

IN THE MATTER OF THE ARBITRATION BETWEEN )

TEAMSTERS LOCAL UNION NO. 227, )

Union )

And )

STATE OF WASHINGTON )  
DEPARTMENT OF CORRECTIONS, )  
Employer )

) FMCS CASE NUMBER:  
) 100405-02552-8

) ARBITRATOR'S OPINION  
) AND AWARD

) GRIEVANT:  
) ROBERT ZIRKLE, JR.

) RECEIVED

) FEB 28 2011

) OFFICE OF THE ATTORNEY GENERAL  
) LABOR & PERSONNEL DIVISION

ARBITRATOR: ANTHONY D. VIVENZIO

AWARD DATE: February 25, 2011

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## PROCEDURAL HISTORY

The Washington State Department of Corrections, McNeil Island, is hereinafter referred to as "the State," "the Employer," "DOC" or "MICC." Teamsters Local Union 117 is hereinafter referred to as "the Union." Collectively, they are hereinafter referred to as "the parties." This arbitration addresses the Employer's discharge of the Grievant, Robert Zirkle, Jr., "the Grievant," noted by letter of January 22, 2010, effective January 26, 2010.

The grievance filed by the Union to contest the discharge is based upon the collective bargaining agreement between the parties, hereinafter the "Agreement" or "contract," effective for the period July 1, 2009 through June 30, 2011. The Union filed the grievance regarding the discharge on January 25, 2010. Following unsuccessful attempts at resolution, the Union invoked arbitration under Article 9 of the Agreement. Using the services of the Federal Mediation and Conciliation Service, Anthony D. Vivenzio was appointed as Arbitrator. An arbitration hearing was held at the office of the Attorney General in Spokane, Washington, on October 4, 2010. The parties stipulated that all prior steps in the grievance process had been completed or waived, and that the grievance and arbitration were timely and properly before the Arbitrator. During the course of the hearing, both parties were afforded a full opportunity for the presentation of evidence, examination and cross-examination of witnesses, and oral argument. The evidentiary record was closed on October 4, 2010. The Arbitrator received timely post-hearing briefs from both parties on December 27, 2010. The full record was deemed closed and the matter submitted on December 27, 2010.

## STATEMENT OF THE ISSUE BEFORE THE ARBITRATOR

At the hearing, the parties stipulated the issue before the Arbitrator as:

Did the Employer have just cause for their termination of Robert Zirkle, Jr. on January 22, 2010, and, if not, what shall the remedy be?

## BACKGROUND

The Washington State Department of Corrections is responsible for the housing, and monitoring upon their release into the community, of persons convicted of felony offenses. The Department employs approximately 8,000 men and women and administers a 1.8 billion dollar biennial operating budget. As of December 31, 2010, approximately 18,000 offenders remained in confinement, over half of whom were serving terms ranging from five years to life in prison. Another 18,690 persons were being supervised in the community, of whom over a third were considered "high violent" with a risk to reoffend. The paramount interests of the Department include preserving the safety of the public, Department staff, and inmates.

On September 22, 2009, a Corporal Probation Officer at Geiger Work Release in Spokane, Washington, called the Pine Lodge Correction Center for Women in order to report misconduct. Her daughter was told by a friend that her mother, an inmate at Pine Lodge Correction Center, was involved with a corrections officer. Subsequent investigation identified the offender, hereinafter "Jane Doe" or "J.D.", and the Grievant, Robert Zirkle, Jr., who at that time was employed as a Corrections and Custody Officer at the Department of Corrections, Airway Heights Corrections Center. The ensuing investigation revealed that the Grievant had known J. D. since approximately 2004 or 2005, when he had moved to Spokane while going through a divorce. He maintained a friendship with her through her incarceration in prison on

May 14, 2009, and apparently did not stop communicating with her until the investigation of their relationship became known to him. The investigation revealed a substantial amount of correspondence between the Grievant and J.D., including telephone calls and at least one retrieved letter. Some of the communications could be interpreted as flirtatious, others involved information she requested. The communications were not confined to the offender but were also directed towards members of her family, with whom the Grievant maintained an ongoing relationship.

## **PERTINENT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT AND WORK RULES**

**From the collective bargaining agreement effective July 1, 2009 – June 30, 2011:**

### **Article 8 DISCIPLINE**

#### **8.1 Just Cause**

The Employer will not discipline any permanent employee without just cause.

### **Article 9 GRIEVANCE PROCEDURE**

#### **9.2 Non-Panel Grievance Processing**

**Step 3: Arbitration.** If the grievance is not resolved at Step 2, the Union may file a demand for arbitration...

#### **9.5 Authority of the Arbitrator**

The Arbitrator will have the authority to interpret the provisions of this Agreement to the extent necessary to render a decision on the case being heard. The Arbitrator will have no authority to add to, subtract from, or modify the provisions of this Agreement, nor will the Arbitrator make a decision that would result in a violation of this Agreement.

**From the State of Washington Department Of Corrections Policies:**

**Department of Corrections Employee Handbook:**

Page 12: DEPARTMENT EXPECTATIONS:

As an employee of the Department of Corrections **you will be expected to:**

Adhere to the confidentiality requirements of any information you have access to in the workplace;

Report all personal contact with offenders, their families, or known associates outside your job in accordance with Department procedures;

It is also important to a new employee you understand some of the specific prohibitions that the Department must enforce. **You are not allowed to:**

Engage in personal relationships with offenders, their family members, or close personal associates; such relationships with offender that include sexual contact may be a felony under state law and may be referred for prosecution;

Use state equipment/supplies for personal use, gain, or profit;

**DOC 801.005, revised as DOC 850.030**

**“EMPLOYEE RELATIONSHIPS/CONTACT WITH OFFENDERS”**

**POLICY:**

- I. Interactions with offenders and their family members and/or known associates by Department staff, contract staff, and volunteers will be conducted in a professional manner consistent with state law, prudent correctional practice, and Department policies and procedures.

**DIRECTIVE:**

- II. Department Staff, Contract Staff, and Volunteer Association With Offenders.
  - A. Association with offenders, beyond that which is required in the performance of official Department duties, is prohibited in the interest of professional, unbiased service.
  - B. Personal or business communications and/or relationships with offenders, their family members, or known associates are not appropriate and are prohibited,

except as defined in DOC 530.100 volunteer resource services – community partnership program or the employee’s position description and resource services – Community Partnership Program.

- C. Department staff, contract staff, and volunteers are cautioned that personal relationships by their immediate family members with offenders, offenders family members, or known associates of offenders have the potential to pose conflicts and security risks at work and should be avoided when it is known when these relationships exist.

### III. Reporting Requirements

- A. Department staff, contract staff and volunteers will report contact with offenders, their family members, or known associates, not authorized within official duties, to the appropriate Appointing Authority on DOC 03-039 Report of Contact/Relationship With an Offender no later than the next working day. This reporting requirement does not include casual contacts or unintentional contacts, such as greeting an offender when passing on the street, but does apply to significant or on-going contact.

- C. Pre-existing family or personal relationships with an offender under the jurisdiction of the Department must be reported on DOC 03-039 Report of Contact/Relationship With an Offender as soon as the individual’s status as an offender is known.

1. The appointing authority has the discretion to reassign an employee or offender on a case-by-case basis to avoid potential conflicts.

- a. Requests by the employee to voluntarily be reassigned may be considered.

- E. Physical contact or communication of a sexual or romantic nature directed toward an offender is prohibited and may constitute criminal behavior. Prohibited contact includes, but it not limited to, sexual abuse, sexual assault, sexual contact, or sexual harassment. Such alleged contacts will be investigated per DOC 490.800 Prison Rape Elimination Procedures and will be referred to local law enforcement when appropriate.

### VII. Expectations

- A. Violation of the provisions of this policy may result in corrective or disciplinary action up to and including dismissal.

**DOC 800.010 Ethics**

**Directive:**

- I. General Expectations
  - A. The Department has adopted a statement of values that exemplify standards and principles that serve to guide individual behavior. The Employee Handbook contains information on this and other areas of responsibility and expectations.
    - 1. Staff who work with offenders will reinforce proper behavior, correct misbehavior, and set a good example that commands offender respect.
- II. Use of State Resources
  - A. Staff will not use state resources for personal benefit or to benefit another, except as required for official duties or as authorized by policy.
  - B. Staff will follow DOC 280.100 Acceptable Use of Technology regarding use of the internet, e-mail, cellular phones, and other technology resources.
- IV. Confidential Information
  - A. Staff will not access any Department resource to obtain information for their personal benefit or gain, or for the benefit or gain of another, except as required for official duties.
- V. Conflict of Interest
  - A. Staff will not use their official position to secure privileges for themselves or others or to engage in activities that constitute a conflict of interest.

**DOC 280.100 Acceptable Use of Technology**

**Directive:**

- I. General Guidelines
  - A. Computer hardware, Information Technology systems, the Internet, e-mail, cellular phones, and all other Department Information Technology resources will be used for official business purposes. However, there are exceptions per the Washington State Executive Ethics Board.
  - D. Anyone who uses the Department 's Internet, e-mail, cellular phone, and portable computing device technology resources in a manner that violates this policy may

have his/her access immediately terminated and may be subject to corrective/disciplinary action up to and including dismissal.

G. Users of the Department's Information Technology resources will only use the resources within the privileges and permissions granted to them and only for their intended business purposes. Information Technology resources include, but are not limited to:

1. Data;
2. Hardware, including computers and servers;
3. Software;
4. Network infrastructure.

## **POSITIONS OF THE PARTIES**

### **Position of the Employer**

The Employer states its position (in summary) as follows:

The Grievant, who was a Corrections Officer at Airway Heights had enjoyed a successful 17 year career. In disregard of his training, he conducted a personal relationship with an inmate, Jane Doe, and maintained connections with her family while she was incarcerated at Pine Lodge Correctional Facility. The Employer's investigation revealed that the Grievant had engaged in numerous phone calls with J.D. and had maintained contact with her family while she was at Pine Lodge. Contrary to his training and DOC policies, he chose not to report his relationship and communications with the offender, or visits with her family and, in fact, took steps to hide the relationship from the Employer. The Grievant shared agency-specific information with J.D., for example, facility operations, decisions being made by the DOC, and the character of another officer. He used DOC computers to obtain this information and to research information about J.D. The Employer believes, as does the Grievant, that he was compromised by J.D. and her family. As a result, the mission of the DOC was likewise compromised. The evidence overcomes any claims of ignorance of the application of the DOC work rules and policies or any

defense based upon a prior friendship with the offender. Regardless of whether the relationship was romantic or not, it was sufficiently close to come within the proscriptions set forth in the DOC rules and policies.

J.D. possessed a key to the Grievant's house and often stayed in a room provided for her there. The Grievant spent holidays with her and her family. In his writing to J.D., the Grievant enclosed references such as "my little blond," "my girl," and appreciation for her "back view." He did not cease his communications with the offender or her family until he learned he was under investigation. The Grievant never reported the relationship or his contacts with J.D. or her family, in violation of clear Employer policies. In pursuing the relationship, the Grievant accessed the Department of Corrections Offender Management Network Information System "OMNI" to collect information about J.D., her conviction, and her bed assignment.

The contractual just cause standard was appropriately applied in this case. The Grievant provided, through his admission, proof that he had a relationship with J.D. and her family and that he used state resources to obtain information on and for the offender. The DOC prohibits staff from having personal relationships with offenders or their family members and requires notification if there is significant or on-going contact. The DOC provides training to educate staff concerning the risks of offender manipulation and training on an employee's ethical obligation to avoid conflicts of interest, and to avoid utilizing agency resources for personal benefit. Work rules and penalties for their violation are referenced in the Employee Handbook and in DOC policies. The evidence establishes the Grievant knew his contacts with the offender and her family were prohibited, and that he was hiding the relationship.

The core competencies and traits a correctional officer must display are numerous, including observations of ethics, honest and professional behavior, serving as an exemplary role

model, and avoiding inappropriate situations and actions which result in and/or present the appearance of impropriety. Given the Grievant's conduct in this matter, the Employer believes it had no other alternative but to terminate his employment. The Grievant's behavior spanned a course of many months in which he chose not to cease contact with the offender or to report himself as required.

### **Position of the Union**

The Union states its position (in summary) as follows:

Robert Zirkle, Jr., the Grievant, enjoyed a seventeen year career boasting excellent performance reviews including being named Officer of the Month in 1995 on a statewide basis. There are no instances of discipline contained in his file with the Employer. In this case Mr. Zirkle had a pre-existing friendship with the offender, J.D., prior to her incarceration, and had no connection with the Pine Lodge Correction facility where J.D. was incarcerated. Because of these factors, he did not take certain steps that the Employer believes he should have taken. There is some ambiguity and confusion within the Employer's work rules which cite reassignment as the cure for a relationship between a corrections officer and inmate, so it is reasonable to assume that the rule exists to address personal relationships between corrections officers and offenders within the facility they serve.

The whole of the Grievant's "contact" with J.D. while she was in custody consisted of a few phone calls and one letter, involving casual conversations about prison life, facility closures and how to handle various challenges she was experiencing. Their conversations about the DOC related to rumors that she had heard in public media and the gossip mill. He never visited her in person, and believed that phone calls and letters did not present the conflict that would arise from an in person visit. When he learned that DOC policy did apply to

his relationship, he admitted he was wrong and acknowledged the importance of additional training, and even offered to lead a training session on this issue.

The Employer bears the burden of proving that it had just cause to discharge Mr. Zirkle. The Arbitrator is asked to consider two questions; First, does the evidence support a conclusion that the employee engaged in misconduct that warranted discipline? Second, was the discipline imposed by the Employer appropriate or reasonable under the circumstances? A critical piece of the Employer's case is the Special Investigations Unit Investigative Report prepared by Felice Davis, categorizing the nature of the investigation as "staff sexual misconduct." The findings of that investigation do not support anything other than a platonic relationship between Mr. Zirkle and J.D. The absence of sexuality in this case significantly weakens the Employer's argument that it had just cause for the termination.

Mr. Zirkle had filed offender contact forms in the past when those contacts had involved people who were or had been incarcerated in the same facility where he worked. He reasonably figured such a policy only applied when the inmate and correctional officer were at the same facility. He had never received training on this specific issue. As there was no direct custodial relationship, there was no real danger that Mr. Zirkle would wind up smuggling drugs for the offender, or help to arrange her escape, as witness Maggie Miller Stout suggested, and there was no chance that he could use his position to turn their relationship into one that would have violated the PREA. If his understanding of the rule was mistaken, it was a reasonable mistake and should not cost a seventeen year employee his job.

As to misusing OMNI, Mr. Zirkle never disclosed any sensitive or classified information. The Union's business representative, Joseph Kuhn, testified that the topics of recorded conversations including facility closures, implementation of various programs, and general

information, were the subject of various press releases and news stories at the time. Regarding a strip search that J.D. underwent after a visit from her mother, J.D. believed that the officer had abused her position of power, and Mr. Zirkle advised her to file a PREA complaint. Mr. Zirkle did precisely what he should have done for any inmate regardless if there was a pre-existing relationship or not. He simply told her to report it.

## **DISCUSSION**

At the outset, the Arbitrator would like to express his appreciation for the professional manner in which the parties conducted themselves in the course of the proceedings, rendering vigorous, but courteous, advocacy.

It is well established in labor arbitration that where, as in the present case, an employer's right to discipline an employee is limited by the requirement that any such action be for "just cause," the employer has the burden of proving that the suspension or termination of an employee was for just cause. Therefore, the Employer here had the burden of persuading the Arbitrator that its termination of the grievant, Robert Zirkle, Jr., was for just cause.

"Just cause" consists of a number of substantive and procedural elements. Primary among its substantive elements is the existence of sufficient proof that the grievant engaged in the conduct for which he or she was terminated or disciplined. Though the parties have agreed that the essential facts basing the violation leading to the Grievant's termination are undisputed, the Arbitrator will draw upon them as necessary to base his award. The second area of proof concerns the issue of whether the penalty assessed by the Employer should be upheld, mitigated, or otherwise modified. Factors relevant to this issue include a requirement that an employee knows or is reasonably expected to know ahead of time that engaging in a particular type of behavior will likely result in discipline or termination, the existence of a reasonable relationship

between an employee's misconduct and the punishment imposed, and a requirement that discipline be administered even-handedly, that is, that similarly situated employees be treated similarly and disparate treatment be avoided.

These considerations were summarized in what is now a commonplace in labor arbitration, known as the "Seven Tests," by Arbitrator Carroll Dougherty, pronounced in Enterprise Wire Co., 46 LA 359 (1966):

1. Did the Employer give to the employee forewarning or foreknowledge of the possible or probable disciplinary consequences of the employee's conduct?

2. Was the Employer's rule or managerial order reasonably related to (a) the orderly, efficient, and safe operation of the Employer's business and (b) the performance that the Employer might properly expect of the employee?

3. Did the Employer, before administering discipline to an employee, make an effort to discover whether the employee did in fact violate or disobey a rule or order of management?

4. Was the Employer's investigation conducted fairly and objectively?

5. At the investigation, did the "judge" obtain substantial evidence or proof that the employee was guilty as charged?

6. Has the Employer applied its rules, orders, and penalties even-handedly and without discrimination to all employees?

7. Was the degree of discipline administered by the Employer in a particular case reasonably related to (a) the seriousness of the employee's proven offense and (b) the record of the employee in his service with the Employer?

While these standards have been tailored to address different work places and circumstances, they serve as a useful construct for considering this case. The Arbitrator has studied the entire record in this matter carefully and considered each argument and authority cited in the parties' briefs. The following discussion will center on those factors found to be either controlling or necessary to the decision.

**1. Did the Employer give to the employee forewarning or foreknowledge of the possible or probable disciplinary consequences of the employee's conduct?**

The Arbitrator answers this question: "Yes." The Employer bases its discipline in this matter upon the Grievant's violation of Department of Corrections Policies 801.005/850.30, 280.100, and 800.010, and the expectations of the Department of Corrections Employee Handbook, set forth above. A fair reading of the plain language of those policies evinces a clear prohibition of the kind of conduct alleged by the Employer: failure to report an on-going relationship with an offender; failure to report an on-going relationship with the offender's family members; romantic or personal involvement with an offender; and, misuse of the Offender Management Network Information System (OMNI). The policies are clear that a violator may be subject to disciplinary action, "up to and including dismissal." [DOC 850.030 VII (A); 280.100 Directive I (D)] The Union's advocate has argued that the inclusion of language in DOC 850.030 III (C), noting that the "appointing authority" has the discretion to reassign an employee in the case of a personal relationship with an offender, is confusing because it suggests the case, unlike here, where the inmate is resident at the same facility. The Union points to a lack of training clarifying the issue. However, even were there ambiguity as to whether the specifically alleged conduct is prohibited, and no such finding of ambiguity is here made, the conduct alleged, in the context of this particular workplace, with its unique challenges of security and safety, is of a quality whereby a qualified, experienced employee must be deemed to have known, or should have known, that such conduct is prohibited. Employer Exhibit 12 shows the Grievant's signature acknowledging his responsibility for reading, familiarizing himself with, and following the relevant policies and procedures of the Employer.

**2. Was the Employer's rule or managerial order reasonably related to (a) the orderly, efficient, and safe operation of the Employer's business and (b) the performance that the Employer might properly expect of the employee?**

The Arbitrator answers these questions, "Yes." DOC Policies 801.005/850.30, 800.010, seek to prohibit behaviors that have the potential for compromising the interests and mission of the Employer: the management of a large number of convicted felons in a confined facility, their rehabilitation and readying for re-entry into the community, and the safety of those inmates, DOC staff, and the public. The Union's argument that the physical separation of the Grievant from the offender militates against dangers such as "smuggling drugs" or "arranging her escape" ignores the substantial range of potential risks that can arise from a relationship such as the one alleged here. The Arbitrator will not here provide an exhaustive list of such possibilities, but one potential, mentioned by the Grievant at the hearing, included an inmate's being harassed by fellow inmates should a relationship with an officer be discovered. Another area of concern is where an inmate manipulates an officer into providing information concerning another officer, perhaps their strengths, weaknesses, habits, or schedule, that could result in harm to the officer or to the security of the institution.

Policy 280.100 seeks to limit the Employer's information technology resources to duty-related uses. The values expressed in terms of conserving publicly owned resources to official use, and avoiding personal, distracting, or disruptive uses, or those uses that have the potential to compromise security, are unquestionable values for a governmental employer. In the course of its presentation, the Employer raised these and other values/interests related to safety and mission it viewed as compromised by the Grievant's conduct. The Arbitrator finds that these policies are reasonably related to the orderly, efficient, and safe operation of the Employer's

business, and to the performance that the Employer might properly expect of its employees in general, and as applied to the Employer's interests as impacted by the Grievant in this case.

**3. Did the Employer, before administering discipline to an employee, make an effort to discover whether the employee did in fact violate or disobey a rule or order of management?**

The Arbitrator answers this question, "Yes." The investigatory steps taken by the Employer in this matter, contained in the record in the testimony of Felice Davis, an Investigator 3 with the DOC who performed the central investigation in this matter (Er. Ex. 3), her interviews with J.D., her cellmate, the Grievant, and DOC staff, the recordings obtained of conversations between the Grievant and J.D., and the testimony of Maggie Miller-Stout, the Superintendent of the Grievant's DOC workplace, together show a considerable good faith effort to discover and document the Grievant's violation of its policies leading to the Grievant's termination.

**4. Was the Employer's investigation conducted fairly and objectively?**

The Arbitrator's answer to this question is, "Yes." A review of the investigatory steps and methods followed by the Employer in discovering the Grievant's involvement in the acts leading to his termination, including interviews in which Grievant was accompanied by a Union representative, reveals a fair and objective process, confirmed by the Grievant's admissions and uncontested by the Union.

**5. At the investigation, did the "judge" obtain substantial evidence or proof that the employee was guilty as charged?**

The Arbitrator's answer to this question is, "Yes." The most direct evidence of the Grievant's culpability in this matter is his own admissions obtained in the course of the Employer's investigatory interviews, his testimony at the arbitration hearing, and recordings of

his telephone conversations with the Jane Doe. The record also includes documentary evidence, including writings to J.D. authored by the Grievant. (Er. exhibits 1, 3, and 5, and Jt Ex 2 [CD's of recordings of conversations between the Grievant and the offender]) The Grievant testified in the hearing, in substance by narrative or in response to questions, as follows:

The Grievant had been a Corrections Officer 2, at the Purdy Corrections Center from January 4, 1993 to April 30, 2001 when he was transferred to the Airway Heights Corrections Center; he had participated in Department-provided training, a record of which (Er. Ex 3) revealed the extent of his training from the beginning of his career from 1993 through September 2009; his training included offender manipulation, ethics, the Prison Rape Elimination Act, and staff custodial misconduct with offenders. The Grievant understood or agreed with statements put to him by counsel as follows: he was to report all personal contact with offenders, their families or known associates outside the job in accordance with department procedures; he was, by those expectations, not allowed to engage in personal relationships with offenders, their family members or close personal associates; an association with offenders beyond that which is required in the performance of official duties is prohibited in the interest of professional, unbiased service; he did not have any duties, official in nature requiring him to be in contact with J.D.; unless some special permission were granted, personal or business communications and/or relationships with offenders, their family members or known associates are not appropriate and are prohibited; personal relationships, even by immediate family members, with offenders' family or known associates could create a potential conflict of interest or security risk; engaging in phone calls with J.D. and writing to her constituted engaging in personal communications with her; staff were to report contact with offenders, their family members or known associates not authorized within official duties, to the appropriate appointing authority on the Report of Contact with an Offender form no later than the next business day; the reporting obligation applied to significant or ongoing contact; there is an obligation to report to the appropriate authority any changes to the status of significant or ongoing contact with offenders, their family members or known associates on the Report of Contact/Relationship with an Offender form no later than the next working day; preexisting family or personal relationships with an offender under the jurisdiction of the Department must be reported on the Report of Contact/Relationship with an Offender as soon as the individual status of an offender is known; physical contact or communication of a sexual or romantic nature directed toward an offender is prohibited and may constitute criminal behavior according to department policy; Department policy prohibits staff from engaging in the transmission of messages, mail or articles of property from or to offenders, their family members or known associates except when authorized as part of their official duties; (Tr. pp 35-53)

The Grievant's testimony further developed that he had filled out Report of Contact with Offender forms in the past and was familiar with the requirements and procedures associated with that form. In one situation he was approached by a woman who asked, "Do you remember

me?" "I used to be out at Purdy and you worked there." They talked for perhaps five minutes and when the Grievant returned to work the next day, he reported it. On another occasion, his daughters ex-boyfriend came to the facility. The Grievant eventually recognized him, and after the strip search, took him aside and told him it would be in his best interest to forget that he knew the Grievant, because if an inmate knows as officer inside, and the other inmates find out about it, then they give the inmate a rough time. The Grievant then reported the matter to the Lieutenant immediately after that. On another occasion he encountered an individual who was his niece's ex-boyfriend and who had assaulted her. The Grievant considered that a significant contact and notified the Lieutenant. With regard to the Employer's policy regarding the use of state resources, the Grievant testified that he was aware the staff was not to use state resources for personal benefit or to benefit another except as required for official duties or to access any department resource to obtain information for their personal benefit or gain or for the benefit or gain of another except as required for official duties and that, as a matter of potential conflict of interest, staff was not to use their official position to secure privileges for themselves or others or to engage in activities that constitute a conflict of interest. These policies require that staff identify and report potential and actual conflicts of interest. Personal relationships and contact with offenders are within the ambit of that policy. The Grievant admitted using the Offender Management Information System "OMNI" to look up information about J.D: the crimes for which J.D. was incarcerated, her bed assignment, and her location at Pine Lodge Correctional Center. The Grievant admitted that he did this research not for an official business purpose, but for "just my own curiosity." He also researched and conveyed information about facility closures, programs, law changes that might affect J.D., and assessments of a fellow officer in the facility where J.D.'s cellmate's son was incarcerated. The Grievant admitted that he had

developed a friendship with J.D. and her family for some time prior to the time she had become incarcerated, and that he had phone conversations with her while she was incarcerated at Pine Lodge and that he had written to her while she was at the Washington Corrections Center for Women. He further testified that he did not end his contact with J.D. and her family until he found that he was under investigation, and never submitted the required Offender Contact form with respect to J.D. or her family. In addition to recorded phone calls, and references to communications between the Grievant and J.D.'s family, the Employer retrieved a letter from the Grievant to J.D. containing references to her room at his home, her classification, and affectionate terms such as "XOXO," "1-4-3 4 eva & eva," meaning, between the parties, I love you forever and ever, "I miss you just as much too. Quiet here," "...not dating much, keep waiting on my little blonde," "can't wait to see those 18 pounds," (referring to weight J.D. had lost through a fitness program) and "If I thought you did all those things, we'd be history." (Ex. 5).

In sum, the Employer possessed substantial evidence, largely presented by the Grievant, that he had an ongoing personal relationship and contact with an offender and her family and that, in the course of pursuing that relationship, he utilized the Employer's Offender Management Information system, (OMNI) to obtain information to satisfy his curiosity, and her requests, sometimes providing confidential information, all of which conduct he knew to be in violation of DOC work rules.

**6. Has the Employer applied its rules, orders, and penalties even-handedly and without discrimination to all employees?**

The Arbitrator answers this question, "Yes." An employer's failure to administer discipline in a nondiscriminatory fashion, that is, to engage in disparate treatment of employees, is an affirmative defense that must be proved by the Union by a preponderance of the evidence.

In responding to the portion of the Employer's case dealing with reportage of relationships between staff and offenders, the Union presented one matter involving a staff member repairing an offender's eyeglasses without making a report, probably resulting in minor discipline. The Union also asserted that it had requested but not received information from the Employer concerning discipline of employees who had failed to report contacts and relationships with offenders in the past. The Arbitrator sees the eyeglass-repairing scenario as being too remote in kind and duration from the conduct here at issue to be given weight. As to the Union's not obtaining requested information, options for proceeding were available: The Arbitrator could have been asked to issue a subpoena duces tecum to the Employer to compel the production of needed materials. If the Employer did not comply, the Union could then ask the Arbitrator to make an inference of fact that the evidence, if produced, would have been adverse to the Employer. Also, if an Employer's actions amount to an obstruction of the grievance procedure, an unfair labor practice complaint may have been pursued. In any case, material that would support the Union's claim is not before the Arbitrator, and the Union does not prevail on this claim.

In responding to the portion of the Employer's case dealing with misuse of their information system, the Union elicited testimony from Joseph Kuhn, the Union business representative whose jurisdiction includes Airway Heights, concerning Internet usage practices. Prior to becoming a business representative for the Union, the witness worked as a sergeant at Airway Heights for approximately 6 1/2 years. His testimony, in sum, suggested that: the Grievant's counseling of the offender to file a PREA complaint concerning a strip search was "a little bit unusual, but not inappropriate;" an officer's looking up offender information was common, such as information relating to an offender's crime or housing assignment, as opposed

to transfer information; letters of reprimand were the typical form of punishment for Internet offenses that were something less than pornography, or otherwise less serious offenses; and, much of the information relayed by the Grievant to the offender was available to the public. (Tr. pp. 180-192) The Arbitrator, upon a review of all of the testimony, finds that the sum of the actions of the Grievant, their nature, duration, and impact, were not sufficiently analogous to those cases offered by the Union to support this argument.

The Arbitrator finds that the Union has not carried its burden of proving by a preponderance of the evidence that the Employer's termination of the Grievant was disproportionate to discipline administered to other of its employees in comparable circumstances.

**7. Was the degree of discipline administered by the Employer in a particular case reasonably related to (a) the seriousness of the employee's proven offense and (b) the record of the employee in his service with the Employer?**

The Arbitrator answers these questions, "Yes." In the course of the hearing, the Employer, through credible testimony and exhibits, detailed areas of concern that it felt underscored the seriousness of the Grievant's offense, to the point of overcoming a consideration of the favorable aspects of his term of service.

The Grievant's cooperation with the Employer's investigation, albeit after the fact of discovery, is noted. His disclosure of feeling that he had been "compromised," and the manner in which this process of compromise began and unfolded, raise legitimate concerns considering his employment as a corrections officer for the general population of offenders in a prison setting where security is essential. The Grievant's failure to see the problems raised by his conduct, how and why DOC policies applied to his conduct, and his minimizing of the potential impacts of that conduct leading to his termination, gave the Employer, and this Arbitrator, concerns over

his ability to hereafter function effectively in the workplace. While the Grievant clung to the notion that he was corresponding with a "friend," the record is replete with instances where J.D., directly, and through her family, made repeated requests for information, escalating in sensitivity, concerning, for example, what she should do about a guard's allegedly improper strip search, how changes in the law and DOC programming might affect her incarceration, information about prison programs, information the Grievant was not willing to give to the offender directly but through her mother, information the Grievant tells the offender he "keep(s) on looking at it (the DOC computer) every day," and more seriously, information concerning another officer at the Grievant's institution, where the offender's cellmate's son is incarcerated. (Tr. Pp. 120-140, and Jt. Ex. 28/04/09 at 14:20 and 6/22/09 at 6:44) The witness testified to the networking that offenders engage in as a feature of their unique community, and the problems that can arise. The Grievant's stated as his defense his view that his correspondence with J.D. did not violate DOC rules and did not require reportage because he and the offender were friends. (Tr. P. 127)

The significant problems and risks posed to the Grievant, the offender, staff and inmates of both the Grievant's and the offender's institutions, and the Grievant's denials, minimizations and excuses for his conduct in response, support the Arbitrator's finding that the discipline administered by the Employer was consistent with the seriousness of the Grievant's conduct and that such conduct overcomes the otherwise commendable record the Grievant had amassed over his years with the DOC.

The Union has argued vigorously to protect the Grievant's position. Assertions such as stating the Grievant made "a mistake," however, merely mirror the Grievant's pattern of denial and minimizing that militate against his retention in the workplace. Let us be clear that the sum

of the Grievant's behavior was not "a" mistake, but rather a series of wrongful conscious choices made over a period of many months. The record indicates that the Grievant was conscious of the wrong of his position for some time, as evidenced by his responses to the offender's requests, for example:

Offender: "Well, can't you look in the computer, get some information?"

Grievant: "Yeah, I'll think about doing that."

...

Offender: " Well, what information do you have? Where did you get that?"

Grievant: "Well, I did what you asked."

Offender: " Can you send it to me?"

Grievant: "Well, no."

...

Offender : "Hopefully you will call her (offender's mother) with some information."

...

Grievant: "Well I'm not going to talk about that."

Offender: " Oh, yeah. I can't go there."

The Union asserts that because the evidence failed to show that a sexual relationship existed between the offender and the Grievant, an apparently important part of the Employer's case, the existence of just cause to discharge the Grievant is negated. This argument fails because DOC policy speaks in terms of prohibiting a personal relationship. While the Arbitrator finds insufficient evidence of a sexual relationship between the Grievant and the offender, there is overwhelming evidence of a personal relationship. A personal relationship involves exchange, exchanges of greetings, support, information, and affection. The problems created by personal relationships between staff and offenders were well described in testimony. The potential for manipulation by an offender in the course of conducting such relationships was also well described, and was covered in training which the Grievant acknowledged having received. This manipulation, which led to the compromise of the Grievant's position in this case, directly impacts the ability of the Grievant to return to the workplace. The Arbitrator adopts the

employer's description of the impact of compromise upon the effective functioning of a corrections officer:

It leads to distrust by all the peers. One of the things about corrections is you always want to know your partners have your back. When a corrections professional, no matter what their job class, is more finely attuned with the offender... other than staff, that puts their credibility in everything they do in serious question and the confidence the peers or management, even offenders, have with an individual that they know is compromised... you have no credibility. The integrity of corrections professionals is what we base our control of people with, having that integrity, and once that's lost it's something that is very difficult, if at all possible, to regain. (Tr. P. 139)

The Employer has presented evidence sufficient to satisfy the Arbitrator that the Grievant's actions violated reasonable Employer policies in a manner that severely violated the requirements and expectations of an employee in the Grievant's position as a corrections officer, leaving irreparably broken the trust necessary to the continuation of an employer/employee relationship.

The Grievant's decision to not report his relationship with the offender deprived the Employer and himself of the opportunity to ameliorate the situation. While the Grievant came to acknowledge that his conduct violated the Employer's work rules, and that he learned through his mistake and would welcome further training and perhaps train others, these revelations came after his conduct had been discovered, many months after the conduct began. This was not the case where, before discovery, an employee comes to their supervisor to take responsibility for the problems he has been having in the workplace, and seeks the supervisor's assistance in formulating a corrective plan to assure that conduct would be addressed and remedied in a manner such that the employee's position in the workplace might be rehabilitated.

The Union provided authority in its brief as a guide to the Arbitrator in considering the Grievant's conduct in light of his work record, notably City of Portland, 77 LA 80, 826 (Axon,

1981), reinstating two uniformed police officers in light of their superior work records. While decisions by other arbitrators rendered in other cases dealing with other industries are not generally viewed as binding precedent in the manner that cases reported in the public legal system's reporting services serve as "stare decisis" authority, they may sometimes serve as guides. That said, the Arbitrator does not find the presented cases sufficiently on point so as to resolve the issue of termination in favor of this Grievant. For purposes of resolving this case in this workplace, the Arbitrator tends towards Arbitrator McCoy's view expressed in the earliest years of reported labor arbitration decisions in Stockham Pipe Fittings Co., 1 LA 160 (1945). As that respected neutral noted:

The only circumstances under which a penalty imposed by management can be rightfully set aside by an arbitrator are those where discrimination, unfairness, or capricious or arbitrary action are proved – in other words, when there has been abuse of discretion.

Here, the Arbitrator finds no abuse of discretion since the penalty selected was in keeping with the seriousness of the offense.

The Employer has presented evidence sufficient to satisfy the Arbitrator that the Grievant's actions severely violated the requirements and expectations of an employee in the Grievant's position as a corrections officer, leaving irreparably broken the trust necessary to the continuation of an employer/employee relationship.

Upon consideration of the whole record, the requirements of the Grievant's position and duties, the sensitivity of the mission of the Employer, the characteristics and needs of the inmates in the Grievant's charge, and of his fellow staff, by any standard that could be applied, whether by preponderance of the evidence or by clear and convincing evidence, the Arbitrator finds that the Employer has met its burden of proof in this matter and that the discharge of the Grievant was with just cause.

## CONCLUSION

Based upon all of the evidence surrounding the conduct of the Grievant, Robert Zirkle, the accepted tests of just cause for discipline, and the record as a whole, the Arbitrator finds that termination of his employment was not too harsh a penalty under the circumstances, and was imposed for just cause. The Arbitrator will enter an award consistent with the above analysis and conclusions.

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LABOR & PERSONNEL DIVISION

<b>IN THE MATTER OF THE ARBITRATION BETWEEN</b>	)	<b>FMCS CASE NO:</b>
	)	
<b>TEAMSTERS LOCAL UNION 117</b>	)	<b>100405-02552-8</b>
<b>Union,</b>	)	
<b>and</b>	)	<b>ARBITRATOR'S AWARD</b>
	)	
<b>STATE OF WASHINGTON</b>	)	<b>GRIEVANT:</b>
<b>DEPARTMENT OF CORRECTIONS,</b>	)	
	)	<b>ROBERT ZIRKLE, JR.</b>
<b>Employer.</b>	)	

Having heard or read and carefully reviewed the evidence and arguments in this case, and in light of the above discussions, FMCS Grievance No. 100405-025520-8 is dismissed:

The Employer had just cause to terminate the employment of the Grievant, Robert Zirkle, Jr. on January 22, 2010, consistent with Article 8.1 of the collective bargaining agreement between the parties and associated work rules.

RESPECTFULLY SUBMITTED this 25th day of February, 2011.

\_\_\_\_\_  
Anthony D. Vivenzio, Arbitrator