and asked the Grievant to leave the Pod. Again, according to Harr, the Grievant asked that another area be opened so he could "kick Ryan's ass." This led to a second denial by Harr and a second request to the Grievant to leave the Pod. After the Grievant left, Harr telephoned the captain to explain what had happened.

It is clear that Harr was a reluctant witness and did not wish to be involved in a disciplinary process against a colleague Correction Officer. Harr testified that after the Grievant returned to the desk area for the second time, he and the Grievant walked into a sallyport area. Harr told the Grievant "don't do this in my Pod; don't put me on the spot." It was at that point that the Grievant left the Pod.

Even after the incident occurred, and after Harr had telephoned the captain, Harr did not write an incident report

which was otherwise required by the policy of the prison. Harr did not write the incident report until March 31, only after the department investigator interviewed Harr and told him to write the report.

Harr was questioned in cross examination about his delay in writing the incident report. His response displays the stress and pressure upon him as a result of the behavior by the Grievant.

A: I thought the incident was serious enough to call the captain.

Q: So why not write the incident report that day (March 27)?

A: It happened in front of you, but you don't want to be involved in it. It's like a Catch 22.<sup>4/</sup>

### 3.) The Probationary Correction Officer

Linda Boyd was positioned near the desk where the incident took place about which inmate Ryan and Area Correction Officer testified. She testified that Ryan did indeed come down from his cell to the desk area, followed by the Grievant, and that Ryan did say that he wanted a whiteshirt because the Grievant had threatened him.

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<sup>4/</sup> A "Catch 22" is a "paradox in which seeming alternatives actually cancel each other out, leaving no means of escape from the dilemma." American Heritage Dictionary Of The English Language (1976). The American author Joseph Heller coined this term in his book, Catch 22 (1961).

By contrast to Ryan's and Harr's testimony, Boyd stated "at no time did I hear the Grievant threaten Ryan." Indeed, she testified that Ryan had threatened the Grievant.

It is difficult to accept Boyd's testimony. While she did note that the inmate had sought a whiteshirt because of threats from the Grievant, she then states that the Grievant in the presence of two other correction officers turned and threatened the Grievant.

The difficulty in accepting Boyd's testimony is aggravated by her present relationship with the prison. It does not exist. Her probationary period was terminated on March 31, 2005. As she testified, the period was terminated because she was charged with lying in an official investigation and failure to follow post orders.

This analysis supports the conclusion that the Department did sustain its burden producing evidence sufficient to prove that the Grievant did threaten several times bodily injury on inmate Ryan during the incident on March 27, 2005 in Pod 2D at Mansfield Correctional Institution. The question now becomes whether removal was appropriate.

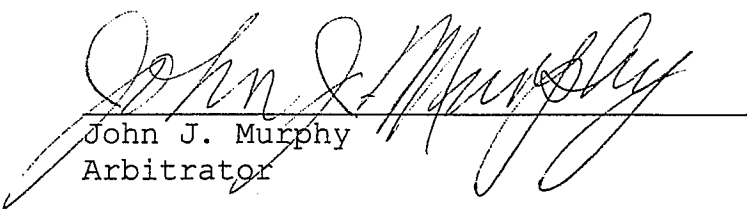
The disciplinary grid for the violation of either Rule 44 or 38 for the first offense contemplates removal, and this is so stated in the Standard of Employee Conduct. It was stipulated that the Grievant had notice of the Standard.

Finally, the record does not include any mitigatory factors that would press for a discipline short of removal. While it was stipulated that the Grievant did not have an active discipline record at the time of the incident, the Grievant had only been a full-time correction officer at Mansfield for approximately seven months prior to the occurrence of the incident. This case, therefore, concerns a very new employee causing an incident in a Pod where he had no present employment duties. Despite at least two requests by the Area Correction Officer to leave, the Grievant threatened the inmate with bodily injury several times. The Grievant then made two brazen requests of the Area Correction Officer to open two areas so he could succeed in his threat to injure the inmate. This was done with complete scorn for the Area Correction Officer who had responsibility in the premises for the professional care of the inmate. Under the circumstances of this case, removal is an appropriate discipline.

AWARD:

The grievance is denied.

Date: February 11, 2006

  
John J. Murphy  
Arbitrator