

ARBITRATION DECISION NO.

695

UNION:

OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:

Ohio Department of Rehabilitation and Correction

DATE OF ARBITRATION:

January 20, 1999

DATE OF DECISION:

February 22, 1999

GRIEVANT:

Alfonso Underwood

OCB GRIEVANCE NO.:

27 33 (98 07 13) 0050 01 03 T

ARBITRATOR:

Nels. E. Nelson

FOR THE UNION:

James McElvian, Advocate

FOR THE EMPLOYER:

Beth A. Lewis, Advocate

Bob Elias, Labor Relations Officer

KEY WORDS:

Hearsay

Just Cause

Mitigation

Progressive Discipline

Removal

Seniority

ARTICLES:

Article 24 - Discipline

§24.01 - Standard

§24.02 - Progressive Discipline

§24.05 - Imposition of Discipline

FACTS:

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Prior to being hired as a correction officer at the Trumbull Correction Institution in October 19, 1992, the grievant had become acquainted with the parolee. In 1992 and 1993 they had sexual relations on a few

occasions which the grievant described as "one night stands."

On March 10, 1994, the parolee was convicted of involuntary manslaughter. On September 22, 1995, she was sent to the Ohio Reformatory for Women at Marysville for violating the terms of her probation. After she was released on May 31, 1996 and placed on parole for two years, the parolee and the grievant resumed their relationship. On July 14, 1996, the grievant filed an incident report. He indicated that he was acquainted with the parolee only as a friend, and that she had a brother and an uncle in his unit at TCL.

On September 29, 1997, the parolee told her parole officer that she was pregnant, and she identified the grievant, a married correction officer at TCI, as father of her child. The parole officer completed an incident report and sent a copy to an investigator at TCL. An investigation followed. During the investigative process, the parolee and her mother picked out the grievant from a number of photographs of individuals that resembled the grievant.

On April 29, 1998, in an interview with a warden's assistant at TCI, the grievant acknowledged that the parolee told him she had been in prison, and he admitted that he had had sex with her twice after she was released from prison. At the pre disciplinary hearing on May 13, 1998, the grievant submitted a written statement claiming that his admission at the investigatory interview was an "interview statement only."

The hearing officer, in his report issued on May 19, 1998, acknowledged that the grievant had attempted to retract the statement he gave at his investigatory interview. The officer concluded, however, that there was just cause for discipline under Rules 46(d) "committing any sexual act with an inmate, furlougee, parolee, or probationer" and 46(e) "committing any sexual act with any individual under the supervision of the Department." On May 28, 1998, the grievant was notified that he was being removed effective July 6, 1998.

The grievant filed a grievance on July 18, 1998. When the case was not resolved, it was appealed to arbitration. At the hearing on January 20, 1998, the state dropped the charge that the grievant violated 46(d).

EMPLOYER'S POSITION:

The Employer argued that the grievant violated Rule 46(e) of the Standards of Employee conduct. The only penalty listed for violating the rule is removal. Once the grievant learned the parolee had been sent to prison, he should have known that she was on parole. The Employer maintained that the grievant had an affirmative duty to find out the parolee's status. .

The Employer charged that there were a number of discrepancies in the grievant's testimony. The incident report submitted by the grievant was an attempt to cover up his relationship with the parolee. The report states that they were "only friends." The grievant committed a serious offense. His actions jeopardized his security and put others at risk. Security is of the highest importance. There is just cause to remove the grievant.

UNION'S POSITION:

The Union argued that the Employer's case was suspect. The Employer did not call Parolee to testify at the arbitration hearing but relied upon hearsay testimony. The Employer's three trained investigators did not even get a signed statement from Davis.

The Union contended that there was no proof that the grievant knew that the parolee was under supervision of the department. The grievant testified that the parolee never told him that she was on parole. Her statement that she would have to go back to prison if she hit someone did not necessarily mean that she was on parole.

The Union challenged the parolee's alleged statements. She did nothing until she thought that she was pregnant and feared being sent back to prison. The parolee implicated the grievant in order to save herself. She started to recant her story when she was released from parole.

The Union questioned the state's response to the incident report filed by the grievant after he learned that the parolee had a brother and an uncle in TCL. The Employer did nothing after the report was filed; its policy, however, in such cases is to transfer inmates to another institution.

ARBITRATOR'S OPINION:

The grievant was discharged for violating Rule 46(e) of the Standards of Employee Conduct. The penalty specified for the violation of the rule is removal.

The Arbitrator gave only very limited weight to the parole officer's testimony, because it is hearsay, and because any statement by the parolee is suspect. She is a convicted felon who was returned to prison for violating the terms of her parole.

The Employer placed primary reliance on the grievant's statements at the investigatory interview, where the grievant admitted having sex with the parolee after she had told him that she had been to prison. First, the Arbitrator rejected the grievant's attempt to change the statements he made at his investigatory interview. Secondly, the Arbitrator rejected the claim that the grievant's admission that he knew that the parolee had been in prison does not indicate he knew that she was under the supervision of the department. Testimony was consistent with other factors that suggested that the grievant knew that Parolee was on probation.

The Arbitrator recognized that removal is a severe penalty. Any relationship between a correction officer and a person under the supervision of the department creates a threat to the security and safety of employees and inmates, and justifies strict rules and harsh penalties.

The final issue was mitigation of the penalty. Long service could not be considered because the grievant had less than six years of seniority. Neither did he have a clean disciplinary record; he had two written reprimands, a one day suspension, and a three day suspension.

AWARD:

The grievance was denied.

TEXT OF THE OPINION:

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ARBITRATION DECISION

February 22, 1999

In the Matter of:

State of Ohio, Department of
Rehabilitation and Correction

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) Case No. 27 33 980713 0050 01 03 T
) Alfonso Underwood, Grievant

and)
)
Ohio Civil Service Employees Association,)
AFSCME Local 11)

APPEARANCES

For the State:

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Beth A. Lewis, Advocate
Bob Elias, Labor Relations Officer
Brad Windle, Parole Officer
Sharon Chilson, Investigator
Frank Shewalter, Warden's Assistant
Jevonda Hill, Captain
Mike Wylie, Lieutenant

For the Union:

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James McElvain, Advocate
Alfonso Underwood, Grievant
Fred Koehnlein, Chapter President
Condie Bright, Chapter Vice President

Arbitrator:

Nels E. Nelson

* * *

BACKGROUND

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The grievant is Alfonso Underwood. He was hired as a correction officer at the Trumbull Correction Institution by the Department of Rehabilitation and Correction on October 19, 1992. Prior to being hired, the grievant had become acquainted with Katherine Davis. In 1992 and 1993 the grievant and Davis had sexual relations on a few occasions which the grievant described as "one night stands."

On March 10, 1994 Davis was convicted of involuntary manslaughter. She was sentenced to 5 to 25 years in prison but was placed on probation for two years. However, on September 22, 1995 Davis was sent to the Ohio Reformatory for Women at Marysville for violating the terms of her probation. She remained there until May 31, 1996 when she was released and placed on parole for two years. When Davis was released, she and the grievant resumed their relationship.

On July 14, 1996 the grievant filed an incident report. He indicated that he was acquainted with Davis and that she had a brother and an uncle in his unit at TCL. The grievant stated that Davis was "only a friend" and that he was reporting his relationship with Davis because he was seeing her more often and because she had asked him about her brother and uncle and they had asked him about her.

Jevonda Hill, a special duty Captain, testified that she received the incident report. She indicated that she did not believe that there was any problem because she did not know that there was a sexual relationship between the grievant and Davis. Hill asserted that if she had known that there was a sexual relationship, Davis's brother and uncle would have been transferred to another facility.

On September 29, 1997 Brad Windle, Davis's parole officer, visited her at her home. She told him that she believed that she was pregnant and identified the grievant as the father of her child. Davis told Windle that the grievant was a correction officer at TCI and was married. Windle completed an incident report and sent a copy to Sharon Chilson, an investigator at TCI. **1**

The record indicates that on November 23, 1997 the grievant was transferred to the Ohio State Penitentiary. However, there was no testimony regarding the reason for his transfer and no suggestion that it was related to the incident report he had filed

On January 5, 1998 Chilson contacted Windle. She asked him to have Davis and her mother identify the grievant from a number of photographs of individuals who resembled the grievant. On February 4, 1998 Windle informed Chilson that Davis and her mother had picked out the grievant from the photographs. He added that Davis stated that the grievant was aware that she was "under supervision of the Adult Parole Authority and that he encourage[d] her to be at her scheduled visits with her P.O. "

On April 29, 1998 the grievant was interviewed by Frank Shewalter, a warden's assistant at TCL At that time the grievant acknowledged that Davis told him that she had been in prison and he admitted that he had sex with her twice after she got out of prison. He indicated that the last time was about one year earlier. The grievant was notified that a pre disciplinary hearing was scheduled for May 13, 1998. He was told that he was being charged with violating Rule 46(d) "committing any sexual act with an inmate, furlougee, parolee, or probationer" and Rule 46(e) "committing any sexual act with any individual under the supervision of the Department."

At the Pre disciplinary hearing the grievant submitted a written statement. In it he claimed that his admission at the investigatory interview that he had sex with Davis after he learned that she had been in prison was an "interview statement only." The grievant claimed that he could not say if he had sexual relations with Davis after she told him she had been in prison and that no one present at the hearing could say when it occurred. He maintained that he should be given the benefit of the doubt on the issue.

The hearing officer issued his report on May 19, 1998. He acknowledged that the grievant had attempted to retract the statement he gave at his investigatory interview where he admitted that he had sex with Davis after he found out that she had been in prison. However, the hearing officer concluded that there was just cause for discipline

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under Rules 46(d) and 46(e). As a result, on May 28, 1998 the grievant was notified that he was being removed effective July 6, 1998.

The grievant filed a grievance on July 18, 1998. He charged that his removal was unwarranted and

improper. The grievant asked to be reinstated as a correction officer and to be made whole,

When the case was not resolved it was appealed to arbitration. The hearing was held on January 20, 1999. At that time the state dropped the charge that the grievant violated Rule 46(d). The hearing concluded with closing statements by both parties.

ISSUE

The issue as agreed to by the parties is as follows:

Was the grievant terminated for just cause? If not, what shall be the remedy?

RELEVANT CONTRACT PROVISIONS

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.

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 oral reprimand(s) (with appropriate notation in employee's file);
- B. one or more written reprimand(s),
- C. a fine in an amount not to exceed two (2) days pay for discipline related to attendance only; to be implemented only after approval from OCB;
- D. one or more day(s) suspension(s);
- E. termination.

24.05 Imposition of Discipline

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Disciplinary measures imposed shall be reasonable and commensurate with the offense and shall not be used solely for punishment.

STATE POSITION

The state argues that the grievant violated Rule 46(e) of the Standards of Employee conduct. It prohibits "committing any sexual act with any individual under the supervision of the Department." The state notes that the only penalty listed for violating the rule is removal.

The state maintains that the grievant admitted violating Rule 46(e). It points out that at the investigatory interview the grievant acknowledged that he knew that Davis had been sent to prison and confirmed that he had sex with her after he learned that she had been in prison. The state notes that at the investigatory interview the grievant was warned that he had to be truthful or he would face further discipline.

The state charges that the grievant changed his position after the investigatory interview. It rejects the union's claim that the grievant was confused by the questions he was asked. The state reports that Shewalter read the questions and the grievant's answers to him before he signed the statement. It notes that

Shewalter and Lieutenant Mike Wylie testified that the grievant was calm and did not appear to be confused.

The state challenges the union's claim that the grievant did not know that Davis was under the department's supervision. It contends that once the grievant learned she had been sent to prison, he should have known that she was on parole. The state maintains that he had an affirmative duty to find out Davis's status. It stresses that a correction officer is not in a position where a "don't ask, don't tell" policy is appropriate.

The state charges that there were a number of discrepancies in the grievant's testimony. It observes that while the incident report the grievant filed states that he was seeing Davis more often, he testified at the arbitration hearing that he was seeing her less. The state indicates that at the arbitration hearing the grievant claimed that he had sex with Davis only twice before she went to prison while at the investigatory interview he

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indicated that he had sex with her three times before she was in prison and twice after her release.

The state contends that the incident report submitted by the grievant was an attempt to cover up his relationship with Davis. It points out that the report does not indicate that he had sexual relations with her but states that they were only "friends." The state notes that Jevonda Hill, the captain who received the report, testified that if the grievant had indicated that he had sexual relations with Davis, there would have been a further investigation and action would have been taken.

The state emphasizes that the grievant committed a serious offense. It contends that his actions jeopardized his security and put others at risk. The state maintains that security is of the highest importance.

The state concludes that there is just cause to remove the grievant. It asks the Arbitrator to deny the grievance in its entirety.

UNION POSITION

The union argues that the state's case is suspect. It points out that the state did not call Davis to testify at the arbitration hearing but relied upon hearsay testimony. The union complains that the state's three trained investigators did not even get a signed statement from Davis.

The union contends that there is no proof that the grievant knew that Davis was under the supervision of the department. It notes that the grievant testified that Davis never told him that she was on parole. The union further maintains that her statement that she would have to go back to prison if she hit someone, did not necessarily mean that she was on parole. It stresses that no one ever asked the grievant if he knew that Davis was on parole.

The union challenges Davis's alleged statements. It asserts that Davis did nothing until she thought that she was pregnant and feared that she would be sent back to prison.

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The union accuses Davis of implicating the grievant in order to save herself. It observes that she started to recant her story when she was released from parole.

The union questions the state's response to the incident report filed by the grievant. It states that he followed proper procedures by filling an incident report after he learned that Davis had a brother and an uncle in TCI. The union indicates that the state did nothing after the report was filed even though its policy in such cases is to transfer inmates to another institution.

The union concludes that the grievant deserves to be reinstated with full back pay and seniority.

AN ALYSIS

The grievant was discharged for violating Rule 46(e) of the Standards of Employee Conduct. It prohibits "committing any sexual act with any individual under the supervision of the Department." The penalty specified for the violation of the rule is removal.

The state's case against the grievant is based in part on the report and testimony of Windle. He stated that Davis told him that she believed that she was pregnant and that the grievant was the father of her child. Windle indicated that the grievant knew that she was under the supervision of the department because he encouraged her to keep her appointments with her parole officer.

The Arbitrator can give only very limited weight to Windle's testimony. First, it is hearsay testimony which experience has demonstrated is unreliable. Second, any statement by Davis is suspect. She is a convicted felon who violated the terms of her parole which resulted in her being returned to prison.

The state placed primary reliance on the grievant's statements at the investigatory interview. The relevant part of the record of the interview is as follows:

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Q.2. Did you have sex with her since you've been a c.o.?

A.2. Yes.

Q.3. When?

A.3. After she came back into town. I ran into her. She told me she had been to prison.

Q.4. Did you have sex with her after she told you she had been to prison?

A.4. Yes. Once in a Blue Moon. Maybe 3 times total. 2 times after she got out of prison.

Q.5. When was the last time?

A.5. About a year ago. (Joint Exhibit 2, page 13).

Two issues must be addressed regarding the grievant's interview. The first is the grievant's attempt to recant. At the investigatory interview the grievant clearly indicates that he had sex with Davis twice after he learned she had been in prison with the last occasion being about a year prior to the interview. At the pre disciplinary meeting the grievant presented a statement suggesting that he did not have sex with Davis after he learned of her imprisonment. His statement indicates:

I said in my interview with Mr. Shewalter on 04/29/98 yes I had sex after she told me the above history. But that was a interview statement only. If I had to answer a sworn question and my life and job was on the line

my answer would have been uncertain. Can any one present or who could be present put forth and bet his/her life or job on when I last had a sexual encounter with "Shawn Davis" and when she told me all the history on herself Show it to me (film), play it to me (tape) or the physical evidence before me and this hearing board. Any one here was with me or can verify me and "Shawn Davis" every run in and sexual encounter also what was said. I can't to a sure fact give the exact dates, times and places along with conversation, how can any one present. (Joint Exhibit 8, page 2).

The Arbitrator must reject the grievant's attempt to change the statements he made at his investigatory interview. At the beginning of the interview the grievant was told that he must be truthful or he would face further discipline. He had union representation and there was no indication that he was pressured or confused. The questions to the grievant and his answers were reviewed with him before he signed each page of the record. This

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suggests that the grievant's attempt to change his story is simply an attempt to escape the discipline that was imposed on him based on his admissions.

The second issue regarding the grievant's investigatory interview is the union's claim that the grievant's admission that he knew that Davis had been in prison does not indicate he knew that she was under the supervision of the department.

The Arbitrator must reject this claim. He believes that the grievant knew or should have known that Davis was under the supervision of the department. First, as a correction officer the grievant would have known that when an inmate is released from prison, it would not be unusual for the individual to be on parole. Second, the grievant's testimony at the hearing that he did not ask Davis whether she was on parole because his relationship with her was not "deep," suggests that the question occurred to him. Given the rule against sexual relations with individuals under the supervision of the department, it was the grievant's responsibility to ask Davis about her status. Third, the grievant testified at the arbitration hearing that at some point in time, Davis said that she would not hit a woman because she would be sent back to prison. This statement ought to have indicated to the grievant that Davis was on parole where another offense would result in her being returned to custody. At the least, it should have prompted an inquiry by the grievant. Fourth, while Windle's hearsay testimony that Davis told him that the grievant encouraged her to see her parole officer as scheduled can be given very minimal weight, it is consistent with other factors that suggest that the grievant knew that Davis was on probation.

The grievant's testimony that he did not know that Davis was under the supervision of the department is not very credible. First, as indicated above, it appears that the grievant inappropriately attempted to change the position he took in the investigatory interview to avoid the consequences of the actions he had acknowledged took place. Second, the incident report that the grievant filed on July 14, 1996 describes Davis as only a "friend" when in fact they were having sexual relations. If the grievant had

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been truthful about the nature of their relationship, there is little doubt that the response of the department would have been different.

The Arbitrator recognizes that removal is an extremely severe penalty. However, any relationship

between a correction officer and a person under the supervision of the department can put the correction officer in a position where he can be manipulated. The threat that this creates to the security and safety of employees and inmates justifies strict rules and harsh penalties for the violation of the rules.

The final issue to be considered is the question of mitigation of the penalty. Long service is frequently considered a factor which serves to mitigate a penalty but in the instant case the grievant has less than six years of seniority. A clean disciplinary record is also used to mitigate a penalty. However, the grievant has two written reprimands for failing to provide a physician verification when requested, a one day suspension for insubordination, and a three day suspension for sleeping on duty.

Based on the above analysis, the Arbitrator must deny the grievance.

AWARD

The grievance is denied.

Nels E. Nelson
Arbitrator

February 22, 1999
Russell Township
Geauga County, Ohio

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