

ARBITRATION DECISION NO.:

451

UNION:

OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:

Department of Rehabilitation and
Correction, Dayton Correctional
Institution

DATE OF ARBITRATION:

February 6, 1992

DATE OF DECISION:

June 26, 1992

GRIEVANT:

Audrey Quinn

OCB GRIEVANCE NO.:

27-07-(91-10-22)-0089-01-03

ARBITRATOR:

David M. Pincus

FOR THE UNION:

Patrick A. Mayer

FOR THE EMPLOYER:

Joseph L. Andrews, Advocate
Lou Kitchen, Second Chair

KEY WORDS:

Removal
Unauthorized Relationship
with a Parolee
Security Risks
Failure of Grievant to
Appear at Arbitration
Credibility of Inmates
Testimony

ARTICLES:

Article 24 - Discipline
§24.01-Standard
§24.02-Progressive
Discipline
Article 25 - Grievance
Procedure

§25.01-Process

§25.03-Arbitration

Procedures

FACTS:

The grievant was employed as a Correctional Officer at the Dayton Correctional Institution. She was involved in a personal relationship with a parolee before she became a Correctional Officer, and they were scheduled to be married. The parolee was warned by his parole officer that the grievant would have to end the relationship once she began working for the State.

When the parolee had his parole revoked and was sent back to the institution, his parole officer called DCI and asked the warden to conduct an independent investigation. They did so, and on October 11, 1991, the grievant was removed from employment as a Correctional Officer for violation of Standard of Employee Conduct Rule 46(e), Unauthorized Relationships.

EMPLOYER'S POSITION:

The Employer stated that it had just cause to remove the grievant because she violated Rule 46(e) by having a personal relationship with a parolee. In addition, she was afforded proper notice of this rule. She attended a training program which covered the Standards of Employee Conduct and knew or should have known she was required to inform her supervisor that she was involved with the parolee. The State viewed the grievant's behavior as inappropriate because her relationship with the parolee affected her ability to perform her duties as a Correctional Officer by lessening her credibility with her fellow employees and supervisors, which would in turn cause heightened security risks.

The Employer stated that removal was reasonable and commensurate with the offense. Even though Rule 46(e) has a range of penalties attached, removal is appropriate in this instance because the grievant never attempted to mitigate her actions. She was aware of her inappropriate behavior and never disclosed her misconduct to her supervisors. If she had, the Employer might have considered a reduced penalty.

The grievant, after being discharged, continued her relationship with the parolee while he was incarcerated. She visited him, provided him with packaged items and a money order. The Employer stated that because the grievant knew of the work rule violation and exhibited no change in her behavior, even after she was removed, the Employer was additionally justified in removing the grievant.

UNION'S POSITION:

The Employer did not have just cause to remove the grievant and the penalty was too severe considering the circumstances. Most of the Employer's case was based on the parolee's testimony. The parolee was a convicted felon and incarcerated after a parole violation, and hence, a less than credible witness. At times, his testimony was inconsistent.

The grievant denied knowing that the parolee was in fact on parole up to the time of the pre-disciplinary hearing. The grievant's behavior after her removal were not critical to this analysis. Her status at this point did not preclude any relationship with the parolee even though he was incarcerated and her grievance was under appeal.

The Union asserted that several mitigating factors warrant a lesser penalty than removal. The parole officer had knowledge of the relationship much earlier and could have intervened then. The Employer could have forced the grievant to sever the relationship, and she could have been placed in a less compromising position. Also, a lesser penalty was warranted because there is a distinction between an unauthorized relationship with a parolee and an unauthorized relationship with an inmate. In the former case, there is a lesser security risk.

ARBITRATOR'S OPINION:

The grievant did not participate at the hearing. Extensive precautions were undertaken to protect the grievant's due process rights. The record was left open for an additional 24 hours to determine if there were certain circumstances precluding the grievant's appearance, but the Union was unable to determine this. As a result, justifiable inferences may be drawn which are limited to evidentiary facts, but such inferences do not

extend to conclusions of guilt or innocence.

The Employer had just cause to remove the grievant for violating rule 46(e) of the Standards of Employee Conduct. She engaged in an unauthorized personal relationship with a parolee, and the Union failed to rebut critical facts of the Employer's case. It was established beyond a reasonable doubt that the grievant engaged in a long-term relationship with the parolee prior to and following her appointment as a Correction Officer. The grievant failed to disclose this relationship after training involving this specific work rule. The Union failed to support the contention that the grievant didn't know the parolee was in fact on parole. Rather, the grievant admitted in her conversation with the parole officer that she knew the parolee was on parole and realized the potential ramifications. Even though the parolee's credibility was questioned, he was not subpoenaed nor deposed in order to rebut his testimony. In addition, the Union did not establish how it would have benefited the parolee to provide false testimony.

The grievant's post-discharge actions are viewed as exacerbating circumstances justifying removal and are not irrelevant to the discharge. She continued with her misconduct regardless of the knowledge that it violated a work rule. This should not be discounted because the employment relationship does not necessarily end with removal and does not become final until the grievance procedure is fully exhausted. Therefore, the actions engaged in by the grievant after her removal are so serious that reinstatement will not be considered. Potential security risks exist which minimize her ability to perform her work as a Correction Officer.

AWARD:

The grievance is denied.

TEXT OF THE OPINION:

**THE STATE OF OHIO AND OHIO
CIVIL SERVICE EMPLOYEES
ASSOCIATION VOLUNTARY LABOR
ARBITRATION PROCEEDING**

IN THE MATTER OF THE
ARBITRATION BETWEEN

**THE STATE OF OHIO, DEPARTMENT
OF REHABILITATION AND CORRECTION,
DAYTON CORRECTIONAL INSTITUTION**

-and-

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

GRIEVANT:

Audrey Quinn (Discharge)

OCB CASE NO.:

27-07-911021-0089-01-03

ARBITRATOR'S OPINION AND AWARD

Arbitrator:

David M. Pincus

Date:

June 26, 1992

APPEARANCES

For the Employer

Ronald Ford, Institutional Investigator
James R. Stanforth,
Corrections Supervisor I
A. Hasani Stone II,
Labor Relations Officer
Patrick W. Cooper,
Parole Service Officer
Lou Kitchen, Second Chair
Joseph L. Andrews, Advocate

For the Union

Patrick A. Mayer,
Field Representative

INTRODUCTION

This is a proceeding under Article 25, Sections 25.03 and 25.01 entitled Arbitration Procedures and Arbitration Panel of the Agreement between the State of Ohio, the Department of Rehabilitation and Correction, Dayton Correctional Institution, hereinafter referred to as the Employer, and the Ohio Civil Service Employees Association, Local 11, AFSCME, AFL-CIO, hereinafter referred to as the Union for the period July 1, 1989 through December 31, 1991 (Joint Exhibit 1).

The arbitration hearing was held on February 6, 1992 at the Office of Collective Bargaining, Columbus, Ohio. The Parties had selected David M. Pincus as the Arbitrator.

AT the hearing the Parties were given the opportunity to present their respective positions on the grievance, to offer evidence, to present witnesses and to cross examine witnesses. At the conclusion of the hearing, the Parties were asked by the Arbitrator if they planned to submit post hearing briefs. Both Parties indicated they would not submit briefs.

STIPULATED ISSUE

Was the removal of Audrey Quinn, the Grievant, for just cause? If not, what shall the remedy be?

PERTINENT CONTRACT PROVISIONS

ARTICLE 24 - DISCIPLINE

Section 24.01 - Standard

Disciplinary action shall 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.

Section 24.02 - Progressive Discipline

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 reprimand(s);
- C. One or more suspension(s);
- D. Termination

Disciplinary action taken may not be referred to in an employee's performance evaluation report. The event or action giving rise to the disciplinary action may be referred in an employee's performance evaluation report without indicating the fact that disciplinary action was taken.

Disciplinary action shall be initiated as soon as reasonably possible consistent with the requirements of the other provisions of this Article. An arbitrator deciding a discipline grievance must consider the timeliness of the Employer's decision to begin the disciplinary process.

...

(Joint Exhibit 1, Pgs. 37-38)

STIPULATED FACTS

The Grievant, Audrey Quinn, was hired on October 22, 1990. She was removed from employment October 11, 1991.

The grievance is properly before the Arbitrator.

Prior Discipline:

Ms. Quinn served a one day suspension for violation of Standards of Employee Conduct Rule #5 on March 7, 1990. This was the result of wrecking a State vehicle.

CASE HISTORY

Audrey Quinn, the Grievant, has been employed by Dayton Correctional Institution, the Employer, since October 11, 1991 as a Corrections Officer. The Employer is a medium security facility with five-hundred beds. It houses first time offenders between the ages of seventeen to thirty and is located in an urban setting.

Patrick W. Cooper, a Parole Service Coordinator, provided unrefuted testimony regarding the circumstances giving rise to the contested removal. Edward Hicks was assigned to Cooper's caseload upon his release on July 27, 1991; and had his initial visit as a parolee on July 30, 1990. At the beginning of the parole relationship, Cooper had no problem contacting Hicks. Once he acquired employment at Lutheran Social Services, however, Cooper had trouble seeing him at home regardless of how early the meeting was arranged. As a consequence, Cooper had to arrange to meet Hicks at his work location.

Hicks' relationship with the Grievant surfaced in a meeting held on October 2, 1990. Hicks informed Cooper the Grievant was his girlfriend, knew about his prior incarceration and was about to enter the Police Academy as a trainee. Cooper warned Hicks that the relationship must cease once the Grievant became employed by the State of Ohio.

Another conversation took place on December 6, 1990. Hicks arrived at the meeting with Cooper and exclaimed he had just taken the Grievant to her job as a Corrections Officer at Dayton Correctional Institution. Hicks, moreover, noted a marriage had been scheduled for February of 1991. Cooper, once again, warned Hicks his future wife was engaging in a conflict of interest.

He emphasized this point by calling Hicks on December 7, 1990. Cooper told Hicks his organization would not tolerate this behavior. Hicks remarked he would terminate the relationship and would no longer see the Grievant.

A series of subsequent events indicated Hicks might never have complied with Cooper's directive. On August 27, 1991, one of Cooper's subordinates brought in a copy of the Montgomery County Arrest sheets. By reviewing the document he noticed Hicks was listed for disorderly conduct. Upon contacting the complaining party, he realized Hicks was cohabiting with the Grievant.

Based upon a subsequent investigation. Hicks had his probation revoked; he was sent back to the institution. Once Hicks was placed in custody, Cooper called the warden at Dayton Correctional Institution. This contact took place on September 5, 1991. The warden asked Ronald Ford, an Institutional Investigator, to conduct an independent investigation. The findings supported Cooper's initial accusations.

On October 11, 1991, the Grievant was removed from employment as a Correctional Officer. The following infractions were referenced as support for the removal decision:

“ . . .
Standards of Employee Conduct Rule #46e ‘Unauthorized Relationships - Engaging in any unauthorized personal...relationship with a parolee, . . .’
. . .”

(Joint Exhibit 2c)

On October 17, 1991, a grievance was filed alleging the Grievant was removed without just cause. She asked to be made whole (Joint Exhibit 3a).

Neither Party raised substantive nor procedural due process concerns. As such, the grievance is properly before the Arbitrator.

THE MERITS OF THE CASE

The Position of the Employer

In the opinion of the Employer, it had just cause to remove the Grievant for violating Rule #46e of the Standards of Employee Conduct (Joint Exhibit 4).

The Employer alleged the Grievant was afforded proper notice of the Rule in question. The Grievant attended a training program which covered the pertinent material (Joint Exhibit 5), and she signed for the Standards of Employee Conduct (Joint Exhibit 4). As such, the Grievant knew, or should have known. she was required to inform her supervisor she had been involved with, or was having a relationship with anyone on parole or within the institution.

Several divergent sources were used to establish the unauthorized relationship. Residents in the apartment complex attested to Hicks' presence on a continuous basis. Hicks' arrest at the Grievant's residence for disorderly conduct underscored the depth of the relationship (Employer Exhibits 3a and b). By posting bond for Hicks (Employer Exhibit 4), the Grievant further clarified the extensive nature of her relationship with Hicks. Post discharge conduct was also introduced as exacerbating evidence of the depth of their relationship. The Grievant visited Hicks and provided him with a package of sundry goods (Employer Exhibits 5, 6, and 7) as well as a money order (Employer Exhibit 8).

The Grievant's actions were viewed as inappropriate because nexus existed between her actions and her ability to perform her duties as a corrections officer. A. Hasani Stone, the Labor Relations Officer, provided testimony in support of this argument. He noted the Grievant's relationship would compromise her position and would lessen her credibility with her fellow employees and supervisors. Circumstances of this sort would cause heightened security risks and jeopardize the Employer's mission.

The administered penalty was viewed as reasonable and commensurate with the offense. Stone acknowledged a Rule 46e violation has a range of penalties attached to the contested offense. And yet, removal rather than a lesser penalty was appropriate in this instance considering the Grievant never attempted to mitigate her actions. Even though she was well-aware of her inappropriate behavior early on in the relationship, she never disclosed her misconduct to her superiors. If she had engaged in similar actions, the Employer might have considered a reduced penalty.

The Position of the Union

In the opinion of the Union, the Employer did not have just cause to remove the Grievant. The nature of the supporting evidence, post discharge activity, and the severity of the penalty within the circumstantial net surrounding the removal were questioned by the Union.

Most of the Employer's case was focused on testimony gathered by interviewing Hicks; a convicted felon and presently incarcerated after a parole violation. As such, his views of the episode should be discounted as incredible. In fact, Stone testified Hicks provided inconsistent testimony during one point of the investigation process. Stone maintained Hicks initially claimed he told the Grievant from the start of the relationship that he was on parole. And yet, in his written statement (Employer Exhibit 1) Hicks noted he told her sometime in March or February of 1991. Hicks stood to gain from his relationship with the Grievant because of his emotional attachment, a relationship he cherished and wished not to sever.

Hicks' testimony conflicted with the Grievant's purported version of the events. She denied knowing the Grievant was on parole up to the time of the pre-disciplinary hearing.

The Grievant's actions after her removal were not thought to be critical to the present analysis. Her status did not preclude any relationship with Hicks even though he was incarcerated and her grievance was under appeal.

Several mitigating factors were offered by the Union in an attempt to convince the Arbitrator that a lesser penalty was more appropriate. Cooper had knowledge of the relationship quite early during the affair, and could have intervened by providing the Employer with pertinent information. Armed with this information, the Employer could have forced the Grievant to sever the relationship. The Grievant, moreover, could have been placed in a less compromising position which would have lessened the security risks raised by the Employer. The Union also felt a lesser penalty was in order because it distinguished between an unauthorized relationship with a parolee as opposed to an inmate. The former relationship format was not viewed as dastardly because security risks and potential manipulation attempts would be minimized. Also, the Grievant never used Hicks' status to her benefit as a Corrections Officer; which meant security of the facility was never compromised by the relationship.

THE ARBITRATOR'S OPINION AND AWARD

A few preliminary comments are in order regarding the Grievant's non-participation at the hearing. Extensive precautions were undertaken to protect the Grievant's due process rights. At the hearing, the Union stated it had contacted the Grievant prior to the hearing informing her of the time and location of the arbitration hearing. A telephone contact was also attempted at approximately 9:30 a.m. prior to the start of the hearing. The Union's advocate spoke with the Grievant's neighbor; she was used as a contact person in the past to convey arbitration related information. She noted she had spoken to the Grievant the night before and maintained the Grievant had left her home early in the morning.

The hearing was opened even though the Grievant was not in attendance. Several additional contacts were attempted by the Parties and the Arbitrator. The Employer concluded its side of the case at noon. The Arbitrator directed the Union's advocate to once again attempt to contact the Grievant; this effort also failed. At the conclusion of the hearing, the Union's advocate requested the record remain open for twenty-four (24) hours to ascertain whether certain circumstances precluded the Grievant's attendance. If the Union was fortunate enough to determine special circumstances existed, it would formally proffer a notion to re-open the hearing. To avoid any ex-parte concerns, the notion would be made via a teleconference with an Employer representative in attendance to offer argument contesting the notion. There was no need for a teleconference; the Union was unable to determine whether certain limiting condition frustrated the Grievant's appearance.

Like other arbitrators, I am of the opinion certain justifiable inferences might be drawn from the Grievant not being present at the hearing. When one refuses to testify, inferences can be drawn which are limited to evidentiary facts. These inferences, however, do not extend to ultimate conclusions of guilt or innocence.

For example, un rebutted evidence resulting from a grievant's failure to appear can lead to removal. Removal results because certain evidence has been left un rebutted providing a sufficient basis to satisfy a reasonable mind of guilt. As such, the charge has been independently established.^[1]

In my judgment, the Employer had just cause to remove the Grievant for violating Rule 46e of the Standards of Employee Conduct. She engaged in an unauthorized personal relationship with a parolee. The Union, moreover, failed to properly rebut critical facets of the Employer's case which precluded modification of the implemented penalty.

It was established beyond a reasonable doubt the Grievant engaged In a long term relationship with Parolee Hicks prior to and following her appointment as a Corrections Officer. Testimony provided by Cooper properly supported the timing of these events. His warnings were discounted; and the Grievant failed to disclose the matter after orientation and training involving the specific work rule.

Several arguments were offered by the Union, but none were supported by evidence nor testimony. The Union maintained the Grievant denied knowing Hicks was a parolee; nothing in the record suggested this account. Rather, the Grievant, in her conversation with Cooper, admitted she knew Hicks was a parolee and realized the potential negative ramifications attached to the relationship. Hicks' credibility was questioned, yet, he was never subpoenaed nor was a deposition taken to rebut his initial portrayals. His actions were also viewed as self-serving. The Union, however, did not establish the benefits to be realized as a consequence of the disclosures. Both the Grievant and Hicks had equally identifiable emotional and personal motivations attached to the relationship. Hicks' credibility cannot be automatically reduced because of his standing as an inmate/parolee. Such argument must be supported so that the appropriate inferences may be established.

The Arbitrator must also disagree with the Union regarding the emphasis placed on the Grievant's post-discharge actions. Here, the Grievant's post-discharge actions so closely related to the event or events leading to discharge, that they are viewed as exacerbating circumstances justifying removal. These latter events are not irrelevant to the discharge. After her removal, the Grievant continued her relationship with Hicks while he was incarcerated. She visited Hicks, provided him with packaged items and signed a money order. By this time, she was well-aware of the work rule dealing with unauthorized relationships, but she continued with her misconduct.

Neither the Union nor the Grievant should discount these actions because in some instances the employment relationship does not necessarily end with removal. The matter does not become final until an employee has fully exhausted the grievance procedure up to the point where an arbitrator renders a decision. Here, the actions engaged in by the Grievant after her removal are so serious that reinstatement is considered futile by the Arbitrator. Potential security risks existed during her relationship with Parolee Hicks which minimized her ability to perform her work as a Corrections Officer. Her more recent involvement nullified any possibility of adequate performance. She definitely represents a high security risk. I will not allow her to jeopardize the safety of inmates and other personnel.

AWARD

The grievance is denied. The Employer had just cause to remove the Grievant.

Dr. David M. Pincus, Arbitrator

June 26, 1992
Date

^[1] Southern Bell Telephone & Telegraph Co., 25 LA 270 (McCoy, 1955); United Parcel Service, 45 LA 1050 (Turkus, 1965).

