VOLUNTARY LABOR ARBITRATION TRIBUNAL

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In the Matter of Arbitration Between	*	OPINION AND AWARD
OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION LOCAL 11, AFSCME, AFL/CIO	*	Anna DuVal Smith, Arbitrator
	*	Case No. 27-14-041230-2385-01-03
and	*	
OHIO DEPARTMENT OF REHABILITATION AND CORRECTION	*	Ronnie Board, Grievant Removal

* *

APPEARANCES

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

James McElvain, Staff Representative
Correctional Sgt. Chris Mabe
Ohio Civil Service Employees Association, Local 11 AFSCME, AFL-CIO

For the Ohio Department of Rehabilitation and Correction:

Chris Lambert, Labor Relations Officer
Ohio Department of Rehabilitation and Correction

Ray Mussio, Labor Relations Specialist
Ohio Office of Collective Bargaining

I. HEARING

A hearing on this matter was held at 9:15 a.m. on June 22, 2005, at the Lorain Correctional Institution in Grafton, 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 Correction (the "Department") were Maj. Donald Redwood and Officer Michael Failing. Testifying for the Ohio Civil Service Employees Association, Local 11 AFSCME, AFL-CIO (the "Union") were Correction Officer Daniel Sablack, Deputy Warden Special Services Dennis Baker (by telephone) and the Grievant, Ronnie Board. Also in attendance were LRO David Burrus, LRO Rick Shutek and Capt. Ronald Armbruster. A number of documents were entered into evidence: Joint Exhibits 1-5, Department Exhibits 1-2 and Union Exhibits 1-5. The oral hearing was concluded at 11:05 a.m. Written closing statements were timely filed and exchanged by the Arbitrator on July 23, 2005, 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 off-duty immoral conduct that could compromise his ability to effectively carry out his duties and discredit his employer, the Ohio Department of Rehabilitation and Correction.

The Grievant was employed by the Department on July 16, 1990. He received the October 2004 edition of the Employee Standards of Conduct. At the time of his removal on December 28, 2004, he had no active discipline on his record and had at least two consecutive years of good performance evaluations, meeting or exceeding expectations on every dimension. On June 4, 2004, his rater commented,

> Officer Board works in our special needs unit; he provides very high quality work as required by the unique area he is assigned. He completes all work that is expected from him and submits the work within the appropriate time frame. Officer Board is a team player well respected by his co-workers and supervisors alike. He possesses a unique ability to communicate with the inmates assigned to his unit. He has kept several inmates calm and cooperative enabling other staff members to accomplish their jobs that ensures their safety and well being and all tasks assigned are accomplished. Officer Board possesses good knowledge of the rules and regulations, which he follows without the need to be constantly reminded. (Joint Ex. 3, p. 1)

The Grievant is similarly well thought-of in his personal life. Since 1995 he and his wife have fostered 19 children, 15 through the Berea Children's Home Family Services and many of whom were medically fragile. These efforts were featured in a Cleveland Plain Dealer story (which mentioned the Grievant's employment at the Lorain Correctional Institution) and inspired the following comment from Foster Care Coordinator Debora L. Gault, MSSA, LSW:

> Ronnie is a dedicated and committed foster parent. He has gone the extra mile for each and every foster child in his home. He has attempted to recruit others to become foster parents due to the need he sees for people to help with these children. (Union Ex. 5)

The incident for which the Grievant was removed occurred on November 29, 2004, a day for which he was scheduled for in-service training but which he took off work in order to take his ill wife to the doctor. At approximately 10:30 that morning, the principal of a Catholic elementary school reported a car parked in the school's parking lot near a jungle gym to a Lorain police school resource officer who had stopped by the school to drop money off for his children. According to Officer Failing, when he approached the car its windows were steamed up, but he could see that the two occupants were lying down. As he came closer they sat up and he could see that the female's pants were down. Questioned separately, the female said the male (who was the Grievant) had picked her up at another address, offered her $20 for fellatio, and then drove her to this location. She also said that her pants were down because the Grievant was playing with her vagina. She denied that the $20 she was holding was given to her by the Grievant, who had said he would pay her after completion of the act. Officer Failing testified the Grievant told him the female was his girlfriend and that they were "just talking." When asked

where he had picked her up, he said she was just walking by while he was parked behind the church. When Officer Failing ran their names, the female was revealed to be known prostitute and drug user. The female was arrested for prostitution, possession of drug paraphernalia, possession of cocaine/crack, and public indecency. With his permission, the Grievant's car was searched for drugs and found clean. However, he was cited for solicitation, a charge he initially denied, saying he was a guard at Lorain Correctional and knew better.

On December 2, the Lorain Chronicle-Telegram carried an article about the incident, naming the Grievant and his place of employment. That same evening, the story made television news on Cleveland's WJW Fox Channel 8. This report also named the Grievant and his place of employment.

The Grievant was placed on administrative leave the next day and was interviewed on December 6. In his Incident Report and interview, he said that he had been walking on November 29 and when he got back to his car, the female asked him for a ride. He knew he was in a school parking lot because he goes there frequently to run and jog in the nearby park. He denied he and the woman had engaged in any sexual acts, that he had been in a prone position, that either of them had their clothes off, and that he had given the female money. However, he also admitted he had pled guilty to solicitation (a third degree misdemeanor), was fined $250 and given 40 days of community service. He said he pled guilty because he "didn't want to go back to court because the court systems [sic] isn't a good place for this kind of job." (Joint Ex. 1, p. 11)

A predisciplinary conference was duly conducted on December 9 at which time the Union raised a defense of disparate treatment and claimed that the off-duty, off-premises, out-of-uniform conduct has no bearing on the Grievant's job performance. The hearing officer nevertheless found just cause for discipline. The Grievant was subsequently removed as aforesaid for violations of the Department's 2004 Standards of Employee Conduct, specifically

> 37 - Actions that could compromise or impair the ability of an employee to effectively carry out his/her duties as a public employee.

39 - Any act that would bring discredit to the employer.
49 - Any violation of ORC 124.34 - and for incompetence, inefficiency, dishonesty, drunkenness, immoral conduct, insubordination, discourteous treatment of the public, neglect of duty, violation of such sections or the rules of the Director of Administrative Services or the commission, or any failure of good behavior, or any other acts of misfeasance, malfeasance, or nonfeasance in office. (Joint Ex. 1, p. 1 and Joint Ex. 5)

All of these carry penalties up to and including removal for a first offense.

This action was timely grieved on December 30 and thereafter fully processed to arbitration, where it presently resides free of procedural defect, for final and binding decision on the stipulated issue of *Was the grievant, Ronnie Board, removed from his position of correction officer at Lorain Correctional Institution for just cause? If not, what shall the remedy be?*

In arbitration, the Grievant reiterated that he had been walking in a park behind the church and school, and when he returned to his car the female asked him for a ride. He denied he ever said she was his girlfriend. He testified that she did not have her pants down nor he had given her money for sex. He also did not give her the crack cocaine or pipe found on her nor did he know she had these things. He said he pled guilty to solicitation because he was having marital problems and hoped to keep the incident quiet since he did not think his wife would understand.

Two Department employees testified about their experiences in similar cases. C.O Daniel Sablack pled no contest and was found guilty in 2001 of public indecency (a 4th degree misdemeanor) with another man at a roadside rest. He was not disciplined for this, but when he went back to work at Lorain Correctional, a newspaper article naming him and identifying his place of employment was posted on every pod in the institution. As a result, he said, he went on stress leave. Deputy Warden Special Services Dennis Baker was charged with solicitation (pleading guilty to disorderly conduct) in 1998 when he tried to pick up an undercover police officer in downtown Columbus during the evening hours. When confronted, he did not identify himself as an employee of the Department. He could not recall whether there was a story in the

newspapers, but it was reported on television. The Department disciplined him with a step decrease and reduction from Chief of the Bureau of EEO.

III. ARGUMENTS OF THE PARTIES

Argument of the Department

The Department argues that it has not stacked its charges against the Grievant. Each violation stands on its own merits without redundancy and each carries removal as a potential penalty. Whether on or off duty, a correction officer's conduct must be above that for which inmates are incarcerated. The conduct the Grievant pled guilty to is not acceptable for a public servant charged with safeguarding society. The Grievant obviously understands this as evidenced by his statement that the court system is not a good place for someone with his kind of job. In the Department's view, what the Grievant did constitutes self-inflicted impairment permanently obliterating the Department's trust in him and compromising his ability to carry out his duties.

As for the second charge, the Department submits that the publicity surrounding the case discredits the Department as shown by the citizens' reactions documented in the television news story. The Grievant's actions cast doubt in the community on Lorain Correctional's ability to be an integral and trusted member of the criminal justice system. As such, the public's trust in the facility's ability to safeguard against criminal conduct has been jeopardized.

The Department continues that the Grievant did engage in immoral conduct. Calling off work ostensibly to take his wife to the hospital, then picking up a prostitute on a street corner, bringing her to school grounds and engaging in sex for money is just wrong. His story that he was giving the woman a ride is unbelievable and he did plead guilty in court.

Turning to the Union's claim of disparate treatment, the Department submits that this is an affirmative defense for which the Union did not carry its burden of proof. The Grievant's offense differs in several respects from the two cited by the Union: location of the events, time of day, others involved, charges against those others, level of public attention and level of

publicized moral turpitude. Moreover, we do not know how the actions of the other two employees discredited the Department, but we do know how the Grievant's did. Beyond the offenses, there are other factors contributing to the different treatment: different appointing authorities, different work location (Baker), different classification (Baker), and length of time between the cases (3 and 6 years). The most similar case is Sablack's, but even if it is found to be comparable to the Grievant's, it takes more than one instance to show disparate treatment.

The Department concludes saying that it made its prima facie case for just cause. The Grievant's denial is self-serving. The Union is trying to have it both ways. On the one hand it says the Grievant did not do it (in which case he lied to the Court) and should not be punished. On the other hand, it says he did do it (thus lying to the Arbitrator), but the level of punishment is unwarranted. In the Department's view, the Grievant did do it and is being disingenuous. He shows no remorse and cannot be trusted with the facility's security. For these reasons it asks that the removal be upheld and the grievance denied.

Argument of the Union

The Union argues that the standard for disparate treatment is that the conduct be similar, not exactly the same. Under this standard, the Grievant was treated disparately. Baker was found guilty of the exact same offense and his case was reported on television, yet he was only demoted. Sablack, who is a correction officer at the same institution as the Grievant and whose incident was reported in both the newspaper and on television, got no discipline at all. The fact that there was a different warden at the time is irrelevant inasmuch as the standards of employee conduct must be applied fairly and consistently to all.

The Union points out that the Grievant has told a consistent story from beginning to end, repeatedly denying the accusations and pleading guilty only because he could not afford a lawyer and knew the court system was not a good place for a correction officer to be. He is an honest and caring person and has been a good employee throughout his 14 years with the Department. It asks that the Grievant be reinstated to his former position at Lorain Correctional Institution with

full back pay, no loss of seniority, all leave balances he would have accrued, medical expenses incurred, and lost overtime opportunities.

IV. OPINION OF THE ARBITRATOR

Since the Grievant denies the charges, the first question to be answered is whether he is guilty of the acts alleged. As this arbitrator has previously held, the standard for cases such as these where moral turpitude is involved is clear and convincing evidence. This means that any real doubt must be resolved in favor of the Grievant. Unfortunately for the Grievant, I do not have any such doubt. The police officer's testimony was credible in every respect and he had no reason to make it up whereas the Grievant had his job and personal relationships to protect. The female with whom the Grievant was discovered probably lied about a number of things (e.g., the $20 bill she had clutched in her hand), but this does not mean she lied about everything The fact that she was a known prostitute and drug offender and the circumstances observed by Officer Failing convince me she and the Grievant were engaged in a sex act on school grounds in the Grievant's car during school hours, and that the Grievant solicited this act and brought her to the site to accomplish it. Then, when confronted, the Grievant abused his position with the Department at Lorain Correctional in an attempt to protect himself.

In its opening statement, the Union argued that the charges were stacked. Again I must disagree. Although each charge stems from the same incident, they are separate, distinguishable rule violations as demonstrated in the Department's written closing statement and summarized above. Moreover, each of the rules cited provides for discipline up to removal on a first offense. Thus, violation of any one where the Department has established a reasonable nexus to the Grievant's job subjects the Grievant to possible removal. The Department did so establish. The Grievant compromised his own ability as a correction officer, brought discredit to his employer, and engaged in immoral conduct when he solicited sex for money, brought the prostitute drug offender to the school grounds, engaged in a sex act and then used his position at Lorain Correctional to defend himself.

The question then becomes whether discharge is warranted. Looking first at the disparate treatment argument, this case is distinguished from the two cited by the Union by its location on elementary school grounds while school was in session (not a roadside rest or street corner), the fact that the Grievant was in the act when discovered (not merely bargaining for it), his partner (a prostitute and drug offender), and his use of his position when discovered. It is further distinguished from the Baker case by the differences in their positions and inmate contact. Finally there is the matter of mitigation. The Grievant does have a good record of long and positive service. He is also a man who has made laudable positive contributions to his community. But his lack of candor and lack of remorse shows him not to be taking responsibility for his own mistake or making a commitment to better safeguard his employer's reputation and mission. Under such circumstances I cannot find that the employer abused its discretion. I thus find just cause for discharge and deny the grievance.

V. AWARD

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

Anna DuVal Smith, Ph.D.
Arbitrator

Cuyahoga County, Ohio
September 16, 2005

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