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Connie Vandenberg
mark Hunt*

IN THE MATTER OF ARBITRATION)
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 BETWEEN)
)
 Association of Oregon)
)
 Correctional Employees)
)
 (Robert Amburgey and Jerry)
)
 Gaspard grievances) v. State)
)
 of Oregon, Department of)
)
 Corrections)

OPINION AND AWARD
OF
GEORGE LEHLEITNER
ARBITRATOR

HEARING: April 30, 1998
ARBITRATOR: George Lehleitner
7276 S.W. Beaverton-Hillsdale Hwy. #334
Portland, OR 97225
REPRESENTING THE UNION: John Hoag, Attorney at Law
REPRESENTING THE DEPARTMENT OF CORRECTIONS: Steve Krohn, Assistant Attorney General

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I. INTRODUCTION

This case arises out of separate grievances filed on behalf of grievants Robert Amburgey and Jerry Gaspard. Both grievances arise out of a related incident. Consequently, they were combined for hearing purposes.

Grievant Gaspard challenges a decision of former Oregon State Correctional Institute (OSCI) Superintendent Nick Armenakis to demote him from Correctional Sergeant to Correctional Corporal effective September 16, 1997. Grievant Amburgey challenges a one (1) step reduction in pay for two (2) months imposed by Supt. Armenikas from September 11, 1997 to November 10, 1997.

A hearing was held before the undersigned arbitrator on April 30, 1998. The Association of Oregon Correctional Employees (Union) and the grievants were represented by John Hoag, Attorney at Law. The Department of Corrections (Dept.) was represented by Steve Krohn, Assistant Attorney General. Both sides were afforded an ample opportunity to present evidence, examine and cross-examine witnesses and orally argue their respective causes. The hearing was closed at the conclusion of oral arguments on April 30, 1998.

II. ISSUES

The stipulated issues are:

(1) Did the department have just cause to discipline Corporal Gaspard and Office Amburgey?

(2) If not, what is the appropriate remedy?

III. RELEVANT CONTRACT PROVISIONS AND APPLICABLE POLICIES/POST ORDERS

1. Relevant Contract Provisions

Article 43 - Discipline and Discharge

Section 1 No employee who has completed the initial trial service period shall be disciplined or dismissed without just cause.

Article 44 - Grievance and Arbitration

Sec 1. . . . A grievance shall not be expanded upon after the grievance has been filed at Step 2.

2. Applicable Policies and Post Orders

OSCI Employee Handbook

RELATIONSHIPS

EMPLOYEE-INMATE

Correctional employees are at the heart of the Institution's mission, goals, and programs. The effective Correctional employee interacts with and supervises inmates in a fair, firm and professional manner. This type of an approach is essential.

. . . Giving or receiving gifts, doing special favors, carrying messages and letters is prohibited except in the specific authorized performance of duty (Exh. E-8 pages 18-19).

Post Orders

III. Communications

B. Provide timely and appropriate notification and/or documentation to your supervisor of all unusual incidents, incidents of note, and/or in accordance with DOC/OSCI Directives. If there is any question about whether or not to notify, then err on the side of caution and make the notification.

X. Incident Reporting (As Required)

. . . .

B. Report any unusual, suspicious or significant event(s) occurring in your area of responsibility to your supervisor, and/or the responsible supervisor (as needed/necessary). Note the event in the Post Information Log.

. . . .

E. Immediately report information pertinent to the security, safety, health, and good order of DOC/OSCI to your supervisor with a notation made in the Post Information Log and a memo to your supervisor as needed/necessary.

. . . .

IX. Record Keeping (As Required)

. . . .

B. 3. Questions concerning the post orders are to be brought to the attention of your supervisor immediately.

4. Follow you post orders. (Exh. E-10, pages 6 and 14-16).

IV. RELIEF REQUESTED

Reverse the disciplinary actions imposed on grievants Amburgey and Gaspard and make them whole.

V. FACTS

1. Background

At all times relevant grievants Gaspard and Amburgey were full time, permanent employees of the department. They were members of the bargaining unit represented by the Union and were entitled to terms and conditions of employment as described in the collective bargaining agreement between the parties.

2. The Incident

The facts that gave rise to the decision to discipline grievants Gaspard and Amburgey are largely undisputed.

The grievants were disciplined for their roles in passing a message from an inmate to a co-worker, who was at the time home on administrative leave. Their involvement in passing the message from the inmate to the co-worker occurred sometime around September 1996 (Exh. E-4 and E-17).¹⁾ Mr. Gaspard was a Correctional Corporal when this incident occurred. He was promoted to Correctional Sergeant effective July 17, 1997. At the time of his promotion, management was unaware of the incident involving the passing of a message from an inmate to an employee on administrative leave (Exh. E-4).²⁾

Grievant Robert Amburgey was a Correctional Officer (CO) at the time of the incident in September 1996 (Exh. E-12).

In September 1996 Cpl. Gaspard did not hold an office in the Union. However, he had been Vice President of the local chapter of the Oregon Public Employees Union (COPEU), the predecessor labor organization representing Correctional Officers at the OSCI, in 1994-1995. Terrence Cooper took over from Gaspard when his (Gaspard's) term of office ended in 1995.³⁾

In September 1996, Cooper was being investigated for bringing contraband (i.e., tobacco) into OSCI and providing it to an inmate in exchange for money (Exh. E-26). During the investigation Cooper was on administrative leave. At some point CO Amburgey had a conversation with an inmate on his segregation unit by the name of Williams. According to Amburgey, Inmate Williams told him another inmate (Dumas) was going to "set up" Cooper.⁴⁾ Thereafter, Amburgey related the substance of the comments allegedly made by Inmate Williams to Cooper while he and Cooper were playing basketball. Cooper was under investigation and on administrative leave at the time.⁵⁾

Sometime after the initial conversation between Amburgey and Cooper, the latter placed a telephone conversation to Cpl. Gaspard and indicated Inmate Williams had some information that could be used in his (Cooper's) defense. According to Gaspard, Cooper asked

for his assistance in getting the information from Inmate Williams.⁶⁾ Gaspard contends he reviewed relevant rules and post orders before deciding whether or not it would be appropriate to have a message from Inmate Williams relayed to Mr. Cooper. According to Cpl. Gaspard, based on his review he concluded it would not be a violation for him to do so. Consequently, he telephoned CO Amburgey and asked him to get a written statement from Inmate Williams and return it to him.⁷⁾ Cpl. Gaspard made this request without notifying or seeking prior authorization from management. Cpl. Gaspard contends he spoke with Cooper's private attorney (Cooper was also under investigation for possible criminal charges) and he (the private attorney) indicated it would be okay to do so. However, Cpl. Gaspard did not discuss this matter beforehand with the Union's attorney nor did he mention this alleged discussion with Cooper's private attorney during his due process hearing.⁸⁾

CO Amburgey complied with Cpl. Gaspard's request to bring him a message from Inmate Williams. More specifically, Amburgey went to Inmate Williams' cell and asked him to write the message and give it to him. Inmate Williams did so. Apparently the inmate prepared the message in his cell when Amburgey was not present. Amburgey took the message and transmitted it to Cpl. Gaspard, as requested, but he (Amburgey) did not read it himself.⁹⁾ CO Amburgey contends he got the message from the inmate and gave it to Cpl. Gaspard, as requested, because he wanted to help his friend Mr. Cooper.

However, CO Amburgey acknowledges that he didn't feel he was doing Union work when he solicited and passed on the note from the inmate.¹⁰⁾ CO Amburgey, like Cpl. Gaspard, acted without notifying anyone from management or seeking approval for his actions. Nevertheless, Amburgey contends he did not attempt to conceal his involvement.¹¹⁾

Upon receiving the note from the inmate, Cpl. Gaspard read it and then gave it to Mr. Cooper at his (Cooper's) residence.¹²⁾ Cpl. Gaspard did not disclose his actions to anyone other than CO. Amburgey and Mr. Cooper. Nevertheless, he contends he did not attempt to conceal what he had done.¹³⁾

As it turned out Mr. Cooper was terminated for bringing contraband into the institution and his case was submitted to arbitration. Arbitration hearings were held from July 16-18, 1997 (Exh. E-26). Several weeks prior to the arbitration, Gaspard who by this time had been promoted to Sergeant, was contacted to testify on behalf of Mr. Cooper. He did so. More specifically, Gaspard testified among other things that Cooper had asked him to secure a statement from Inmate Williams and he in turn had asked CO Amburgey to procure the statement for him. Inmate Williams also testified on behalf of Cooper during the arbitration hearing. Ultimately, the arbitrator resolved credibility issues against Mr. Cooper and sustained the discharge (Exh. E-26).

3. The Investigation and the Decision to Discipline the Grievants

OSCI Superintendent Armenikas first learned of the incident when then Sgt. Gaspard testified during Mr. Cooper's arbitration hearing. Armenikas decided to wait until a decision was rendered by the arbitrator.¹⁴⁾ When the arbitrator issued his decision on August 18, 1997, Armenikas went forward with his investigation by setting up meetings with both grievants (Exh. E-3 and E-22). Armenikas met with the grievants separately on or about September 2, 1997. Both acknowledged their involvement but denied any wrong doing. More specifically, both indicated that they believed their actions were justified because they had been helping a friend.¹⁵⁾

By letter dated September 15, 1997 Supt. Armenikas demoted grievant Gaspard from Sergeant to Corporal (Exh. E-4).¹⁶⁾ Armenikas concluded that Gaspard had violated department policies and procedures and had placed himself in a position to be manipulated by an inmate. According to Armenikas, Gaspard should not have taken such action without notifying and/or receiving authorization from management (Exh. E-4).

By letter dated September 10, 1997 Supt. Armenikas imposed a one (1) step pay reduction for two (2) months on CO Amburgey (Exh. E-17). Armenikas concluded that Amburgey had violated department policies and procedures and had placed himself in a position to be manipulated by an inmate. Armenikas concluded further that Amburgey

had by his actions compromised the integrity of an ongoing investigation (Exh. E-17).

Both Gaspard and Amburgey pursued grievances through the various levels of the grievance procedure. Their grievances culminated in this arbitration.

4. Training

Grievants Gaspard and Amburgey are experienced employees of OSCI. More specifically, Gaspard has been in corrections for approximately ten (10) years and has earned promotions from CO to Corporal and Sergeant.¹⁷⁾ Robert Amburgey has been a CO for approximately eight (8) years.¹⁸⁾

A review of Cpl. Gaspard's training record reveals that from 1991-92 to the present he has taken 40 hour inservice training courses on three (3) separate occasions with the most recent being in 1996 (Exh. C-5). The credible testimony of Agency Trainer Richard Thornbeck established that this inservice training emphasizes employee ethics, interactions with inmates and confidentiality. Moreover, the training deals specifically with OAR 291-33-005 through 291-33-045 having to do with relationships between employees and inmates (Exh. E-28). These regulations clearly provide that it is not permissible to take something outside of a Correctional facility from an inmate.¹⁹⁾

Similarly, the training record of CO Amburgey reveals that he took several of the 40 hour inservice training sessions as well as numerous training courses of lesser duration involving issues such as ethics, "Games Criminals Play", Employee/Offender Relationships and Inservice Updates (Exh. E-18). According to Thornbeck, the act of taking a message from an inmate to an outside source compromised the integrity of the institution and constituted a serious breach of security, which after all is at the core of what a Correctional facility is all about.²⁰⁾

5. The Union's Right to Investigate Grievances and Interview Witnesses

The Union in its representative capacity is frequently called upon to interview potential witnesses. At times, this may include interviewing inmates as potential witnesses.²¹⁾ Supt. Armenikas acknowledged that the Union can, after notifying management and making a formal request, interview inmates and take formal statements from them.²²⁾

6. Work Records of the Grievants

Both grievants had good work records at the time in question. For instance, Cpl. Gaspard has received seven (7) letters of appreciation and three (3) commendations during the course of his employment.²³⁾ He also received satisfactory merit ratings in 1996

and 1997 (Exh. E-6 and 7). Moreover, a review of Cpl. Gaspard's record reveals several instances in 1993 where he took a proactive approach to notifying management of situations involving a potential conflict of interest between himself and an inmate (Exh. E-14 and 15).

CO Amburgey received a satisfactory merit rating in 1995 and an above average rating in 1996 (Exh. E-19 and 20). Moreover, in 1990 CO Gaspard took a proactive approach by advising management of a prior acquaintance with an inmate (Exh. E-24).

VI. POSITION OF THE PARTIES

1. The department's arguments are summarized as follows:

(1) The department had just cause to demote grievant Jerry Gaspard and to impose a two (2) month, one (1) step pay reduction on grievant Robert Amburgey.

(2) It is undisputed that both grievants had extensive training on the subject of employee ethics and interactions with inmates. They knew or should have known that the act of taking a message from an inmate outside of the institution without first notifying or receiving authorization from management constituted a serious breach of security. Such an

act was also a violation of departmental rules and as such both grievants were deserving of the discipline imposed.

(3) Cpl. Gaspard's after the fact assertion that he cleared the matter with Mr. Cooper's defense attorney is at best beside the point. He should have spoken with the Security Manager about what he intended to do.

(4) In this instance management had an entirely legitimate concern with the lack of judgement displayed by Cpl. Gaspard when he passed a note from an inmate to an officer that was under investigation for bringing contraband into the prison. Under these circumstances, management properly concluded he should be demoted from Sergeant to Corporal.

(5) CO Amburgey's misconduct was also serious. He knew or should have known it was improper to take a message, which he didn't even bother to read, from a prisoner for the purpose of assisting someone on administrative leave. He should have contacted someone within his chain of command but he chose not to do so.

(6) The Union's protected activity defense lacks merit. In the first place, the right to interview inmates in this context has to be balanced against legitimate security interests of the institution. Second, the credible evidence

established that both grievants acted to help a friend; neither believed at the time he was engaging in protected activity. Finally, under the terms of the labor agreement grievances cannot be expanded after Step 2. The protected activity defense was not raised prior to Step 2.

2. The Union

The Union's arguments are summarized as follows:

(1) A careful review of the transcript from the due process hearing reveals that the protected activity defense was asserted there. Consequently, this defense is properly before the arbitrator.

(2) The department's rule having to do with interactions with inmates are generic in nature. The Union is not suggesting that it is, under normal circumstances, appropriate to take a message from an inmate outside the institution. What the Union is saying, however, is that it is appropriate to carve out a limited exception whereby an employee can engage in protected activity by taking a statement from an inmate to assist in the legal defense of a fellow bargaining unit employee. In this regard, the Union has a legal obligation to defend the rights of its members. Clearly, the grievants were engaging in protected activity when they took a statement from Inmate

Williams in an attempt to assist in the defense of a co-worker. Consequently, no discipline was warranted.

(3) The Union has the right to interview inmates in the context of investigating grievances. Moreover, the Union need not share the results of such interviews with management. In this case, Union members Gaspard and Amburgey were engaged in a protected activity when they received a statement from an inmate to be used in the defense of a co-worker. They were not obligated to share that statement with management.

(4) The department's argument concerning a breach of security is misplaced. There was no evidence indicating the statement from Inmate Williams was used for any purpose other than to defend co-worker Terrence Cooper.

VII. OPINION

The department had just cause to demote grievant Jerry Gaspard from Sergeant to Corporal and to impose a two (2) month, one (1) step pay reduction on grievant Jerry Gaspard. The arbitrator's rationale follows.

1. Analysis

My analysis will be limited to the Union's protected activity defense because that was the basis of the case presented to me. As

previously indicated, I will in the interest of fully litigating all issues presented consider the protected activity defense even though there is some question in my mind as to whether or not this issue was properly raised prior to Step 2.

On the merits, I view this as a simple case. A careful review of the applicable rules and the credible testimony of Agency Trainer Richard Throbeck established that both grievants knew or should have known it was not permissible to solicit a message from an inmate and then taking it outside of the institution without first notifying and/or receiving authorization from management to do so. In this regard both grievants were experienced employees, who should have been aware of the emphasis placed on interactions with inmates during training and the requirement that any questionable transactions must be cleared with higher authority. Had either of the grievants disclosed their intentions to a manager, they probably would have been permitted to interview the inmate and use his statement to assist in the defense of Mr. Cooper. For whatever reason they chose not to tell anyone what they were doing. Moreover, while it is true that they were acting to help a friend and co-worker, the most credible evidence established that neither was thinking in terms of protected activity when they solicited the statement from the inmate.

To the Union's credit, it is not contending that employees have a generic right to solicit messages/statements from inmates

and allow them to be taken outside of the institution. To the contrary, the Union seeks only to carve out a limited exception whereby such an act is protected if the statement is solicited for the purpose of defending the rights of bargaining unit members.

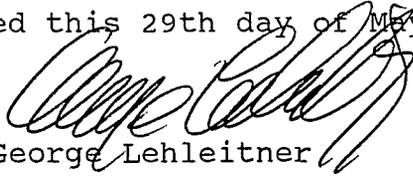
Leaving aside the difficulty of drawing a distinction between statements from inmates solicited to defend the rights of a co-worker and those used for some other purpose, the Union's argument fails because it does not take into account the legitimate security needs of a correctional facility. In my view it is necessary to strike a balance between the right of the Union and its members to engage in protected activities, including without limitation the investigation of grievances, and the security needs of the institution. As the department correctly observes, security is at the heart of what a correctional facility does. Consequently, it is entirely proper for the department to strictly prohibit interactions between employees and inmates that have the potential of constituting a security risk or placing the employee in a position where he/she can be manipulated by an inmate. And while the Union has every right to investigate grievances, I see no reason why the Union or its members cannot notify management before interviewing an inmate. Had this been done, it is likely that a union employee would have been permitted to interview inmate Williams and use his statement in the defense of Mr. Cooper. What was not permissible, however, was to solicit a statement from the

inmate and transmit it outside the facility without first notifying and/or seeking authorization from management.

VIII. AWARD

The grievances are denied.

Respectfully submitted this 29th day of May, 1998,


George Lehleitner

Arbitrator

FOOTNOTES

- 1) Testimony of former OSCI Superintendent Nick Armenikas. Mr. Armenikas was the OSCI Superintendent from May 1995 to September 1997. He is now the Assistant Director for the Institutions Division.
- 2) Testimony of Nick Armenikas.
- 3) Testimony of grievant Jerry Gaspard and Nick Armenikas.
- 4) Testimony of Robert Amburgey.
- 5) Amburgey acknowledged that he knew Cooper was under investigation and on administrative leave at the time. According to Amburgey, he was unaware of any prohibition against talking to him under these circumstances.
- 6) Testimony of Cpl. Jerry Gaspard.
- 7) Apparently CO Amburgey was asked to get the message from Inmate Williams because he (Amburgey) was assigned to the segregation unit where the inmate was confined. Since Cpl. Gaspard and CO Amburgey were assigned to different areas of the facility, Amburgey did not report to Cpl Gaspard.
- 8) Testimony of Cpl. Jerry Gaspard.
Cpl. Gaspard acknowledged further that he didn't tell anyone else from the Union what he was doing.
- 9) Testimony of CO Amburgey.
According to Amburgey, he didn't read the message because he knew what it was going to say.
- 10) Testimony of CO Amburgey.
- 11) Testimony of CO Amburgey.
- 12) Cpl. Gaspard acknowledged on cross-examination that it was important to know what was in the statement from the inmate because it is possible that it could have involved something such as contraband or even an escape plan.
- 13) Testimony of Cpl. Gaspard.
- 14) Testimony of Nick Armenikas.
- 15) The Union's primary defense in this case is that the grievant's actions were justified because they were engaged in a protected activity. According to the Union, the protected activity defense was alluded to during the due process interview with then Sgt.

Gaspard (See, Exh. U-1, pages 2 & 3). Moreover, the Union produced testimony from current Local Union President Gary Haskins to the effect that the protected activity defense was discussed with Mark Hunt of the Labor Relations Division during the processing of the grievance.

On the other side of the coin, Nick Armenikas testified that to his knowledge the protected activity defense was asserted for the first time in the arbitration hearing. Consequently, the department contends this defense cannot be raised at this late date.

I have reviewed a transcript of Mr. Gaspard's interview. To be candid, it is a "stretch" to say that the protected activities defense was raised during this interview. What was asserted, however, by both Gaspard and Amburgey was that their actions were justified because they were attempting to help a friend. This being so, I will in the interest of fully litigating all available defenses consider the protected activity argument.

16) Even though Gaspard had been a sergeant for less than six (6) months, Armenikas treated him as a regular service employee in that position for purposes of imposing a disciplinary action.

17) Testimony of Cpl. Jerry Gaspard.

18) Testimony of CO Robert Amburgey.

19) Agency Trainer Richard Throbeck testified credibly that improper relationships with inmates constitute the most serious threat to the career of COs. According to Throbeck, taking a message from an inmate to a source outside of the institution is a serious breach of security and places an officer's career in jeopardy.

The relevant OAR provides in relevant part:

AUTHORITY, PURPOSE, AND POLICY:

291-113-005(1) Authority: The authority for this rule is granted to the Director of the Department of Corrections in accordance with ORS 179.040, 423.020, 423.030, and 423-075.

(2) Purpose: To establish a uniform principle of professionalism in employee/inmate and employee/offender relationships to be adhered to by all persons employed by or serving in a voluntary capacity with the Department of Corrections in order to ensure protection of the Department and its employees against compromise of professional integrity and legal or financial liability.

(3) Policy: It is the policy of the Department of Corrections that all persons employed or serving as volunteers in functional units of the Oregon Department of Corrections will confine their relationships with inmates/offenders to those activities which are

duly sanctioned as an integral part of the employee's/volunteer's job duties. Unauthorized on-duty or off-duty contacts of a personal nature between Department employees/volunteers and inmates/offenders are specifically prohibited, except as may be modified by procedures outlined herein.

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EMPLOYEE/VOLUNTEER RESPONSIBILITY

291-33-015 (1) No Department of Corrections employees or volunteer shall knowingly engage in any personal or business transaction with any inmate/offender, or the family and friends of such, except as authorized by their position descriptions or as specifically authorized in advance by their functional unit manager or designee. This includes giving or accepting personal gifts, favors, and special considerations of any kind, no matter how trivial they may seem.

.

(3) If any employee or volunteer who is approached by an inmate/offender and asked to engage in activities of a personal or business nature which are not an integral part of their job duties, either on or off the job, shall refuse to engage in such activity and shall report the incident to his/her supervisor immediately. Employees and volunteers are expressly prohibited from initiating engagement in activities with inmates/offenders or the family or friends of such, which are not an authorized part of their job assignments.

(4) If the supervisor determines that the activity in question would contribute positively to the inmate's/offender's rehabilitation and/or treatment program, he/she will submit a written recommendation and statement of circumstances to his/her functional unit manager or designee. The functional unit manager or designee will give written notice to the employee/volunteer and his/her supervisor of approval or disapproval for the activity to be entered into. The functional unit manager or designee shall render his/her determination based on the evaluation criteria outlined in this rule.

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VIOLATIONS

291-33-045 Violations of the rule will have occurred:

(1) If the employee/volunteer:

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(2) If the functional unit manager finds that the conduct:

(a) Adversely affects the employee's/volunteer's ability to perform his/her job duties and responsibilities;

(b) Adversely affects the ability of the Department to carry out its legal responsibilities;

.

(d) Places the employee/volunteer in a situation which compromises his/her professional integrity.

(3) As a result of these violations, the functional unit manager may:

.

(d) Take other disciplinary actions, up to and including dismissal. (Exh. E-28).

20) Thornbeck testified that in such cases it is necessary to go through the chain of command. Otherwise the security of the institution is compromised.

21) Testimony of Union President Gary Haskins.

Haskins acknowledged on cross-examination that while he has interviewed inmates in the context of investigating potential grievances, he has never taken an inmate statement outside of an institution.

22) Testimony of Nick Armenikas.

23) Testimony of Cpl. Jerry Gaspard.