

**ARBITRATION DECISION NO.:**

379

**UNION:**

OCSEA, Local 11, AFSCME, AFL-CIO

**EMPLOYER:**

Department of Rehabilitation  
and Correction, Northeast  
Pre-Release Center

**DATE OF ARBITRATION:**

August 22, 1991

**DATE OF DECISION:**

September 25, 1991

**GRIEVANT:**

Luis Vizcarrondo

**OCB GRIEVANCE NO.:**

27-17-(90-11-13)-0117-01-03

**ARBITRATOR:**

Rhonda Rivera

**FOR THE UNION:**

Steve Lieber

**FOR THE EMPLOYER:**

Roger A. Coe  
Lou Kitchen

**KEY WORDS:**

Removal  
Sex With Inmates  
Employer's Burden of Proof  
Use of Inmate's Statement  
Without Inmate Testifying

**ARTICLES:**

Article 24 - Discipline  
    §24.01-Standard  
    §24.02-Progressive  
Discipline

**FACTS:**

The grievant had been a Corrections Officer at the Northeast Pre-Release Center, a women's' facility, since August 1988. Inmate Smith reported that the grievant had taken her roommate, inmate Winnick, to the storeroom and wanted to have sex with her. While investigating this incident, inmate Winnick reported that

the incident did occur as inmate Smith stated. Inmate Fitzgerald reported that the grievant requested oral sex from her and had rubbed her crotch on one other occasion. Inmate Rodriguez reported that she had sex with the grievant three times and that he had touched her breasts on one other occasion. The inmates were placed into Security Control during the investigation and the interviews were recorded and statements written. The grievant was removed for committing sexual acts with inmates.

#### **EMPLOYER'S POSITION:**

There was just cause for the grievant's removal. The grievant had notice of the rule against engaging in sex with inmates and the rule is reasonably related to security. The employer investigated the incidents fully and did not coerce any inmates into testifying against the grievant. Further their statements are not less credible because they are inmates. Inmate Smith reported that the grievant took her roommate, inmate Winnick to the storeroom and requested that she have sex with him and inmate Winnick corroborated the story. Inmate Fitzgerald reported that the grievant requested oral sex from her and inmate Rodriguez reported that the grievant had sex with her three times and touched her on another occasion. The inmate witnesses had nothing to gain by reporting these incidents and lack of physical evidence does not discredit their stories.

#### **UNION'S POSITION:**

There was not just cause for removal of the grievant. The only evidence of the incidents for which the grievant was removed were the inmates' statements. There was no full and fair investigation, therefore, no corroborating physical evidence or eyewitness was found. The inmates were coerced by management by being placed into Security Control until they reported that: 1) the grievant took inmate Winnick to the storeroom and requested that she have sex with him; 2) the grievant requested oral sex from inmate Fitzgerald; and 3) the grievant had sex with inmate Rodriguez three times and touched her breasts on one other occasion. The only inmate to testify at arbitration was Fitzgerald, thus the statements of the other inmates used to support discipline lack reliability.

#### **ARBITRATOR'S OPINION:**

The employer failed to prove that the grievant committed the acts for which he 'was removed. The employer was informed that the grievant had taken an inmate to the storeroom and requested sex from her. The inmate taken, Winnick, supported the report. During the investigation, another inmate reported that the grievant had requested oral sex from her and a third reported that she had sex with him three times and he touched her breasts one other time. The investigation was full and fair, and there were no procedural errors which warrant a reduced penalty.

However, the employer stacked charges by charging a catch-all provision when a more specific rule applied to the circumstances, and failed to prove by clear and convincing evidence that the applicable rule had been violated. Inmates Smith, Winnick and Rodriguez did not testify at arbitration. The only evidence of their allegations are the statements made during the investigation which were not subject to cross examination. Inmate Fitzgerald did testify, however, she was not credible. There was no corroborating physical evidence nor were there any eyewitnesses. The one piece of documentation supports the grievant. It places him outside the institution when one incident was supposed to have occurred. For those reasons, the employer failed to meet its burden of proof.

#### **AWARD:**

The grievant was reinstated with full back pay, benefits, and restoration of state seniority. The arbitrator recommended that the grievant be transferred to a male institution due to the nature of the allegations.

#### **TEXT OF THE OPINION:**

In the Matter of the  
Arbitration Between

**OCSEA, Local 11  
AFSCME, AFL-CIO  
Union**

and

**State of Ohio  
Employer.**

**Grievance No.:**  
27-17-(11-13-90)-0117-01-03

**Grievant:**  
(Vizcarrondo, Luis)

**Hearing Date:**  
August 22, 1991

**Closing Date:**  
September 3, 1991

**Award Date:**  
September 25, 1991

**Arbitrator:**  
Rivera

**For the Employer:**

Roger A. Coe  
Lou Kitchen

**For the Union:**

Steve Lieber

Present at the Hearing, in addition to the Grievant and Advocates, were Mary Beth Aufmuth, Deputy Warden - Operations (witness), Michael T. Griffith - Captain (witness), Sharon Lee Chilson - Lieutenant (witness), Thomas R. Israel - Deputy Warden - Programs (witness), Eric S. Pierson - Inspector (witness), Leslie Fitzgerald (witness), Jeanette L. Baker - Lieutenant (witness), Ted Williams - Correctional Officer (witness), Ricky Applewhite - Correctional Officer II (witness), Kenneth Robey - Correctional Officer II (witness), Rene Cardarelli - Correctional Officer (witness), Jerry Gilbert - Sergeant (witness), Barbara Thompson - Sergeant (witness).

**Preliminary Matters**

The Arbitrator asked permission to record the hearing for the sole purpose of refreshing her recollection and on condition that the tapes would be destroyed on the date the opinion is rendered. Both the Union and the Employer granted their permission. The Arbitrator asked permission to submit the award for possible publication. Both the Union and the Employer granted permission. The parties stipulated that the matter was properly before the Arbitrator. Witnesses were sequestered. All witnesses were sworn.

**Stipulations of Fact**

1. Grievant was employed by the Department of Rehabilitation and Correction on August 28, 1988, as a Correctional Officer 2.

2. The Grievant had no prior discipline.
3. The Grievant had read and received the Revised Standards of Employee Conduct which became effective June 17, 1990, and which included Rule 40 and Rule 46(d). That reading and receipt was dated June 6, 1990.

### **Joint Exhibits**

1. The Contract
2. Grievance Trail
  - a) Grievance (11/7/90)
  - b) Step 3 Response (1/11/91)
3. Discipline Trail
  - a) Notice of Pre-disciplinary Conference
  - b) Notice of Discipline
  - c) Acknowledgment of Receipt of Notice
4. ODRC Standards of Employee Conduct

### **Employer's Exhibit**

1. Statement of Inmate Kimberly Smith (7/10/90), Transcript of Recorded Interview
2. Handwritten Statement of Inmate Kimberly Smith
3. Transcript of Recorded Interview with Inmate Pricilla Winnick, 7/10/90
4. Handwritten Statement of Inmate Theresa Rodriguez
5. Statement of Inmate Theresa Rodriguez (8/6/90), Transcript of Recorded Interview
6. Handwritten Statement of Inmate Leslie Fitzgerald, 7/25/90
7. Handwritten Statement of Inmate Leslie Fitzgerald, 7/18/90

### **Union Exhibits**

1. IOC from Israel (Department Warden) to Grievant, 8/10/90
2. Notice of Pre-disciplinary Conference for 8/20/90
3. IOC from Israel to Warden Rogers, 9/11/90
4. Incident Report 8/3/90 by Correctional Officer II Frye
5. Incident Report by Correctional Officer II Cardarelli, 7/21/90
6. IOC from Aufmuth LRO to Rocky Shelley - LRO, 10/23/90
7. Evaluation (Probationary) of Grievant (11/21/88)
8. Final Probation Evaluation of Grievant (1/04/89)
9. Wage Calendar of Grievant, May 15-31, 1990
10. Comments by Grievant

### **Issue**

“Was the Grievant disciplined for Just Cause? If not, what shall the remedy be?”

### **Relevant Contract Sections**

#### **§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.

#### §24.02 - Progressive Discipline (in part)

The Employer will follow the principles of progressive discipline. Disciplinary action shall be commensurate with the offense. Disciplinary action shall include:

- A. One or more verbal reprimand(s) (with appropriate notation in employee's file);
- B. One or more written reprimand(s);
- C. One or more suspension(s);
- D. Termination.

#### **Facts**

The Grievant in this case was a Correctional Officer at Northeast Pre-Release Center. He was employed as of August 28, 1988 by the Department of Rehabilitation and Correction (DRC). (Stipulated Facts) He received and read the Revised Standards of Employee Conduct on or about June 6, 1990. (Stipulated Facts) On November 28, 1988, he received his mid-Probationary Evaluation which was satisfactory (Union Exhibit 7). On January 4, 1989, he received his final Probationary Evaluation which was also satisfactory. (Union Exhibit 8) As of this Grievance, he had no prior discipline. (Stipulated Facts) According to official records (Union Exhibit 9) and his testimony, the Grievant's work shift during the crucial time period was as follows:

May 23, 1990 (Wednesday) 2 p.m. to 10 p.m.

May 24, 1990 (Thursday) 2 p.m. to 10 p.m.

May 25, 1990 (Friday) 10 p.m. to 6 a.m. (overtime)

May 25, 1990 (Friday) 2 p.m. to 10 p.m. (overtime)

Mary Beth Aufmuth, Deputy Warden for Operations at the Northeast Pre-Release Center testified that on or about July 10, 1990, Sergeant Chilson, a Correctional Counselor brought Inmate Kimberly Smith in to see her. Inmate Smith claimed that she wanted the rumors stopped about her, namely, that she had gone to the storeroom with the Grievant, a Correctional Officer. Inmate Smith said that her roommate was the person who had gone. Deputy Aufmuth secured a handwritten statement from Smith (Employer's Exhibit 2). Smith claimed that early in the morning of July 3, 1990 at 3:30 a.m., the Grievant had come to her room and that her roommate, Inmate Winnick, had followed him out. According to Smith, Winnick returned 25 minutes later. (This handwritten statement (E-2) is not sworn to or witnessed.)

On July 10, 1990, at 3:30, Deputy Warden Aufmuth and Warden Rogers interviewed Inmate Winnick and recorded that interview. A transcript was made (Employer's Exhibit 3). In that recorded interview, Inmate Winnick claimed that the Grievant had taken her down to a storeroom and asked to see her body and asked her to have sex with him. In the interview, she said he did not touch her, nor did she disrobe. She then went back to her room. (This transcript (Exhibit 3) is not signed by the Inmate, nor witnessed, nor sworn to.)

On July 10, 1990 at 4:40 p.m., Inmate Smith was interviewed by Deputy Warden Aufmuth and Warden Rogers; this interview was recorded, and a transcript was made (Employer's Exhibit 1). Inmate Smith repeated in this interview that she had seen her roommate (Inmate Winnick) leave with the Grievant between 3:30 a.m. and 4:00 a.m. Deputy Warden Aufmuth testified that she interviewed other inmates in that section but received no substantive information which corroborated or denied the incident.

During the course of these interviews, Inmate Leslie Fitzgerald told her that the Grievant had asked her to suck his penis when they were in the mop room, but that she did not do so. She also alleged that on another occasion the Grievant had rubbed her crotch outside her clothes. Grievant wrote a statement dated 7/18/90 containing these allegations. (Employer's Exhibit 7 - This document is neither witnessed or sworn to.) After receiving this information, the Warden ordered Inmates Winnick and Fitzgerald into Security Control. While in Security Control, Inmate Fitzgerald apparently had a delusion of "a little man in a red suit". This incident

was reported by Correctional officer Cardarelli on July 21, 1990 (Union Exhibit 5). On July 25, 1990, at 12:50 p.m., Inmate Fitzgerald made a written statement on an Inmate Voluntary Statement Form witnessed by Captain Griffith (Employer's Exhibit 6). In this statement, she repeated the essential elements of her former statement.

Deputy Warden Aufmuth said that when all these statements had been gathered, she turned them over to Deputy Israel. In one of these statements, Inmate Fitzgerald named Inmate Rodriguez as an inmate who had a sexual relationship with the Grievant. On August 3, 1990, Inmate Fitzgerald wrote that "T.R." had told her she had sex with the Grievant in Room #110 behind the Correctional Officer's desk. (Employer's Exhibit 4 - Witnessed by M.B. Aufmuth)

On August 6, 1990, Inmate Rodriguez was interviewed by Captain Griffith at 2:25 p.m. This interview was reduced to writing, signed by Rodriguez and witnessed by the Captain. (Employer's Exhibit 5) The inmate said that on May 24th at 4:00 a.m. she and the grievant had intercourse. She also said that a few days later they had intercourse again at 5:00 a.m. and that on another day, after the 2:00 a.m. count, that they again had intercourse, this time in the staff bathroom. A fourth time, he touched her sexually, but no intercourse occurred. Deputy Warden Aufmuth said she saw Inmate Rodriguez on August 10th and that interview was her last contact with the case. She testified that she knew that Winnick, Fitzgerald, and Rodriguez had been polygraphed. (The Union objected to this testimony; the testimony was admitted for the limited purpose of showing that an investigation had been conducted by the Employer.) Captain Griffith testified at the hearing and said that his only participation in the investigation was to interview Inmate Rodriguez.

Deputy Israel stated that his job was to investigate the charges. On August 10, 1990, he sent a notice to the Grievant asking him to attend an Investigatory Interview on August 14, 1990. (Union Exhibit 1) The Grievant did attend with Officer Frye as his Union representative. The Grievant "emphatically" denied the charges at that interview.

On August 14, 1990, Grievant was sent at Pre-Disciplinary notice telling him to attend a Pre-Disciplinary Conference on August 20, 1990. That Conference was never held. Deputy Israel testified that by August 14, 1990 he had not completed his investigation. He said that Deputy Warden Aufmuth who was going on vacation had apparently jumped the gun and issued an inappropriate notice.

On September 11, 1990, Deputy Israel recommended to the Warden that a Pre-Disciplinary Conference be held for the Grievant. This recommendation, he said, was based on statements of the three inmates, Fitzgerald, Smith, and Rodriguez and on the positive polygraph results. (Union Exhibit 3)

On September 12, 1990, the Warden sent the Grievant notice of a Pre-Disciplinary Conference to be held September 24, 1990. That notice alleged violations of:

Rule 46: Committing any Sexual Act with an inmate

Rule 40: Any act or commission not otherwise set forth herein etc.

The Grievant was charged with the following acts:

On or about July 2, 1990 at 3:30 a.m. he asked Inmate Winnick to see her body.

On a day in early July, he rubbed Inmate Fitzgerald's crotch, exposed himself to her, and asked her to suck his penis.

On or about May 24, 1990 at 4:00 a.m. he had intercourse with Inmate Rodriguez. He had intercourse also several days later and fondling her breasts on a third occasion.

On October 30, 1990, the Grievant was terminated for violations of Rule 40 and 46(d). He received this notice on November 2, 1990. On November 7, 1990, a grievance was filed. On November 27, 1990, a step 3 was held, and the Grievance was denied.

On August 22, 1991, the Grievance was arbitrated. In addition to the exhibits and testimony already

outlined above, the hearing produced the following other relevant testimony:

Deputy Israel testified that he did a full investigation and only afterwards did he make any recommendation of discipline. He said the case was unusual because no physical evidence was adduced and because all the evidence was from inmates and was uncorroborated. He said in his investigation he could find no reason why these particular inmates should want to "get" this particular Correctional Officer, nor did he find anything they (the inmates) could gain. He said that had the polygraphs turned out negative, he probably would have closed the investigation. He said he did find in the logbook that Inmate Fitzgerald had apparently seen a little red man while in Security but that the officers told him that she had said it was a nightmare. Deputy Israel also said he could find no evidence that the inmates were acting in concert. Under cross examination, he said that Inmates Fitzgerald and Rodriguez had shared a cell while in Isolation.

Former Inmate Fitzgerald testified. Her testimony was terse: "Grievant, while I was at a water fountain, rubbed my vagina and some time later in a mop closet he asked me to suck his penis." She said in both cases no witnesses existed. The former inmate said that she was told that if she made a statement, she would get out of the hole (isolation). She stated that she had hallucinations while in the hole about little red men.

Arnold Frye, a Correctional Officer, testified for the Union. He said that on August 3, 1990, Inmate Rodriguez told him she had been coerced into writing a statement against the Grievant. Correctional Officer Frye filed an incident report. (See Union Exhibit 4) Officer Frye also gave "character" evidence favorable to the Grievant. Sergeant Jerry Gilbert, Correctional Officer Supervisor I, claimed that Inmate Fitzgerald had told him she was being coerced. He did not file an incident report but claimed he did put it in the log. Officer Cardarelli was called. The Employer then stipulated that Ms. Fitzgerald had had a hallucinatory event that Cardarelli would have offered favorable character evidence. Officer Robey also offered favorable character evidence, as did Lieutenant Baker.

The Grievant testified. He denied the allegations. He introduced his shift record to show that on May 25th he left work at 10:00 p.m. and did not come to work until May 24th at 2:00 p.m. Hence, he was not at work at 4:00 a.m. on May 24th when Inmate Rodriguez was allegedly having intercourse with him. He agreed that he was at work at 4:00 a.m. on Thursday, May 25th, while on overtime.

### **Employer's Position**

The Grievant was properly charged after a full and fair investigation of the allegations made against him. Extensive testimony has been presented as to the extraordinary steps management took in order to determine the veracity of these charges. Other evidence and stipulations show that the Grievant was on notice as to the work rules and as to the consequences which could result from a violation of those rules. The Employer has proven that the work rule is reasonably related to the mission of the department.

The facts of this case are essentially simple. Grievant, while serving as a Correctional Officer on third shift at the Northeast Pre-Release Center, sexually abused at least two and possibly more inmates in his care. One former inmate was fondled by the Grievant, and one was the victim of "sexual imposition," a felony under the laws of the State of Ohio.

In this case, as with many other cases of sexual abuse, the outcome will turn on the credibility of the witnesses on both sides of the question. Management's witnesses testified that the two inmates who were the principal victims had nothing to gain, and in fact, had a lot to lose by giving this information to management. The victim of the Grievant's act of sexual intercourse, Ms. Theresa Rodriguez, knew the Grievant prior to her incarceration, and the Grievant was a friend of the victim's estranged husband. As such, she knew the Grievant's position and power as both an officer and a friend of her family. Her accusation has subjected her to intense pressure from the Hispanic community from which she and the Grievant came as well as pressure from within her own family.

Ms. Leslie Fitzgerald, also a former inmate at the Pre-Release Center, testified that the Grievant placed his hand on her vagina and began rubbing her without the consent of Ms. Fitzgerald, such consent being neither express, nor implied.

The Union has attempted to use its usual defense for cases of this type: first, the victims are not credible because they were, after all, inmates. Testimony has shown that the witnesses acted against their own interest in coming forward with these charges, that they were willing to take and did take a polygraph examination concerning these charges, and that they had nothing to gain by reporting this information.

To discredit this testimony the Union has said that management coerced these witnesses to make the allegations against the Grievant. Testimony from the witness herself as well as from, shows that the inmate witness' testimony was a free and voluntary act.

We are dealing with victims who were essentially helpless in the face of a sexually aggressive male Correctional Officer who loomed large as an authority figure in whose hands rested the health and welfare of these inmates. These victims were not residents of the institution as a result of their volition, but rather were incarcerated as a result of the power of the State, the same power that Grievant explicitly or implicitly invoked to gain sexual favor from these otherwise powerless persons.

### **Union's Position**

The Union has shown that the Grievant was removed without just cause.

The Union has shown that no fair and objective investigation was made. The Union's testimony has shown that management had its mind made up to remove the Grievant based on statements made by inmates and only inmates. No eye witnesses existed to these allegations, only statements from inmates who had been coerced by management so that they could get out of solitary confinement.

Further, through the testimony of Captain Griffin, it was shown that the inmates make statements that management wants to hear. As he succinctly stated, the inmates could be let out "when they told the truth." How was the Captain to know what was "the truth"?

Further, the Union has shown, not only that no substantial evidence of proof of guilt exists, but no real evidence whatsoever exists: no eyewitnesses to the allegations and no supportive documentation at all -- only the statements of inmates in trouble -- inmates trying to save their own selves -- willing to sacrifice an innocent victim.

No just cause exists for the removal of the Grievant.

The Union asks that the Grievant be made whole in this case, that the Grievant be put back to work with all back pay and with all rights that he lost: such as seniority, good days, sick leave, and vacation.

### **Discussion**

The Union has claimed that the Employer failed to make a full and fair investigation. The Arbitrator finds that Deputy Israel did investigate fully and fairly as the evidence permitted. The procedural errors committed by Deputy Warden Aufmuth were inconsequential. Secondly, the Grievant was charged with both Rule 40 and Rule 46. The Arbitrator agrees with the Union that Rule 40 was, in essence, a make-weight and essentially was "stacking." Rule 46 is explicit and clear and given the allegations a proper and complete charge for this case.

Had the Employer proven by clear and convincing evidence what was charged, this Arbitrator could have found termination both just and commensurate. However, the evidence presented by the Employer fell significantly and substantially short of that standard.

1. Inmate Rodriguez did not testify. The state presented in her case only a transcript of her interview signed by her and witnessed by Captain Griffith. At no time, did the accused or the Union have an opportunity to confront this accuser.
2. Inmate Winnick did not testify. Her alleged accusations are found only in an unsigned transcript.
3. Inmate Smith, the apparent initiator, also did not testify.
4. Former inmate Fitzgerald did testify. Her testimony was perfunctory and had a "canned" quality. Moreover, she contradicted herself on several occasions and admitted to hallucinations while in isolation. She was not a credible or convincing witness.



As Deputy Israel himself admitted, no physical evidence nor eyewitnesses corroborated the inmates' testimony. Moreover, the only objective evidence -- the time of the Grievant's work hours -- contradicts the written time alleged by Inmate Rodriguez. While it is possible that Inmate Rodriguez got her times confused, she did not testify to lend weight to this possibility.

These charges are very serious. The Arbitrator is mindful of the responsibility of the Employer to keep inmates safe. However, the evidence is insufficient to subject the Grievant to discipline. The termination was not for just cause.

### **Award**

The Arbitrator upholds the Grievance and directs the Employer to reinstate the Grievant to a Correctional Officer position. He is to receive full back pay, full benefits, and restoration of his state seniority. The Arbitrator is well aware of prison culture both among inmates and among employees. Therefore, the Arbitrator recommends that the Grievant be transferred to a men's prison if one is reasonably within commuting distance of his home.

Rhonda R. Rivera  
Arbitrator

September 25, 1991  
Date