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VOLUNTARY LABOR ARBITRATION TRIBUNAL

GRIEVANCE COORDINATOR

In the Matter of Arbitration *
 Between *
 OHIO CIVIL SERVICE *
 EMPLOYEES ASSOCIATION *
 LOCAL 11, AFSCME, AFL/CIO *
 and *
 OHIO DEPARTMENT OF *
 REHABILITATION AND *
 CORRECTIONS *

OPINION AND AWARD

Anna DuVal Smith, Arbitrator

Case No. 27-34(001127)-0172-01-03

Joyce Bailey, Grievant

Removal

APPEARANCES

For the Ohio Civil Service Employees Association/AFSCME Local 11/AFL-CIO:

James McElvain, Staff Representative
Ohio Civil Service Employees Association/AFSCME Local 11/AFL-CIO

For the Ohio Department of Rehabilitation and Corrections:

David Burrus, Labor Relations Officer
Jacqueline Visintine, Labor Relations Officer
Ohio Department of Rehabilitation and Corrections

I. HEARING

A hearing on this matter was held at 10:00 a.m. on July 24, 2001, at the Richland Correctional Institution in Mansfield, Ohio, before Anna DuVal Smith, Arbitrator, who was mutually selected by the parties, pursuant to the procedures of their collective bargaining agreement. The parties stipulated the matter is properly before the Arbitrator and presented one issue on the merits, which is set forth below. They were given a full opportunity to present written evidence and documentation, to examine and cross-examine witnesses, who were sworn or affirmed and excluded, and to argue their respective positions. Testifying for the Ohio Department of Rehabilitation and Corrections (the "State") were Russell Albright, Institutional Investigator, Dennis Sizemore, Special Projects Specialist, Oriana House; and Sandra L. Sturm, Citizen. Testifying for the Ohio Civil Service Employees Association/AFSCME Local 11/AFL-CIO (the "Union") were Correction Officers Tereasa Brady and Roy Steward; Dillard Bailey, Jr., husband of the Grievant; and the Grievant, Joyce Bailey. A number of documents were entered into evidence: Joint Exhibits 1-7A-C, State Exhibit 1 and Union Exhibits 1-3. The oral hearing was concluded at 3:00 p.m. following oral summation, whereupon the record was closed. This opinion and award is based solely on the record as described herein.

II. STATEMENT OF THE CASE

This case concerns the removal of a correction officer for an alleged unauthorized relationship with an inmate and falsification of her report of a relationship with another inmate's mother.

The Grievant was employed on January 28, 1999, and received training and a copy of the Standards of Employee Conduct in due course. From at least November 1999 she was assigned to dormitory H3C at Richland Correctional Institution ("RiCI") where she worked third shift (10 p.m.-6 a.m.). Among the inmates she supervised were James Kempf and Frank Sturm, both of whom were porters at various times and who had a history of drug use. The Grievant testified, with the corroboration of fellow officer Tereasa Brady, that she reported Inmate Kempf for suspected drug use. When he tested positive, he was placed in segregation. According to the Grievant, she never saw him again. Kempf was paroled to Oriana House, a half-way house and substance abuse treatment facility in Akron on March 6, 2000. On March 24 he went AWOL from the facility. Near the end of April, the Grievant's bank reported overdrafts on her and her husband's checking account. Upon investigation, five checks were found to be missing from their checkbook (#4218, 4219, 4220, 4210 and 4211). The three which had already been presented were made out to James Kempf and signed with the Grievant's name. The Grievant and her husband closed the account and reported the forgery and theft to the Richland County Sheriff on April 28. A month later, on June 1, Kempf was arrested by the Summit County Sheriff. When interviewed, he said he had been given the checks by the Grievant whom he had met while at RiCI and where she had brought drugs in for inmates. He also claimed he had had a sexual relationship with her since his release. His parole officer reported these allegations to RiCI Investigator Russell Albright.

When Albright interviewed the inmate on June 6, Kempf told him the Grievant had picked him up when he was released from RiCI and taken him to Akron. Kempf described vehicles driven by the Grievant, knew her address and partial phone number. He also gave the

names of motels in the area where they allegedly stayed and dates of meetings. In addition, Kempf had a letter on him dated May 11, 2000, from Inmate Sturm to "Missy" (with whom Kempf allegedly stayed while AWOL from Oriana) which contains several allegations of an inappropriate relationship between "Joyce" and "Jimmy." Albright obtained bank records and motel receipts (one showing the Grievant had been registered as a party of two on March 23-24 (a date she had called off work sick) and again on March 29, listened to recordings of Inmate Sturm's phone calls to his parents, interviewed Sturm's parents and subpoenaed the Grievant's phone records. The latter showed a 64-minute collect phone call to the Grievant's number at 5:01 a.m. on March 7 from a pay phone at Oriana House as well as several calls to the Sturm residence on April 2. The Grievant's phone number was changed on June 6. Albright interviewed the Grievant on August 30, the Sturms on September 1, and the Grievant again on September 18. The Sturms told Albright that they met the Grievant through Kempf and never knew her before. Mrs. Sturm said she saw the Grievant once when she came to the house looking for Kempf and perhaps another three times at the house, all in the company of Kempf. She also saw her at the restaurant where she, Mrs. Sturm, worked at the time. The first time they saw the Grievant was about a week after Kempf was released from RiCI. Another time was towards the end of March or early April when Mrs. Sturm helped the Grievant cash a \$250 check. She could not remember seeing or signing the check, but went into the bank with the Grievant, then saw her give the money to Kempf. The Grievant's car was little and tannish brown. Once the Grievant called her using a calling card and told her she was going to fill out a nexus report, but Mrs. Sturm told her she would not lie for her. The Sturms also said Kempf stole from them and their neighbor. In arbitration Mrs. Sturm added that she collects Boyds

Bears and that the Grievant knew that when she first came to the house, but that no one at work knows she does. She also said she took Kempf to Oriana House the night he got out of RiCI, but denied she visited him there or went back there the next day. She denied having a conversation with the Grievant about where to stay, but said there are only two places in the area. She never saw the Grievant and Kempf at a motel together, but insisted there is no question the Grievant and Kempf came to her house together and that the Grievant knew her own son, Frank, was incarcerated. On cross-examination, she said her husband had been convicted of a felony and her older son is presently incarcerated.

In her interviews, the Grievant denied receiving or making phone calls to any person under the supervision of the Department, bringing any contraband into RiCI, having sexual relations with Kempf or cashing a check for him. She admitted that she had been in the Akron area earlier in the year, but said this was to shop. She also admitted she knew Mrs. Sturm and cashed a check for her, but said she had filed a nexus report (on May 14, 2000) when she learned Mrs. Sturm's son was incarcerated at RiCI. She did not know how Kempf would have gotten her checks unless he took them from her handbag at RiCI and she had no explanation for the 64 minute collect call from Oriana House. In arbitration, the Grievant testified she travels around quite a lot to collect Boyd Bears. Sometimes she stays overnight so she can continue her shopping the next day, and sometimes she shops with her daughter. She met Sandra Sturm on one of these trips, she said, at the restaurant where Mrs. Sturm works. Having Boyds Bears in common, they "clicked." Mrs. Sturm recommended a motel to her, and she did stay there, but never with an inmate. Once she went to the Sturm house briefly to see Mrs. Sturm's bear collection. Another time she called Mrs. Sturm at home to see about getting a check cashed.

When she saw Inmate Sturm's name on the roster, she asked Mrs. Sturm about it. Learning the inmate was her friend's son, the Grievant told Mrs. Sturm she would have to report it and would not be able to talk to her again, then she followed through on these intentions. She does not know why Mrs. Sturm would lie about her unless to help her son, but Mrs. Sturm never saw her with Kempf. She did not even know the payee on the stolen checks was an ex-inmate until the prosecutor called her after he was arrested. She did call off and stay overnight on March 24 because she developed a migraine while shopping, but she did not have anyone with her and thinks the "2" in the "No. in Party" place on the form is written in a different hand than the other 2s on the form. On March 29, she was working. In her opinion, Kempf had plenty of opportunity to learn personal details about her including where she was on March 24.

On October 9, Albright filed a report of his investigation concluding that the Grievant had an unauthorized relationship with Inmate Kempf, falsely documented a relationship with the Sturms when, in fact, it was with Kempf, and that she called off sick on March 24 when she was really staying at a motel with him. A pre-disciplinary conference was duly scheduled for October 20 and held on that date. The hearing officer found just cause for the unauthorized relationship and falsification of the nexus document. The Grievant was terminated from her employment on November 22, 2000. This action was grieved on November 27 and duly processed without resolution to arbitration where it presently stands free of procedural defect for final and binding decision. Meanwhile, Kempf pled guilty to forgery.

III. ISSUE

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

IV. ARGUMENTS OF THE PARTIES

Argument of the State

The State argues that two rules were violated, each of which carries the penalty of removal for a first offense depending on its severity. In weighing the credibility of what the State offers, the State asks that the Arbitrator take into consideration the Grievant's relatively short tenure. Yes, some of the evidence is circumstantial, but some is not, and it all should be evaluated in context.

Specifically, the State asks the Arbitrator to consider the following:

- The Grievant worked on H3C, where both inmates were housed and were porters at various times.
- Kempf was indicted for and pled guilty to forgery, not theft.
- Kempf said they stayed at a certain motel in Barberton. Registrations prove she did. How did he know unless the Grievant told him or they both were there?
- The forged checks were from the Grievant's checkbook. She had to know at least by April 28 that he had them, but she did not come forward. A reasonable person who remembered the name of an inmate, as the Grievant did per her investigatory interview, would have followed through. This is what she was trained for. Perhaps if she had come forward at this time, her story would be credible.
- There was a series of phone calls to Inmate Sturm's mother's house and a 64-minute collect call from a payphone at Kempf's halfway house at 5:01 a.m. the morning after he arrived there. As testified to by Sizemore, the phone are turned on at 5 a.m. and there are no visitors until after 9 a.m. The Union says it called the number and spoke to someone claiming to be a visitor, but who and where is this anonymous visitor? The State submits that the Grievant has only been evasive about the call, so it stands un rebutted.
- The bank records, with check numbers and dates, speak for themselves.
- Mrs. Sturm, who testified voluntarily, had much to offer substantively, such as the trip to the bank and not having met the Grievant until the inmate brought her to

the house. The Grievant admits being at the house and going to the bank, but leaves out critical details such as the presence of the inmate.

The State submits that when all is considered, it has established that there was an unauthorized relationship between the Grievant and Kempf.

Regarding the charge of falsifying the nexus form, the State says it all depends on whom one believes, Mrs. Sturm or the Grievant. It asks the Arbitrator to look at when the form was filled out and when the Grievant knew that Mrs. Sturm's son was an inmate she supervised. Mrs. Sturm, who had no qualms in arbitration talking about her husband's and older son's record, told the Grievant early on that one of her sons was at RiCI. The Grievant should have reported it as soon as she knew. That she did not implies she had something to hide.

Finally, regarding the Union's defense that all this was some sort of conspiracy, the State points out that what is missing is someone to take credit for it. It asks the Arbitrator to review the recorded telephone conversations, which were made before the State knew what was going on. The content of those tapes, which is unrebutted, substantiates what the State submits is the truth. Accordingly, the State asks that the removal be upheld and the grievance be denied.

Argument of the Union

The Union asks, if there was a conspiracy, which side was conspiring? What it urges the Arbitrator to consider is the following:

- Kempf is under the supervision of the State. If he is so credible, why was he not called to testify? Instead, the State relies on the interview notes, which were not signed or dated. The State came up empty on the drug allegation and it offered no proof he was only convicted of forgery. The Union submits that since the inmate lied about the drugs, all his statements are false. Its theory of the case is that the inmate made up the story to help himself with his own case. <
- The State offered only photocopies of the motel receipts, not originals.

- The State offered no proof that the Grievant took Kempf to Akron on the day of his release. Even Mrs. Sturm testified that she did not see the Grievant on that date.
- Why didn't Investigator Albright type, then have the inmate read and sign the statement after it was taken, as was done with the Grievant? The Union submits the charges are serious, but the case was not treated as if they were.
- Sizemore testified that it is possible for visitors to get to the payphones at Oriana House, and the Union steward, who has the least reason to lie of anyone in this case, confirmed that with his call. The reason the Union did not call the visitor is that the visitor refused to identify himself.
- Regarding the calls from Inmate Sturm to his parents, the Union says they were recorded after the State was aware of Kempf's arrest and after the investigator told Sturm he was going to call his mother giving time to make up a story.
- Mrs. Sturm's testimony is unreliable. There is a lot she did not know and she changed her story. The Arbitrator is asked to look particularly at her cross-examination when she refused to answer the question about her family truthfully. She gave up her son, Frank, and her husband, but not her older son because she did not know the Union knew about him. She also lied about the check she cashed for the Grievant until the Union brought the check in, and this makes all her testimony unreliable.
- In contrast, there is the credible testimony of the Grievant's husband, which was consistent with the Grievant's testimony. He also testified that he did not believe his wife had a relationship with an inmate.

The Union concludes that the grievance should be granted because the State's case is based on circumstantial evidence and the lies of two people, Kempf and Mrs. Sturm. In addition, the State failed to prove Kempf made that 5 o'clock phone call or that the Grievant received it. It asks that the Grievant be made whole in every way. She should be reinstated to a correction officer position on third shift in her unit, granted all back pay, shift differential and vacation, sick and personal time.

V. OPINION OF THE ARBITRATOR

Although much of the State's case consists of circumstantial evidence, it is nevertheless strong enough to convince me the Grievant is guilty as charged.

To begin with, Inmate Kempf's statements are hearsay and cannot be relied upon except to the extent the facts asserted therein are verified by other means. The key claim of this inmate for the State's case is that he had a relationship with the Grievant while he was on parole. I find this claim credible because it is supported by the 5:01 a.m. phone call from Oriana House to the Grievant's number, by the motel receipts, by Mrs. Sturm's testimony, and by the recordings of Inmate Sturm's calls to his family.

Taking the long, early morning phone call first, I do not find access to the phones by visitors to be troublesome under the circumstances. The Union implies that some visitor may have made the call and that someone other than the Grievant accepted the call at her house. If that is the case, the visitor would have had to know where the pay phones are at Oriana, when they are turned on, and the Grievant's phone number. Moreover, they would have had to persuade the person at the other end to accept the charges and to keep the line open for 64 minutes starting at 5:01 a.m. At this time of day, the possibility that the caller was someone other than staff or a resident is remote. It is even more remote that the recipient was someone unknown to the Grievant, yet no one came forward to say, "I took that call." Moreover, the record discloses the date was a "good day" for the Grievant, so she would not have been at work. If she was, or if she was somewhere else other than home, why was this not raised at the pre-disciplinary conference or in arbitration? As it is, I must follow the pre-disciplinary hearing officer and conclude she was at home. Then, if she knew Inmate Kempf--and she did--and no one

else in her household is taking responsibility, a strong inference is created that the Grievant and Kempf were the parties on that call.

Looking next at the motel receipts, again the record establishes that the Grievant was not at work on March 24 (which happens to be the date Kempf went AWOL) and that she called off, just as Kempf said she had. The Grievant even admits to being there, but denies she had a companion and challenges the number of people registered to her room. I am not a handwriting expert (nor was anyone else at the hearing), but the "2" for number of persons does not appear to me to be significantly different from other 2s on the card. The registration card also places her at this motel on March 29, another date provided by Kempf. The Grievant says she worked that day. She may have done, but still could have kept a date with Kempf since Barberton is, by her own estimate, an hour and a half from Mansfield. The Union points out that only photocopies of receipts were submitted, implying that they are not true copies. Absent a compelling reason to do otherwise, photocopies may be admitted as "duplicate originals." There is no compelling reason here for excluding them, only a suggestion that they may have been altered by some unnamed person. I therefore accept them and give them weight, not as dispositive of the case, but as lending credence to the inmate's claims about meeting the Grievant while he was on parole. Their value in that regard also depends on whether Kempf could have learned of the Grievant's whereabouts on those dates from another source. The Union posits that Mrs. Sturm could have provided that information to him, but there is no evidence Mrs. Sturm knew the Grievant had called off or stayed at this motel on these dates. Her only testimony about it was that she never saw the two of them together at a motel. Moreover, given Mrs. Sturm's attitude towards Kempf, it is hard to find a motive for cooperating with him. I now turn to her evidence.

Mrs. Sturm's testimony places the Grievant and Kempf together after he was paroled more than once and establishes that the Grievant gave money to him. The inconsistencies in her story are more readily laid to memory lapses than to gaps or fabrication. She did not remember how the check was made out or that she endorsed it, and she was incorrect in its amount, but very close to the mark (saying \$250 instead of the correct \$225), and correctly remembered it was before April 17 because she had the marker of her dog's death. As for her testimony about her family member's criminal records, it is true she readily came forth with two members and did not include the third in her initial reply, but since the two she named were the those involved in the instant case, they would have been the first to come to mind. I do not believe she understood by the first question that she was being asked to name everyone in her family with a felony record. Then, when the follow-up questions came, she understood and completed her answer. I therefore do not find her testimony about the Grievant and Inmate Kempf unreliable. It was given straightforwardly and without significant inconsistencies. If she displayed any rancor, it was only towards Kempf for stealing from her and her neighbor, and over having lost her job as the result of the pre-arbitration investigation, which came after she had already been interviewed by Albright and so did not affect her initial report of what she knew. Since there were no material changes in her story between that interview and her arbitration testimony, I must conclude that any antipathy she felt towards whomever she blamed did not influence her testimony in any meaningful way.

Finally, there are the recordings of phone conversations between Inmate Sturm and his family, which I listened to and compared with the investigator's report. The first call was made April 22, more than a month before Kempf told the State of his relationship with the Grievant,

the last was made June 8, a few days after Kempf's claim was reported to the investigator. Yes, the investigator generated the call report (Joint Ex. 3:40) on September 18, 2000, and made copies of the calls as an exhibit for arbitration on July 10, 2001 (Joint Ex. 7C), but the record supports that the calls themselves were recorded as they occurred and the Arbitrator has no reason to believe they were altered in any way, either from the flow of the conversation between the parties or the technical quality of the recording. As with the handwriting, the Arbitrator is not an expert, but has no reason to doubt their authenticity. What they show, amongst else, is that the Sturms were aware as early as April 29 (long before the State was) that "Jimmy" had checks from "Joyce" (by theft or gift). Indeed, they knew that two were for \$800 each, which was, in fact, true as shown by the checks themselves. Thus, while I accept the premise that a number of people had reason to lie (Kempf for revenge and to reduce his sentence, the Sturms to help their son, the investigator for the sake of his case), neither the chronology nor the documents nor the testimony of witnesses against the Grievant support the conspiracy theory. On the contrary, they make a convincing case that the Grievant had an entanglement with a parolee which threatened the security of RiCI.

Against this are the Grievant's statements and testimony which contain serious and inexplicable inconsistencies and statements that do not fit the facts. For example, in the written note added to the nexus statement (Joint Ex. 3:43) she says Mrs. Sturm told her she had a son at RiCI "after I said something about that's where I worked," but her testimony was that she saw the name "Sturm" on the roster and asked Mrs. Sturm about it. Her knowledge of Kempf as an inmate improved as the case against her advanced and her explanation of how he may have gotten her checks simply does not stand up in the face of the evidence. When interviewed by

Det. Paolucci on May 23 she did "not know who James Kempf is," did recall an inmate named Kempf, but "does not take her checkbook to work with her." By August 8, though, she knew who James Kempf was and his job assignment while at RiCI, and thought he "may have got [the checks] here [at the institution] though she "usually [doesn't] bring them in" (Joint Ex. 3:57). In her pre-disciplinary hearing, "she knew Kempf because he was a porter on the night shift" and had turned him in on suspicion of drug use and "he probably could of stolen checks from her purse while it was in the bathroom." However, her steward argued that the reason she did not report the stolen checks to the institution was because Kempf was a former inmate. Which is it? Did she know he was an ex-inmate and therefore did not report it, thinking that meant he did not fall under the rule, or did she not know he was an ex-inmate and therefore did not report it. Then, in arbitration, she again claimed she did not know the James Kempf cashing her checks was an inmate and may have learned it when the prosecutor called, but she also testified that when he was under her supervision, she had problems with him, that he was volatile, and that he never came up for a random drug test, so she asked that he be tested. Again, which is it? Was he so bad that he stood out in her mind even though she never saw him after he was segregated? Or were there just so many night porters behaving erratically on her unit that she had to have her memory refreshed by a records search? And if "Sturm" rang a bell for her, why not "Kempf?"

As far as the checks are concerned, the Grievant, herself, discounted the possibility that they were available to him in the institution, and I agree. For one, she admittedly does not write a lot of checks and "usually" does not carry them into the institution. However, the checks Kempf had were numbered 51 and higher than the check paid by the bank on March 13 (a week after the inmate was paroled) and only 21 to 31 higher than the check she had Mrs. Sturm cash

for her on April 5. No check higher than 4200 was paid by the bank until the ones Kempf had (4210 and up) were presented beginning on April 11, five weeks after he was paroled, two weeks after he left Oriana and only days after he got \$225 from the check (4189) the Grievant cashed with Mrs. Sturm. Unless the Baileys wrote a lot of checks (which they did not) or wrote them out of order (which they did not), or the Grievant carried a lot of checks into the institution (which she disavows), Kempf got them on the outside. The Grievant's early speculation that they were stolen while she shopped may be true, but it is far-fetched to believe that anyone other than Kempf, himself, took them from her after he got out, probably in June, either by theft (possibly while she shopped) or by gift. Either way implicates the Grievant because her failure to report the theft to the institution once she knew the name, her improbable explanation of the check number sequence and her inability to explain the early morning phone call indicate she is not being honest and forthright, but instead is covering up for having foolishly entered a forbidden relationship. Perhaps Kempf stole the checks from her, instead of receiving them as a gift, but her unauthorized relationship with him gave him the opportunity to do so. When he was finally arrested, he may have given her up to reduce his sentence, as the Union alleges, but he had something of substance to give. As for the Grievant, she may have been the victim of theft, but she was not an innocent victim because she placed herself and her employer in harm's way. The State was therefore justified in removing her from her position.

VI. AWARD

The Grievant was removed for just cause. The grievance is denied in its entirety.



Anna DuVal Smith, Ph.D.

Arbitrator

Cuyahoga County, Ohio
September 6, 2001

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