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#1230

OPINION AND AWARD
IN THE MATTER OF THE ARBITRATION BETWEEN

OHIO CIVIL SERVICE EMPLOYEES' ASSOCIATION, LOCAL 11, AFSCME

-AND-

STATE OF OHIO DEPARTMENT OF REHABILITATION AND CORRECTION
SOUTHERN OHIO CORRECTIONAL FACILITY

APPEARANCES

FOR OCSEA
Cline, Sarah, Grievant
Conley, Shane, Correction Officer, CRC
Rick Daily, Correction Officer, CRC
Hill, Patricia, Union Advocate
McLaughlin, Brandon, Electrician 2, PCI

FOR OHIO DRC
Atkins, James, Advocate, Labor Relations Officer 3, DRC
Boone, Derrick, Witness
Broom, Antonio, Witness
Cook, Brian Former Warden
Harris, Nathan, Investigator
Hudson, Jaquinn, Witness
Hudson, Stuwart Assistant Director
Lee, Antonio Assistant Chief Inspector

HEARINGS HELD
9/23/23; 10/26/23; 12/7/23

GRIEVANCE NUMBER
DRC-2021-02785-03

SUBJECT
Violation of Work Rules 7, 8, 24, 36, 41

DECISION
Grievance Denied

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I. The Facts

A. Introduction

The parties to this disciplinary dispute are the State of Ohio Department of Rehabilitation and Correction Southern Ohio Correctional Facility ("Management" or "ODRC") and the Ohio Civil Service Employees' Association, Local 11, AFSCME ("Union" or "OCSEA"), the exclusive bargaining representative for Correctional Officer Sarah Cline ("Grievant").[1]

B. Factual History

ODRC hired the Grievant as a Correction Officer on May 24, 2010 and terminated her on August 27, 2021 for having violated the work rules cited below.[2] During her eleven-year tenure with ODRC, the Grievant developed an impressive discipline-free work record[3] with overall job performance reviews that either met or exceeded Management's expectations. Also. she completed numerous advanced courses and programs with concomitant titles.[4] Except for some documented concerns about the Grievant's aggressive interactions with inmates,[5] Management considered her to be a well-trained, experienced . . . respected[6] and . . . appreciated[7] Correction Officer . . . ."[8]

The instant dispute erupted on February 6, 2021 in unit R2 of the Ohio Corrections Reception Center ("CRC"). As the Grievant was doing her rounds,

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1 Hereinafter referenced as, "Parties."
2 *See, infra.* pp. 5-6.
3 Joint Exhibit 3, at 13-45.
4 Joint Exhibit 3, at 13, 16, 18, 21, 22, 29-45.
5 Joint Exhibit 10, at 199-237.
6 Management's Post-hearing Brief, at 4.
7 *Id.*, at 11.
8 Management's Post-hearing Brief, at 9.

Inmate Michael McDaniel (Mr. McDaniel) began yelling from his cell to an inmate in a neighboring cell to borrow a book. The Grievant responded to Mr. McDaniel's yelling by walking closer to his cell and asking whether he was yelling.[9] Mr. McDaniel's responded by saying, "No bitch I'm not screaming."[10] In response, . . .[The Grievant] said "Don't call me what you call your mother."[11] The Grievant and Mr. McDaniel then exchanged similar comments. The Grievant walked away from Mr. McDaniel's cell, encountered Correctional Officer Kristy Judd (CO Judd), and said, "Sounds like someone needs their cell searched." CO Judd said, "Yep let's search it."[12]

The Grievant and CO Judd then approached Mr. McDaniel's cell. At some point during that encounter, the Grievant appeared to have moved her hand toward her container of mace. Mr. McDaniel then said, "You try to spray me, you white trailer bitches, and I'll whoop both of your asses."[13] Shortly after that threat (with the Grievant nearby), CO Judd open Mr. McDaniel's cell door, and guided him behind a nearby stairwell beyond the lens of ***all*** security cameras. Then Mr. McDaniel, the Grievant, and CO Judd began to scuffle, during which all three were injured. The Grievant suffered a head injury, and Mr. McDaniel passed away that same day .[14]

C. PROCEDURAL HISTORY

ODRC completed its administrative investigation of the instant dispute, held pre-disciplinary hearings, and terminated the Grievant on August 27, 2021 for having

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9 Some witnesses said the Grievant's inquiry was couched in profanity.
10 Management's Post-hearing Brief, at 6 (citing Joint Exhibit 4, at 102).
11 *Id.*
12 *Id.*
13 Management's Post-hearing Brief, at 12, (citing Joint Exhibit 12, at 388).
14 The foregoing facts capture the essence of the instant dispute. However, Mr. McDaniel died after several corrections officers physically carried him to a medical facility within CDC. The facts surrounding his death exceed the scope of the instant dispute. Therefore, further consideration of those facts is contraindicated.

violated several rules and post orders.[15] On September 2, 2021, the Union filed ***Grievance DRC-2021-02785-03*** ("Grievance") challenging the just cause status of that removal.[16]

After reaching impasse on the just-cause status of the Grievant's removal, the Parties selected the Undersigned to resolve the instant dispute. At the outset of the virtual arbitral hearing, the Parties raised no procedural issues that affected the Undersigned's jurisdiction to hear that matter. During the arbitral hearing, the Parties' advocates made opening statements, as well as introduced testimonial and documentary evidence to support their respective positions in this dispute. All documentary evidence was available for proper and relevant challenges. All witnesses were duly sworn and available for both direct and cross-examination. At the close of the hearing, the Parties agreed to submit Post-hearing Briefs. The Undersigned closed the arbitral record upon receipt of the Parties' Post-hearing Briefs.

II. Relevant Contractual Provisions and Work Rules[17]

Article 24.02 - Progressive Discipline

The Employer will follow the principles of progressive discipline. Disciplinary action shall be commensurate with the offense. Disciplinary action shall include:

a. One (1) or more written reprimand(s).
b. One (1) or more working suspension(s). A minor working suspension is a one (1) day suspension, a medium working suspension is a two (2) to four (4) day suspension, and a major working suspension is a five (5) day suspension. No working suspension greater than five (5) days shall be issued by the Employer.[18]

Article 24.06—Imposition of Discipline

Disciplinary measures imposed shall be *reasonable* and commensurate with the offense and shall not be used solely for *punishment*.[19]

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15 Joint Exhibit 2, at 1.
16 *Id.*
17 Although the Parties neither cited nor *argued* the nuances of a *specific* contractual provision(s), No. 7 of the Joint Stipulations cites Article 24 of the Collective-bargaining Agreement. Therefore, the Arbitrator included relevant sections of the Collective-bargaining Agreement (2021-2024).
18 Collective-bargaining Agreement (2021-2024), at 92.
19 Collective-bargaining Agreement, at 94.

Work Rules

Rule 7 Failure to follow post orders, administrative regulations, policies, or written or verbal directives.

Rule 8 Failure to carry out a work assignment or the exercise of poor judgment in carrying out an assignment.

Rule 24 Interfering with, failing to cooperate in, or lying in an official investigation or inquiry.

Rule 36 Any act or failure to act that could harm or potentially harm the employee, fellow employee(s) or a member of the general public.

Rule 41 Unauthorized actions, a failure to act or a failure to provide treatment that could harm any individual under the supervision of the Department.

ODRC Post Orders[20]

* * * *

IV. Definitions

* * * *

Search — To examine, investigate and/or carefully scrutinize in order to find something lost, stolen, misplaced, or concealed.[21]

Random Search — A search that lacks a definite pattern.[22]

* * * *

VI. Procedures

A. General Duties

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23 . . . . All schedules will be determined by Unit Management . . . Indoor Recreation-Only a shift Supervisor or Unit Manager has the authority to cancel indoor recreation.[23]

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B. Shakedowns and Search Procedures

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General Statement To Begin Shakedown /Cell Searches

3. . . . Avoid conducting shakedowns/cell searches during periods of inside recreation.[24]

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20 Joint Exhibit 4, at 127-147.

21 Joint Exhibit 4, at 128.

22 *Id.*

23 *Id.*, at 133. (emphasis added) (Hereinafter referenced as PO-1).

24 Joint Exhibit 4, at 134 (emphasis added) (Hereinafter referenced as PO-2).

Opening Inmates' Cell Doors[25]

III. THE ISSUE

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

IV. Summary of the Parties' Relevant Arguments

A. SUMMARY OF ODRC'S ARGUMENTS

1. Management's Burden of Persuasion

The Union's request for elevating the measure of persuasion from preponderant evidence to beyond a reasonable doubt should be denied because the charges against the Grievant are not stigmatizing.

2. Violation of Rule 7

a. The Grievant violated PO-2 by performing a *retaliatory/targeted* search on Mr. McDaniel's cell: (1) while other inmates were on inside recreation ("Simultaneous Recreation") in Unit R.
b. The Grievant failed to follow her training by opening Mr. McDaniel's cell after he had displayed hostilities toward her.
c. The Union's claim of past practice should be denied because:
(1) The Union failed to establish a prima facie case of past practice.
(2) The Union first raised a past practice claim at the arbitral hearing.

3. Violation of Rule 8

The Grievant exercised poor judgement by not requesting the presence of a supervisor before opening Mr. McDaniel's cell.

4. Violation of Rule 24

The Grievant interfered with an official ODRC administrative investigation by falsely claiming a memory loss during the investigatory interviews.

5. Violation of Rule 36

The Grievant and CO Judd removed Mr. McDaniel from his cell despite his previous utterances of verbal hostilities toward the Grievant. Once Mr. McDaniel was released from his cell, he, the Grievant, and CO Judd were seriously injured.

6. Violation of Rule 41

The Arbitrator was unable to discern a specific argument by Management that the Grievant violated Rule 41.

25 See, infra note – for full discussion of this subject.

B. Summary of the Union's Arguments

1. Management's Burden of Persuasion

The Arbitrator should elevate the burden of persuasion in this dispute from preponderant evidence to beyond a reasonable doubt because the charges stigmatized and harmed the Grievant, and the Grievant had stellar work credentials at the time of her removal.

2. Violation of Rule 7

The Grievant did not violate Rule 7 because she violated neither PO-1 nor P0-2. During the COVID pandemic, the parties adopted a past practice for allowing correctional officers to search inmates' cells during recreation.

3. Violation of Rule 8

The Grievant exercised good judgment by granting inmates their missed recreations while removing Mr. McDaniel from his cell.

4. Violation of Rule 24

The Grievant suffered head injuries, which triggered actual memory loss. Therefore, she was not evading Management's questions during the investigatory interviews.

5. Violation of Rule 36

Injuries that Mr. McDaniel suffered when struggling with correctional officers beneath the stairwell were ruled justifiable. Thus, there is no actionable "harm" associated with the Grievant under Rule 36. The only conceivable "harm" under Rule 36 was opening Mr. McDaniel's door, which was necessary for prisoners to have recreation.

6. Violation of Rule 41

Rule 41 is inapplicable because it focuses on "treatment," which is not an issue in the instant case.

V. Evidentiary Preliminaries

Because this is a disciplinary dispute, Management has the burden of proof (persuasion), requiring it to demonstrate by ***preponderant* evidence** in the arbitral record as a whole that it terminated the Grievant for ***just cause***. Doubts that ***exceed*** the level of preponderant evidence shall be resolved against Management. Similarly, the Union must establish its ***allegations*** and ***defenses*** by ***preponderant evidence*** in the arbitral record as a whole. Doubts that ***exceed*** the level of preponderant evidence shall be resolved against the Union.

VI. Discussion and Analysis—Proper Measure of Persuasion

At the beginning of the arbitral hearing, the Union requested the Undersigned to elevate Management's burden of persuasion from *preponderant* evidence to *beyond a reasonable doubt* ("Request").[26] Because the Union is the proponent of this ***affirmative defense***, it must demonstrate, by ***preponderant evidence*** in the arbitral record as a whole the ***necessity*** for this evidentiary modification[27]

A. The Union's Arguments

In support of its request, the Union cites two groups of circumstances. The first group entails qualities over which the Grievant has ***direct*** control such as her: (1) tenure with ODRC; (2) excellent work record; (3) advanced job-related skills. The second group comprises circumstances over which the Grievant has ***no direct*** control such as the ***adverse publicity*** and ***purported stigmatization*** associated with the instant dispute.

The Union contends that two events ***factually caused*** the ***adverse publicity***, which triggered the alleged ***stigma*** that subjected the Grievant to ***harassment*** and encumbered her employment opportunities. The first event involved public conferences, during which Ms. Annette Chambers-Smith, Director of ODRC, (Director Chambers-Smith), delineated and condemned circumstances surrounding the instant dispute and predicted *termination* of all staff involved therein. The second event was the Coroner's Report of Mr. McDaniel's death ("Coroner's Report"), which found ***"stress-induced sudden cardiac death"*** was the ***"immediate cause;"*** of death;

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26 Transcript, at 19. Hereinafter referenced as "Request."

27 The Union's Post-hearing Brief lacks an in-depth discussion of this issue. Nor did the Union apparently raise this issue for discussion during the Parties' negotiated grievance procedure, which includes mediation. Nevertheless, the Parties addressed this issue at the beginning of the arbitral hearing. Transcript, at 19-24.

"Homicide" was the ***"manner"*** of death and "***altercation with correctional officers***" was "***how***". . . [Mr. McDaniel's] injury occurred.[28]

B. Management's Arguments

Management disagrees. First, ODRC perceives no ***nexus*** between Director Chambers-Smith's public **conferences** and ***charges*** against the Grievant. Director Chambers-Smith played no part in Management's case against the Grievant. Second, Management maintains that the Union's claims lack a factual causal nexus between the Coroner's report and the Grievant's alleged stigmatization. Management also contends that the Undersigned should deny the Union's affirmative defense because it was first asserted during the arbitral hearing. Finally, Management observes that the Grievant's employment opportunities could not have been dismal because she secured employment after ODRC terminated her.

C. Analysis of Parties' Arguments

The measure of persuasion can be (and often is) an outcome-determinative standard in litigation. The most common measures of persuasion are preponderance of the evidence (preponderant evidence), clear and convincing evidence, and beyond a reasonable doubt. Preponderant evidence is the "workhorse" in civil litigation, including grievance arbitration. But it is *occasionally* supplanted by clear and convincing evidence in civil litigation involving either nonmonetary issues or *stigmatizing* charges. For example, *civil fraud* can be considerably more stigmatizing than other civil charges. Consequently, courts may adopt clear and convincing (rather than preponderant) evidence as a measure of persuasion in civil fraud cases.

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28 Joint Exhibit 7 (emphasis added).

In grievance arbitration, most, if not virtually all mainline arbitrators embrace preponderant evidence as the measure of persuasion. A few grievance arbitrators adopt the clear and convincing standard, and fewer still apply beyond a reasonable doubt.

Essentially two rationales explain these evidentiary schools of thoughts. First, grievance arbitration is essentially informal *civil litigation*. Second, grievance arbitration is an *administrative* (rather than judicial) forum where preponderant evidence is the preferred measure of persuasion.

1. NATURE OF PREPONDERANT EVIDENCE

Functionally, preponderant evidence tolerates ***more uncertainty*** than other evidentiary standards. For example, a plaintiff may satisfy the preponderant evidence standard merely by proving that "*more likely than not*" a defendant engaged in the alleged misconduct. In contrast. the clear and convincing standard tolerates *much* **less *uncertainty***, obliging a plaintiff to adduce evidence that ***clearly convinces*** a decisionmaker of a defendant's misconduct. Finally, when ***strictly applied***, the beyond a reasonable doubt standard ***tolerates precious little uncertainty*** relative to the other measures of persuasion, requiring a plaintiff to abolish ***any reasonable doubt*** regarding a defendant's alleged misconduct.

As mentioned in the arbitral hearing, the Undersigned does not apply the beyond a reasonable doubt standard in arbitral hearings because (if properly applied) it would inordinately burden employers. However, under the *proper circumstances*, the Undersigned will apply the ***clear and convincing*** standard. The proper

circumstances entail situations where a Grievant faces ***intrinsically*** stigmatizing charges such as theft, sexual harassment, or drug trafficking on an employer's premises. The magnitude and immanent nature of stigma in such charges virtually assures negative employment results for employees who are either charged with or found guilty of such charges.

2. PREPONDERANT EVIDENCE IS PROPER MEASURE OF PERSUASION

In the instant case, the Arbitrator perceives no charges against the Grievant that justify raising Management's measure of persuasion to clear and convincing evidence. Management charged the Grievant with having violated operational work rules (such as Rule 7) that are *integral* to ODRC's legitimate interests. Therefore, the Arbitrator hereby denies the Union's request to elevate Management's measure of persuasion from preponderant evidence to clear and convincing evidence.

VII. DISCUSSION AND ANALYSIS—PAST PRACTICE, RULE 7, PO-1, PO-2

The first issue here is whether the Grievant violated Rule 7 by violating PO-2.[29]

1. Rule 7 prohibits: "Failure to follow ***post orders***, administrative regulations, policies, or written or verbal directives."[30]
2. PO-1 states: (1) Allrecreation schedules will be determined by Unit Management . . . . Only a *Shift Supervisor or Unit Manager* has the *authority to* ***cancel*** *indoor recreation*;[31]
3. PO-2 states, "***Avoid*** conducting ***shakedowns/cell searches*** during periods of *recreation*.[32]

A. MANAGEMENT'S ARGUMENTS

Management argues that:

1. The Union failed to establish a prima facie case for a ***past practice***. Also, the Union ***initially*** alleged a past practice during the arbitral hearing.

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29 Management does not accuse the Grievant of having violated PO-1. Nevertheless, the Arbitrator analyzes PO-1 because the Union argues that it justified the Grievant's decision to open Mr. McDaniel's cell while other inmates were on recreation.

30 Joint Exhibit 3A.

31 Joint Exhibit 4, at 133.

32 *Id*, at 134 (emphasis added).

2. The Grievant violated PO-2 and, hence, Rule 7 when she opened Mr. McDaniel's cell door while other inmates were on recreation.
3. "Avoid" in PO-2 clearly reflects an intent to prohibit correctional officers from performing cell searches while other inmates are on recreation.
4. The Grievant subjected Mr. McDaniel's cell to a targeted or retaliatory cell search.

B. Union's Arguments

The Grievant did not violate Rule 7 because:

1. During the COVID pandemic, the Parties adopted a ***past practice*** of conducting cell searches during recreation.
2. Under PO-1, correctional officers ***lack discretion*** to *deny* recreation to inmates even when other inmates are also on recreation at the same time ("simultaneous recreation").[33]
   a. First, even if other inmates are on simultaneous recreation, PO-1 ***implicitly*** *obligated* the Grievant to give Mr. McDaniel recreation. PO-1 *authorizes only Shift Supervisors* and *Unit Management* to *cancel* inmates' recreation. That restricted grant of authority implicitly ***intends*** to ***deny c***orrectional officers the authority to cancel inmates' recreation.[34]
   b. Second, skipping cell searches would have more likely triggered discipline than skipping recreation: "Failure to complete cell searches was *sure discipline*.[35] Recreation outside of . . . [recreation] time was not *expressly* identified as *leading to discipline*, unlike the *failure to complete cell searche*s. . . . Failure to complete cell searches was *sure discipline*."[36]
3. PO-2 does not prohibit correctional officers from conducting ***cell searches*** during simultaneous recreation because ***"avoid,"*** does not ban cell searches during simultaneous recreation.

C. Analysis of the Arguments

1. Past Practice

As an affirmative defense, the Union asserts that, during the pandemic, the Parties adopted a past practice that permitted correctional officers to search inmates' cells during simultaneous recreation. Furthermore, the Union alleges that Management was fully aware of past practice.

First, Management denies any knowledge of the past practice. Second,

33 "Post Orders do not permit the Officers to *cancel* recreation." Union's Post-hearing Brief, at 16.
34 Union's Post-hearing Brief, at 17-18.
35 The Union cites no post order or rule that *explicitly* calls for disciplining correctional officers who skip cell searches.
36 *Id*. at 18.

Management stoutly contends that the Union failed to establish a prima facie case of past practice. Finally, Management observes that the Union ***initially*** raised past practice as an affirmative defense during the arbitral hearing.

Because a past practice can substantially recontour a collective-bargaining relationship, proving such a practice is deliberately onerous. Accordingly, the prima-facie elements of a past practice must establish that practice as:(1) unequivocal; (2) clearly enunciated and acted upon; and (3) readily ascertainable over a reasonable period of time as fixed, established, and mutually acceptable by both Parties.

Preponderant evidence in the arbitral record as a whole does not demonstrate the parties' mutual intent to establish the alleged past practice. Indeed, the Union's Post-hearing Brief never specifically discusses a past practice. Therefore, the Arbitrator denies the Union's allegation of a past practice.

2. PO-1[37]

The argument that PO-1 implicitly forbids correctional officers to skip inmates' simultaneous recreation does not carry the day. First, Management's charge against the Grievant under PO-2 addresses ***cell searches*** rather than ***recreation.*** Second, preponderant evidence in the arbitral record as a whole establishes that the Grievant and CO Judd opened Mr. McDaniel's cell to perform a ***cell search***, which PO-1 does not address.[38] Finally, the argument that PO-1 prohibits correctional officers from canceling recreation flows from the Union's interpretation that permitting ***only*** Unit Management and Shift Supervisors to

37 Management offered an analysis of PO-1.
38 There is, however, language in the arbitral record where CO Judd acknowledges having granted makeup recreation to inmates who had missed their regularly scheduled sessions.

cancel recreation ***implicitly*** disallow correctional officers to ever skip recreation. Standing alone, interpretation seems overbroad because it equates the power to ***cancel with the power*** to ***absolutely preempt*** the authority to ***skip***, irrespective of ***any*** competing rules or post orders, however compelling. Based on the foregoing discussion, the Arbitrator holds that the Union's interpretation of PO-1 lacks persuasive force.

3. PO-2
Cell Searches During Inmate Simultaneous Recreation

Management argues that the Grievant violated PO-2, which ***explicitly*** prohibited her from searching Mr. McDonnell's cell during simultaneous recreation. In support of its position, Management references the Plain Meaning Rule and cites the dictionary definition of "*avoid*" to mean "*refrain* from," or "to *prevent* the occurrence of."[39] Management then argues that: . . . [T]he plain meaning of [avoid] in [PO-2] is, "to . . . [absolutely] refrain from conducting shakedowns/cell searches during periods of . . . recreation."[40]

Instead of directly challenging Management's dictionary definition of "avoid," the Union proffers a ***contextual interpretation***, which, arguably, deprives "avoid" of preclusive force because to ***"Avoid"*** an action does not ***necessarily*** establish an ***intent*** to prohibit it.

In support of its contextual interpretation, the Union maintains that when post orders ***intend*** to flatly prohibit conduct, the language clearly and unambiguously communicates that intent: "Post Order[s] . . . [generally use]. .

39 Management's Post-hearing Brief, at 14 (citation omitted), (emphasis added).

40 Management's Post-hearing Brief, at 14.

.dynamic words such as 'never', 'shall' and 'shall never'. . . . forceful indicators that leave no implication as mere guidance. . . . 'avoid' . . . only used once in the Post Orders. . . . not a formal context word like . . . "never." 'shall' and 'require'. . . . [focus]

on . . . obligation . . .. '[A]void' . . . emphasize[s] . . . recommendation or . . . desirability.]."[41]

For the reasons discussed below, the Arbitrator holds that Management has the a more persuasive interpretation of PO-2. The problem with the Union's contextual interpretation is that it ***contravenes*** the l***anguage*** of other Post Orders. The following excerpt should illustrate this point.

Use of Force

* * * *

VI. PROCEDURES

A. Use of Force Generally

* * * *

4.b. *Whenever safe and possible* to do so, an employee shall summon assistance before becoming involved in a use of force. Whenever it is necessary to use force, *it is ideal* to have enough staff to safely control the situation. . . [42]

The emphasized language in the foregoing passage highlights a problem with the Union's *contextual*, interpretive approach: Post orders *clearly and unambiguously* express the *intent* to ***grant*** *discretion*. Absent such clear and unambiguous language, one can *reasonably conclude* that discretion was ***not*** intended. With respect to PO-2, the emphasized language demonstrates that had the drafters intended to communicate a ***discretionar***y passage, they plainly

41 Union's Post-hearing Brief, at 34 (emphasis added).
42 Joint Exhibit 4, at 110, (4b).

could have done so as illustrated in the emphasized text in the foregoing quote. Instead, they used "***avoid,***" which has "***refrain***" as a dictionary definition. Consequently, the Arbitrator holds that one can reasonably interpret PO-2 as ***intending to prohibit*** cell searches during simultaneous recreation.

The Arbitrator also finds unpersuasive the Union's argument that the Grievant was ***obliged*** to search Mr. McDaniel's cell because cell searches were obligatory and failure to perform them would trigger discipline. The Union cited no specific post order or provision to support its claim that failure to conduct cell searches would trigger certain discipline. A search of the arbitral record revealed only the following passages regarding cell searches, none of which explicitly linked discipline to a failure to conduct cell searches:

> A minimum of three 3 random cell searches will be conducted on first and second shifts. Cell searches are not to be conducted on third shift without strong evidence that contraband is present or a serious threat to the security of the institution exists and then only with a Shift Commanders approval and also in the presence of a Supervisor. . . . All cells are to be shut down and searched for contraband at least once a month.[43]

Again, based on the foregoing discussion of the Union's position with respect to cell searches, the Arbitrator finds that position to be unpersuasive.

VIII . Discussion and Analysis: Rule 24

Rule 24 prohibits "Interfering with, *failing to cooperate* in, or *lying* in an official investigation or inquiry." The issue here is whether the Grievant's *head injury caused* a *memory loss* that ultimately prevented her from answering *some* investigatory questions.

43 Joint Exhibit 4 at 134.

Two facts are undisputed about the alleged violation of Rule 24. First, the Grievant suffered a head injury during her struggles with Mr. McDaniel. Second, during her investigatory interviews, the Grievant was either unresponsive or not fully responsive to some questions.

A. Management's Arguments

Management insists that neither the Grievant's head injury nor associated memory losses *factually caused* her failure to answer some questions during investigatory interviews. Instead, Management vigorously contends that the Grievant D*eliberately elected not to answer certain questions*.

B. The Union 's Argument

Conversely, the Union stresses two undisputed medical facts: (1) The Grievant suffered a head injury and (2) Head injuries *often* cause memory losses. [44] Furthermore, the Union argues that Management could have consulted with medical personnel to verify the Grievant's memory loss.[45]

C. Assessing the Parties Arguments

For reasons set forth in the ensuing discussion, the Undersigned holds that preponderant evidence in the arbitral record as a whole ***does not*** demonstrate that: (1) The Grievant's head injury *factually caused* her alleged memory loss; and (2) The alleged memory loss *factually caused* the Grievant's failure to answer questions posed to her during investigatory interviews.

As previously set forth in this opinion [46], Management has the *burden of persuasion* regarding proof of *just cause*, which entails proof of its *charges* against the Grievant.

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[44] "Memory loss is common for head injuries. Memory loss in a traumatic brain injury is complex." Union Post-hearing Brief, at 11.

[45] If there was *doubt* about Officer Cline's condition, the investigators could have *followed* the *medical trail* to *confirm* her *serious medical condition*. Institutional *medical staff* and the shift office supervisors could have *corroborated* that she was sent out for a *possible concussion*." Union Post-hearing Brief, at 3. (emphasis added).

[46] See, Evidentiary Preliminaries, at 9.

Similarly, the Union shoulders the burden of persuasion concerning its *allegations* and *affirmative defenses*. The measure of persuasion for both parties is preponderance of the evidence. Also, from a layman's perspective, a *causal nexus* between a head injury and the *existence/extent* of subsequent memory loss can be *imperceptible*. Such lack of apparency can (and frequently does) amplify *reasonable* concerns about *veracity*. Therefore, it becomes even more incumbent for the proponent of these conditions to medically *establish* and *link* them.

To establish a nexus between the Grievant's *proven* head injury and her *alleged memory loss*, the Union references *general* medical statements that do not address the Grievant's specific circumstances. However accurate the Union's ***general*** medical references, they lack sufficient ***specificity*** to constitute preponderant evidence that the Grievant's head injury *factually caused* the *alleged* memory loss, which *allegedly* prevented her from answering questions during investigatory interviews. Management's contrary observations and arguments also reasonably challenge the Union's *alleged nexus* between the Grievant's head injury and her purported memory loss. Set forth below are some of Management's contrary contentions:

1. The Grievant could not remember:
    a. If inmates were on recreation when she and CO Judd began to search Mr. McDaniel's cell.
    b. Conversing with CO Judd about the starting point for their cell searches. Starting at Mr. McDaniel's cell would tend to substantiate a targeted/retaliatory search.
2. The Grievant should be barred from using "'I don't remember to avoid exposing their mendacity. "' Credible evidence can rebut the I-don't-remember defense.
3. The Union produced no medical documentation to support its claim of memory loss due to head injuries.
4. Inmates' investigatory statements together with the video of February 6, 2021,

reveal the true facts and circumstances. Statements from those who observed, heard, and consistently reported the Grievant and Mr. McDaniel exchanging verbal hostilities are credible.

5. The Grievant's inability to recall the content of these witnesses' statements tends to reinforce the credibility of those statements.

The foregoing arguments, evidence, and analysis demonstrate the absence of a *credible* ***causal nexus*** between the Grievant's ***head injury*** and her ***alleged memory loss***, which is said to have prevented her from answering relevant questions during her investigatory interviews.

IX. Discussion and Analysis: Supervisory Presence

Having decided to forgo analysis of "poor judgment" under Rule 8, the Arbitrator now examines whether ODRC's training *obliged* the Grievant to obtain *supervisory presence* before she opened Mr. McDaniel's cell door.

A. Management's Arguments

Management's Post-hearing Brief declares that the Grievant violated a "*Well-known policy*"[47] by opening Mr. McDaniel's cell door *without supervisory presence*: "[W]hen an officer is faced with a *hostile . . . [inmate]. . . Making threats* towards [him/her] . . . And . . . [No one] . . . Is in immediate danger, a supervisor should be called *prior to opening a cell door*."[48] An Inmate's *innocuous* hostility toward a correctional officer *requires* that officer to *secure supervisory presence* before opening the hostle inmate's cell door. In the instant case, Management argues that the verbal hostilities between the Grievant and Mr. McDaniel obliged the Grievant to secure supervisory presence prior to opening Mr. McDaniel's cell door.

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[47] Management Post-hearing Brief, at 23.
[48] *Id.*

B. UNION'S ARGUMENTS

The Union offers three responsive contentions, challenging Management's mandate for supervisory presence. First, the Union observes: "[Post Orders are also clear that opening a cell door requires 2 *staff* to be present."[49] In the video, the cell door can clearly be seen with *both Officers at the door*.[50] Second, the Union observes that CO Judd radioed for a supervisor *after* she and the Grievant had *escorted* Mr. McDaniel *behind the stairwell*.[51]" Finally, the Union contends:

> The Post Orders . . . *require[d]* Officer Cline to enter the cell for a *shakedown*. The investigators allege that the opening of a hostile McDaniel cell is a violation. Still, *hostilities aside*, a *cell shake* was *authorized*. Officer Judd did not *observe* McDaniel to be *hostile*, and the video shows a *compliant McDaniel* exiting the cell. [52]

C. SUPERVISORY PRESENCE—ODRC'S TRAINING

With respect to the issue of ***supervisory presence***, the arbitral record lacks a ***formal, written rule or post order***, referencing that alleged duty. However, investigatory statements from CO Judd and the Grievant flatly acknowledge their *specific training not* to open the cell doors of *apparently hostile inmates* without first securing a supervisory presence. Set forth below in the order presented are CO Judd's and the Grievant's investigatory statements:

CO Judd

Q: Now, if you had an inmate that's combative-not combative, but yelling in a cell and he's not harming himself or harming anyone else in the cell or whatever, *would you open that cell*?
A: I did not know that it was specifically-if it even was him one of the ones yelling. *No. No.* If somebody's yelling, I'm not going to-being annoying stuff-if it was more of an annoyance kind of, and I knew who it is, I would kind of deal with that something with the Sgt. *Threatening, that would be supervisor.*
Q: So you *wouldn't open the door unless someone was actually hurting someone hurting themselves*?

49 Union's Post-hearing Brief, at 15.

50 Union's Post-hearing Brief, at 15 (emphasis added).

51 *Id.*, at 14.

52 *Id.*

A: *Right*
Q: You would *call a supervisor over*?
A: Well, I would probably *call them* on *the phone* or something and let them know what I got going on. See what they think.
Q: So we *wouldn't pop that door*, right?
A: *No*.[53]

The Grievant

Q: When you have an inmate and he is kind of hostile and he is behind a door and there's no harm coming to anybody in the cell, himself or anything, what do we do what's protocol in handling that situation?
A: what's, seeing how the inmate wasn't angry when we opened the door but the protocol stating that, I am an unarmed self-defense instructor and a use of force instructor, you don't open the door if there is a hostile or angry inmate. So being trained like that, knowing that, we did open the door because he was not angry at all.
Q: If you had a hostile inmate and there was verbal confrontation, you would not open that door you would call a supervisor, correct?
A: Per our training, yes. We would. But seeing as how he wasn't angry; we opened the door.[54]

These admissions are credible surrogates for the formal written rules and/or post orders that *notify* correctional officers of Management's behavioral expectations in the workplace.

1. ASSESSMENT OF THE PARTIES' ARGUMENTS

As discussed below, Management prevails on the issue of supervisory presence. First, the Union's contention that CO Judd's presence at Mr. McDaniel's cell somehow satisfied the requirement for *supervisory* presence fails because CO Judd is not a *supervisor*, and nothing in the arbitral record even *suggests* a managerial *intent* for staff correctional officers to satisfy a need for supervisory presence. Second, CO Judd's tardy communication with supervision *after* she *removed* Mr. McDaniel from his cell eviscerates the rationale for *supervisory presence* in the first instance. Finally, assuming, arguendo, that "shakedowns" were authorized when the Grievant and CO Judd removed Mr. McDaniel from his cell, the Union does not *demonstrate why* the

[53] Joint Exhibit 4, at 350 (emphasis added).
[54] *Id.* at 386 (emphasis added).

authorization of shakedowns somehow transcends the *duty* to obtain supervisory presence.[55] Based on the foregoing discussion and analysis, the Arbitrator holds that the Grievant had a *duty* to wait for supervisory presence *before* opening Mr. McDaniel's cell door on February 6, 2021. Her failure to comply violates the standard established in ODRC's training of correctional officers.

X. Discussion and Analysis: Cell Search—Random, Targeted, Retaliatory

Management argues that the Grievant: (1) conducted a *targeted/retaliatory* search of Mr. McDaniel's cell; (2) Searched Mr. McDaniel's cell during simultaneous recreation in violation of PO-2; and (3) opened Mr. McDaniel's cell almost immediately after he verbally assaulted her. The Union offers the following responses to Management's charges. The Grievant did not violate PO-2 because: (1) The search was "*random*" and, thus, consistent with PO-2.; and (2) PO-2 does not prohibit cell searches when inmates are on simultaneous recreation.

The issue here is whether the Grievant search of Mr. McDaniel's cell was "random," "targeted," or "retaliatory." The Union argues that Mr. McDaniel's cell search was "*random" because it lacked* "a ***definite pattern***."[56] One of CO Judd's investigatory interviews informs the nature of the requisite" definite pattern" set forth above:

Q: (NH) So, if you have yelling and you've identified a wall that they are yelling from and you decide you are going to do *shakedowns* at that wall *right after* they just got done yelling, is that not considered ***retaliator***y?
A: Like ***retaliation***?
Q: ***Yes.***

[55] The Parties' stout disagreement as to whether the Grievant exchanged verbal hostilities with Mr. McDaniel opening his cell door explains the divergence in their adversarial approaches to supervisory presence.
[56] Joint Exhibit 4, at 128 (emphasis added).

A: I guess it, in a sense, ***it could be***. I ***don't feel like I was retaliating*** because my *intent* was *not* management to go in and **mess their stuff up**. [57]

CO Judd *concedes* that when inmates' yelling ***triggers*** a search of their cells, the search is ***retaliatory***. Her intent not to "*mess their stuff up*" hardly converts that ***retaliatory*** search into ***a random*** one. A cell search loses its randomness and assumes a "definite pattern" when there is a ***reasonably discernible nexus*** between an inmate's conduct ("***yelling***")and a **subsequent cell search**. In the foregoing interview, CO Judd acknowledges that her cell searches were responsive to inmates' yelling. The manifest **nexus** in this instance is the inmates' **yelling** and the resulting cell search. The nexus constitutes the "***definite pattern***.

Evidence in the arbitral record establishes the following facts about the Grievant's search of Mr. McDaniel's cell. Mr. McDaniel was yelling to borrow a book from another inmate in a different cell. The Grievant heard the yelling, stop at Mr. McDaniel's cell, and asked whether he was yelling. Mr. McDaniel's responded by saying, "No bitch I'm not screaming. . . ." "[The Grievant] said don't call me what you call your mother." After a subsequent exchange of similar insults, the Grievant walked away from Mr. McDaniel's cell and joined CO Judd. The Grievant, then said, "sounds like someone needs their cell searched," and CO Judd said, "yep let's search it." Then, the Grievant and CO Judd proceeded directly to Mr. McDaniel's cell and began interacting with him. This factual pattern clearly reveals the telling ***nexus***, which links the Grievant's ***verbal***

57 Management's Post-hearing Brief, at 1, citing Joint Exhibit 12, at 354-355. Observe that CO Judd's intent not to "mess up their stuff" is irrelevant to a *reasonable* analysis of whether a given cell search is either targeted or retaliatory.

exchanges with Mr. McDaniel to the ***subsequent search of his cell***. Based on the foregoing discussion, the Arbitrator holds that the Grievant participated in a targeted or retaliatory search of Mr. McDaniel's cell on February 6, 2021.

X. DISCUSSION AND ANALYSIS: RULE 8

Rule 8 prohibits, "Failure to carry out a work assignment or the exercise of *poor judgment* in carrying out an assignment. "The issue here is whether the Grievant exercised "Poor judgment" during her effort to search Mr. McDaniel's cell.

A. MANAGEMENT'S ARGUMENTS

1. After exchanging insults with Mr. McDaniel, the Grievant had a duty under Rule 8 to de-escalate the hostilities**.** Furthermore, statements from the Grievant's supervisors as well as inmates show that she had frequently insulted and disrespected inmate.[58]
2. Although the Grievant received extensive training in areas such as the use of force and de-escalation, she often failed to apply that training while supervising inmates.
3. During her arbitral testimony, the Grievant simultaneously explained and admitted having displayed a "dominant personality toward inmates: "[B]eking in a male prison, I have to take that seriously and being very command present, very strong, because they want to take advantage . . . So I have to show a very ***dominant personality*** and very strong."[59]

Management argues that the ***consistency*** of inmates' ***written, investigatory, and testimony statements*** enhances the credibility and corroborative impact of inmates' statements enhances the likelihood that she

58 Management's Post-hearing Brief, at 9, 11.
59 Management Post-hearing Brie, at

exchanged verbal hostilities toward Mr. McDaniel.

B. Unions Arguments

The Union argues that Management should apply ***either Rule 8 or post orders*** (not both) to the Grievant's alleged ***poor judgment***. "Being in violation of *Post Orders is* ***poor judgement***. . . ."[60] Accordingly, the Union asks the Arbitrator to "[W]neigh the cell search only by [R]ule 7 (failure to follow Post Orders) and forgo the application of Rule 8, 36, and 41 to the Grievant's search of Mr. McDaniel's cell."[61]

The Union's position is persuasive. Standing alone, proof that the Grievant actually exchanged verbal insults with Mr. McDaniel establishes ***actionable misconduct*** and, hence, ***just cause*** for *some measure* of discipline. Annexing "*poor judgment*" to that substantiated misconduct is redundant. ***Misconduct*** in the form of verbal hostilities is, by definition, ***poor judgment***. In this *particular dispute*, it is tautological to analyze whether *proven misconduct* constitutes "poor judgment." These observations and considerations prompt the Undersigned to forego an analysis of the Grievant's alleged "poor judgment" under Rule 8.

XI. Discussion and Analysis: Rule 36

Rule 36 prohibits: ***Any act*** or failure to act that ***could harm or potentially harm*** the **employee, fellow employee(s)** or a member of the *general public.*

exposed her, a fellow employee, or a member of the general public to *harm*.

A. Management's Arguments

The Grievant's and CO Judd's decision to open Mr. McDaniel's cell on February 6, 2021 resulted in injuries to both of those correctional officers and the death of Mr.

60 Union's Post-hearing Brief, at 20 (emphasis added).
61 Union's Post-hearing Brief, at 20.

McDaniel. [62] That chain of events arguably runs afoul of Rule 36.[63]

B. Union's Arguments

Management concluded that the actions of CO Judd and the Grievant were *justified*. One cannot reasonably interpret "harm" in Rules 36 and 41 to comprehend CO Judd's and the Grievant's decision to open Mr. McDaniel's cell door. Correctional officers *mus*t open cell doors "every day all day" to perform their duties such as shakedowns.[64]

1. Analysis of the Parties' Arguments

The Union contends that because correctional officers routinely open cell doors every day, there is no ***regulatory*** limit on their authority to do so. That argument carries insufficient persuasive force. Opening Mr. McDaniel's cell door was an **"Act"** under Rule 36. After having shortly exchanged verbal insults with Mr. McDaniel, the Grievant either knew or should have known that opening Mr. McDaniel 's cell door ***could*** cause ***harm*** to herself and fellow ***employee***s. Iindeed, that is precisely what happened, as Rule 36 contemplates. Consequently, the Arbitrator holds that the Grievant ***violated Rule 36*** when she opened Mr. McDaniel's cell door almost immediately after exchanging insults with him.

XII. Discussion and Analysis: Officer Created Jeopardy (OCG)

ODRC training materials provide: "An employee who ***fails to respond reasonably*** to ***existing circumstances*** or . . . [fails] to ***adapt to changing conditions*** within an incident" may cause ***"Officer Created Jeopardy***."[65]

[62] Although Rule 36 is silent regarding *harm to inmates*, the decision to open Mr. McDaniel's cell door on February 6, 2021 *ultimately* resulted in Mr. McDaniel's death.
[63] Management's Post-hearing Brief, at 18-19.
[64] Union's Post-hearing Brief, at 12.
[65] Management's Post-hearing Brief, at 9, (citing Joint Exhibit 13, at 485).

The issue here is whether the Grievant caused ***"Officer Created Jeopardy"*** by opening Mr. McDaniel's cell almost immediately after he and the Grievant had exchanged verbal hostilities.

A. Management's Arguments

By opening Mr. McDaniel's cell for a cell search on February 6, 2021,the Grievant created ***OCJ*** because that act factually caused harm to both the Grievant and CO Judd. Management argues that the Grievant set the stage for OCJ by exchanging insults and vitriol with Mr. McDaniel and almost *immediately* thereafter opening his cell to execute a retaliatory/targeted search.[66]

B. Union's Arguments[67]

> . . . [As a correctional officer] your physical . . . and mental wellbeing are always in jeopardy. Opening cell doors is a ***daily risk*** . . . yet opening cell doors is a ***daily requirement***. Cell search procedures are ***found in the Post Orders***. [P]Ost Order[s] . . . [direct] ...Officer[s] on how to conduct . . . cell search[s] and when to open . . . cell door[s]. These specific Post Orders ***do not dictate or suggest*** that ***supervision need to*** be called for a cell search.[68]

1. Analyzing the Parties' Arguments

Management prevails on this issue. Elsewhere in this opinion, the Arbitrator issued a factual finding that almost immediately after exchanging verbal hostilities with Mr. McDaniel, the Grievant and CO Judd opened his cell door to perform a **targeted or retaliatory** search. Set forth below is an analytical application of OCG to that factual finding: The ***"existing conditions***" occurred when the Grievant first inquired about Mr. McDaniel's yelling to his neighbor to borrow a book. The ***changing conditions*** arose when Mr. McDaniel berated and threatened the Grievant, who neither

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[66] Management's Post-hearing Brief, at 18-19.
[67] The Union does not specifically address "Officer Created Jeopardy," but it does discuss Jeopardy in relation to opening cells
[68] Union's Post-hearing Brief, at 14.

responded reasonably nor ***adopted or adapted*** to the ***"changing circumstances."*** Instead, she reciprocated with her own insults and vulgarities toward Mr. McDaniel. The Grievant then further exacerbated the OCG by almost immediately joining CO Judd, returning to Mr. McDaniel's cell, and his cell door to execute a targeted/retaliatory search. Neither correctional officer sought either to secure supervisory presence or to apply other de-escalatory techniques.

Once removed from his cell, Mr. McDaniel the Grievant, and CO Judd began scuffling. In response to the physical violence, one inmate considered getting involved. Another inmate risked discipline by leaving the area to secure assistance from other correctional officers.

The Grievant's conduct is almost a paradigm of ***OCG.*** Specifically, she ***unreasonably responded***" to Mr. McDaniel's verbal assaults through reciprocation. Nor did she adopt [adapt] to the changing condition created by Mr. McDaniel's initial vulgarities and threats.

Management presents the more persuasive argument on this issue. Mr. McDaniel verbally assaulted the Grievant who immediately retaliated, thereby aggravating an already explosive situation. Subsequently, the Grievant and CO Judd removed Mr. MCDANIEL FROM HIS CELL TO A PERFORM A RETALIATORY OR TARGETED SEARH.

XII. Discussion and Analysis: Rule 41

Rule 41 prohibits "Unauthorized actions, a failure to act or a failure to provide treatment that could harm any individual under the supervision of the Department"[69]

69 Joint Exhibit, at 3, at 8.

Management's analysis of Rule 41 lacks analytical focus and rigor. Management's arguments never clearly and specifically place any of the Grievant's "misconduct" within the actionable provisions of Rule 41. For example, nowhere in its Post-hearing Brief does Management even attempt to categorize the Grievant's misconduct as "unauthorized actions." After citing Rule 41 in its Post-hearing Brief, Management's analysis seems more geared toward other rules that were allegedly violated in this dispute. Consequently, the Arbitrator holds that preponderant evidence in the arbitral record as a whole does not establish that the Grievant violated Rule 41.

XIII. Disciplinary Assessment

Preponderant evidence in the arbitral record as a whole demonstrates that the Grievant violated Rules 7, 8, 24, and 36 as well as PO-1 and PO-2. Consequently, some measure of discipline is indicated. Assessment of the proper measure of discipline requires evaluation of the ***mitigative and aggravative factors*** surrounding Management's decision to terminate the Grievant. The arbitrator shall not ***modify*** a disciplinary measure unless it is ***unreasonable, arbitrary, capricious, discriminatory***, ***in bad faith, or abusive of discretion***. Assessing the propriety of the Grievant's removal requires dispassionately evaluating and balancing the aggravative and mitigative factors that influenced Management's decision.

A. Aggravative Factors

The pivotal aggravative factors are the Grievant's decision to: (1) enflame a smoldering situation into an inferno that scorched her, CO Judd, and consumed Mr. McDaniel; (2) open Mr. McDaniel's cell, which essentially oxygenated the inferno; and (3) refrain from using her considerable de-escalatory skills; (4) be less than forthright

during investigatory interviews (5) execute retaliatory and targeted searches in Mr. McDaniel 's cell; and (6) not request supervisory presence before opening Mr. McDaniel's cell.

Management had repeatedly warned the Grievant to improve her relationships with inmates but her behavior in the instant dispute displays either a stubborn refusal or the inability to internalize and apply those warnings.

The Grievant magnified the foregoing aggravative dimensions of her misconduct by not being a highly visible paradigm of integrity and trust for inmates and Management. As a correctional officer, she was absolutely duty-bound to embrace that role for inmates and to protect them if at all possible. They are her wards.

B. Mitigative Factors

The major mitigative factors for the Grievant are her (1) Eleven years of stellar service to ODRC.; (2) Willingness and ability to become a highly trained and respected correctional officer; (3) Unblemished disciplinary record.

Article 24.02 - Progressive Discipline

The Employer will follow the principles of ***progressive discipline***. Disciplinary action shall be *commensurate with the offense. . . .*

The cornerstone of the ***progressive disciplinary doctrine*** is the existence of a ***reasonable likelihood*** that an employee can be ***reinstated and rehabilitated*** without exposing an employer's legitimate operational interests to ***unreasonable risk***. *The viability of progressive discipline as a remedial measure therefore turns on both the* **nature** *of the misconduct in question and the nature of the employer's* operations. Correctional facilities must delegate inordinate authority to their correctional officers who then must reveal that authority over the inmates, many of

whom have struggled to comport with society's standards. That situation becomes substantially more tenuous when correctional officers, themselves, have behavioral issues. Balancing aggravative and mitigative factors involved in awarding progressive discipline to a correctional officer with behavioral issues is hardly the same as awarding progressive discipline to employees in other operational settings. It is this line of thought that counsels against the application of progressive discipline in the instant case.

Article 24.06—Imposition of Discipline

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

The observations set forth above are equally applicable to the magnitude of disciplinary measures invoked in a given workplace. The reasonableness of the disciplinary measure pivots on the ***nature*** and ***frequency*** of the misconduct, the nature of the employer's operations and reasonable prospects for rehabilitation. In other words, proper application of ***disciplinary imposition*** involves the same considerations as those for progressive discipline.

D. Proper Measure of Discipline

This case would present a troublesome balance of aggravative and mitigative circumstances in any workplace, but, for the reasons set forth above, it is sharply concerning in a correctional facility. Given the number of cautionary warnings that the Grievant received about her strained relationship with inmates, one has difficulty perceiving her as a ***prime and promising*** candidate for rehabilitation. Yet, that image is a pre-condition for any reasonable decision-maker to reinstate the Grievant in a correctional facility. Trust and integrity are the indispensable "glue" that binds all employer-employee relationships, and that is especially true for correctional facilities.

The level of trust increases proportionately with the level of an employee's power, position, and duties in the workplace. As a Correctional Officer, the Grievant literally held the very lives and well-being of inmates in in her hands. Trust and sound judgment are indispensable for correctional officers. The Grievant's conduct, in the instant case, constitutes a deafening warning for any reasonable employer. Retention of the Grievant, in the shadow of this dispute is, therefore, the key contraindicated.

IX. The Award

For all of the foregoing reasons, the Grievance is hereby DENIED IN ITS ENTIRETY.

Robert Brookins

Robert Brookins, Professor of Law, Labor Arbitrator, J.D. Ph.D.