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GRIEVANCE COORDINATOR

OPINION AND AWARD

IN THE MATTER OF THE ARBITRATION BETWEEN
Department of Rehabilitations and Corrections—Madison Correctional Institution

-AND-

OCSEA/AFSCME, Local 11

APPEARANCES

Department of Rehabilitations and Corrections

Samantha Coon, Management 2nd Chair
Pat Mogan, OCB 2nd Chair
John Row, LRO Madison Correctional Institution
Erric L. Moore, Bureau Chief—Department of Youth Services
Walt Ashbridge, Investigator
Faye, Scott, Witness
Pat Fisher, Witness
James P. Hogan, Corrections Officer
Andrew Shuman, OCB 2nd Chair (for Pat Mogan)
Leann K. Rogan, Corrections Officer

For OCSEA
George L. Yerkes, OCSEA Staff Representative
Tim Roberts, OCSEA Staff Representative
Fred R. Chesser, OCSEA Chapter 4910 Representative
Felicia L. Perkins, Grievant
James L. Wolverton Sr., Corrections Officer, Chief Union Steward
Clifton Askew, Inmate
Tyrone Freeman, Inmate
Anthony Stokes, Inmate

Case-Specific Data

Date of Hearing:	**August 29, 2000, September 27, 2000**
Date of Award:	**November 24, 2000**
Contract Year:	**1997-2000**
Type of Grievance	**Discharge/Unauthorized Relationships/Accepting Money**

Grievance No. No. 27-15 (99-11-30) 738 01 03

Robert Brookins

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

TABLE OF CONTENTS

I. Procedural Background

Madison Correctional Institution (MCI or the Employer) is a branch of the Ohio Department of Correction and Rehabilitation (DRC) and is a party to a collection-bargaining relationship with the Ohio Civil Service Association, Local 11 (the Union), which represents MCI's corrections officers. MCI is a minimum closed facility in London, Ohio. On November 17, 1999, MCI and the Union (the Parties) scheduled a predisciplinary hearing, on November 22, 1999,[1] for Ms. Melissa Felicia Perkins (the Grievant) who had allegedly violated the following work rules:

> (1) Rule No.16—"Misusing official position for personal gain to include but not limited to the accepting or soliciting of bribes in the course of carrying out assigned duties," (2) Rule No. 24—"Interfering with or failing to cooperate in official investigation or inquiry," (3) Rule No. 46(b)—"Unauthorized personal or business relationship(s) with any current or former individual under the supervision of the Department or friends or family of the same."[2]

On November 22, 1999, the parties held the Grievant's predisciplinary hearing, and the Predisciplinary Hearing Officer decided that there was just cause for disciplining the Grievant.[3] On November 22, 1999, MCI notified the Grievant that her employment was terminated, effective November 25, 1999.[4] On November 30, 1999, the Union filed Grievance No. 27-15 (99-11-30) 738 01 03, challenging the measure of discipline (removal) as too harsh and, hence, without just cause. The Union requested MCI to reinstate the Grievant and to reimburse her for all lost wages, including missed overtime and roll-call pay.[5] Accordingly, a Third-Step Grievance Meeting was held on March 8, 2000, in which the Employer denied

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1 Joint Exhibit No. 6 at 2.

2 Joint Exhibit No. 6.

3 Joint Exhibit No. 6 at 4.

4 Joint Exhibit No. 6 at 7, Notice of Disciplinary Action.

5 Joint Exhibit No. 5.

the Grievance. The Union appealed to Step 4, on March 15, 2000[6] and ultimately to arbitration on May 31, 2000.[7]

The parties elected to arbitrate this dispute before the Undersigned at the Madison Correctional Institution in London, Ohio, on August 29, 2000 and September 27, 2000. All parties relevant to the resolution of this dispute were present at both hearings, which commenced at approximately 9:00 a.m. During the arbitral hearing, both parties had a full and fair opportunity to present any admissible evidence and arguments supporting their positions. Specifically, they were permitted to make opening statements and to introduce admissible documentary and testimonial evidence, all of which was available for relevant objections and for cross-examination. Finally, the parties had a full opportunity either to offer closing arguments or to submit post-hearing briefs and opted for the former.

II. The Facts

Prior to removing the Grievant, MCI had employed her as a Corrections Officer for approximately 22 months.[8] An MCI Investigator (Mr. Ashbridge) investigated the Grievant and his investigatory report[9] (the report) was the sole source of the charges against the Grievant. Some portions of the report are only tangentially related to MCI's charges against the Grievant and are, thus, omitted from the ensuing factual statement.

Between August 11, 1999 and August 22, 1999, Mr. Ashbridge received several serious allegations that the Grievant was involved in unauthorized relationships with inmates. Specifically, on or about August 11, 1999, Captain Wamsley informed Mr. Ashbridge that an unnamed, "reliable" informant had told Captain Wamsley that the Grievant was having sex with Inmate Anthony Stokes. In addition, on August 11, 1999,

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[6] Joint Exhibit No. 5 at 3.

[7] *Id.* at 4.

[8] Joint Exhibit No. 6 at 6, Just cause work sheet shows the Grievant was hired on January 5, 1998 and Joint Exhibit No. 6 at 7 shows her effective termination date to be November 25, 1999.

[9] Employer Exhibit No. 1.

Captain Wamsley sent Mr. Ashbridge an Inter-Office Communication (IOC),[10] stating that, on that day, Inmate Stokes was out-of-place on the Grievant's floor and that the Grievant had failed to write a ticket on Inmate Stokes. It is unclear who had actually observed Inmate Stokes' alleged misconduct.

On August 20, 1999, the Grievant gave Mr. Ashbridge a clipping from the newspaper in her hometown and informed him that MCI's inmates probably knew her home address, which appeared in the clipping. The Grievant and Mr. Ashbridge were alone when she gave him the clipping. The news clipping reported that the Grievant's husband was apprehended while apparently driving with a suspended driving license.[11]

On or about August 22, 1999, Captain Wamsley sent Mr. Ashbridge an IOC from Corrections Officer B. Pierce, stating that Inmate Stokes again was out-of-place on the Grievant's floor and no ticket was written against him. Sometime during September 1999, a segregated inmate, Joshua Ashenfelter, informed Mr. Ashbridge that the Grievant was smuggling drugs into MCI and having sex with inmates. Inmate Ashenfelter was in segregation purportedly to get away from other inmates who were expecting him to pay for drugs the Grievant had allegedly delivered. Mr. Ashenfelter remained in segregation until his release on November 11, 1999. Also, in September 1999, Corrections Officer Carol Knisley reported that Inmate Tyrone Freeman had told her that Inmate Clifton Askew was involved with the Grievant and with Corrections Officer Mildred Caplinger.

On September 27, Mr. Ashbridge listened in on Inmate Askew's telephone call to Ms. Tina Higgins, during which Inmate Askew repeatedly referred to his "lawyers." Mr. Ashbridge interpreted "lawyers" to mean Corrections Officers. On October 3, 1999, following up on another tip, Mr. Ashbridge stopped and conducted a fruitless strip search of Corrections Officer Caplinger, who later admitted her involvement with Inmate Askew and thereafter resigned her position. For his part in the relationship with Corrections Officer

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[10] Employer Exhibit No. 1 Attachment A.

[11] Employer Exhibit No. 1, Attachment B.

Caplinger, Inmate Askew was placed in segregation and Mr. Ashbridge obtained permission to monitor the Inmate's mail.

On October 12, 1999, Mr. Ashbridge interviewed Inmate Askew. During that interview, Inmate Askew suggested that he had dealings with the Grievant through a contact in Washington Court House. Inmate Askew also suggested that the Grievant was trafficking drugs for which he pays. Finally, Inmate Askew mentioned that he had advised the Grievant to write an incident report on the newspaper clipping and to use that report as a defense against future charges against her.

This information helped Mr. Ashbridge to locate Ms. Faye Scott in Washington Court House. On October 15, 1999, he interviewed Miss Scott in the presence of Ohio State Trooper Brun. During that interview Ms. Scott made essentially the same statements that she later offered in credible testimony before the Undersigned, on August 29, 2000. Ms. Scott was once a nurse at Ross Correctional Institution until she resigned her position because of an unauthorized relationship with Inmate Askew. Also, she stated that Inmate Askew had "lent" her approximately $3000.00 and instructed her to "repay" that loan by making payments to persons whom he subsequently designated. Indeed, Inmate Askew instructed Ms. Scott to send a blank, $260.00 Money Order to the Grievant via certified mail. Inmate Askew said he counted on the Grievant's cashing the Money Order, thereby making her vulnerable to blackmail for having accepted money from an inmate. On August 22, 1999, Ms. Scott received a telephone call from a person who claimed to be Felicia Perkins, gave Ms. Scott the Grievant's home address, and told Ms. Scott to send a Money Order for $260.00 to the Grievant's address.[12] On August, 24, 1999, Ms. Scott purchased the $260.00 Money Order, left it blank, and, on August 25, 1999, sent it certified mail to the Grievant's address in an envelope without a return address or a sender's name.[13] On October 24, 1999, an unidentified inmate tried to telephone the Grievant at her home, but no one answered the telephone.

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[12] Employer Exhibit No. 1 at 25, Attachment H.

[13] Employer Exhibit No. 1, Attachment G.

The arbitral record shows that the Grievant placed her name on in the blank Money Order as the recipient and deposited it in her bank account.[14] The return receipt that the Grievant was required to sign to obtain the certified letter was not a part of the arbitral record.[15]

Subsequently, Mr. Ashbridge scheduled an interview with the Grievant who had then been placed on administrative leave, pending investigation of her alleged relationships with inmates. On November 3, 1999, Mr. Ashbridge interviewed the Grievant, questioning her about her relationships with various inmates and about the $260.00 Money Order. At some point, the Grievant expressed a desire to end the interview but completed it after Mr. Ashbridge placed a tape recorder on the desk and reminded her that she was still on MCI's payroll and was, therefore, obliged to cooperate in the investigation. Also, during the interview, the Grievant denied any knowledge of the Money Order.

However, during the subsequent predisciplinary hearing, on November 22, the Grievant acknowledged having received and deposited the Money Order, alleging that she thought it was from her grandmother. Furthermore, documentary evidence in the arbitral record as well as the Grievant's testimony establishes that she received the Money Order and deposited it into her bank account.[16]

III. The issue

Whether the Grievant was terminated for just cause, and, if not, what shall the remedy be.

IV. Relevant Contractual and Work Rules Provisions

Article 24 – Discipline[17]

24.01 — Standard

"Disciplinary Action shall not be imposed upon an employee except for just cause. The Employer

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[14] Employer Exhibit No. 1, Attachment J.

[15] Because the arbitral record does not contain the receipt, it is unclear exactly when the Money Order was delivered to the Grievant.

[16] Employer Exhibit No. 1 Attachment J and K.

[17] Joint Exhibit No. 1-A at 81 (Collective-Bargaining Agreement at).

has the burden of proof to establish just cause for any disciplinary action."[18]

24.02 — Progressive Discipline

"The Employer will follow the principles of progressive discipline. Disciplinary action shall be commensurate with the offense."[19]

24.05 – Imposition of Discipline

"Disciplinary measures imposed shall be reasonable and commensurate with the offense and shall not be used solely for punishment."[20]

Policies and Work Rules of the Department of Corrections and Rehabilitations

Investigations

> The Appointing Authority of his/her designee will investigate all allegations of unauthorized relationships. Where appropriate, the Chief Inspector's Office will conduct and/or coordinate investigations in institutions and Central Office. . . . Employees are to *cooperate fully by providing all pertinent information during the investigation. Failure of an employee to answer any inquiry fully and to the best of their knowledge will be grounds for disciplinary actions.*[21]

Unauthorized Relationships

Policy

> It is the policy of the Ohio Department of Rehabilitation and Correction to prohibit *any type of unauthorized relationship between its employees and any person* under the supervision of the Department or under the jurisdiction of a criminal court without approval. All employees are expected to have a clear understanding that the Department considers *any type of unauthorized relationship* with an individual under its supervision or under the supervision of a criminal court to be a serious breach of security and these relationships *will not be tolerated.*[22]

Purpose

"The purpose of this policy is to establish a clear understanding of the mandate that employees must maintain a *professional relationship* with *all persons* under the supervision of the Department of Rehabilitation and Correction and that any relationship other than a professional relationship is deemed an unauthorized relationship."[23]

Applicability

"This policy applies to all persons employed by the Ohio Department of Rehabilitation and

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[18] *Id.* (emphasis added).

[19] *Id.* (emphasis added).

[20] *Id.* (emphasis added).

[21] Joint Exhibit No. 1. (emphasis added).

[22] *Id.* (emphasis added).

[23] *Id.* (emphasis added).

Correction. . . ."[24]

Definition of Unauthorized Relationships

"A relationship with any individual under the supervision of the Department . . . which has not been approved by the Appointing Authority. Prohibited activities include, but *are not limited* to":[25]

"The exchange of personal letters, pictures, phone Galls, or information with any individual under the supervision of the Department/criminal court or friends or family of same";[26]

"Engaging in *any other unauthorized personal* or *business* relationship(s) with any current or former individual under the supervision of the Department/criminal court or friends or family of same";[27]

"Committing any sexual act with any individual under the supervision of the Department or under the jurisdiction of a criminal court";[28]

V. Summaries of the Parties' Arguments

A. The Employer's Arguments

1. The Grievant accepted the $260.00 money when she knew or should have known it was from Ms. Scott and Inmate Askew.
2. The Grievant refused to render full cooperation in an administrative interview
3. The Grievant engaged in other unauthorized relationships with inmates Stokes and Freeman.

B. The Union's Arguments

1. The Employer failed to conduct a thorough administrative investigation.
2. The Employer failed to prove that the Grievant knew or had reason to know who sent the $260.00 Money Order.
3. The Employer failed to link the Grievant to Inmate Askew, Inmate Stokes, or Inmate Freeman.

VI. Discussion and Analysis

A. Preliminary considerations

As previously mentioned, the Employer leveled three charges against the Grievant: (1) Rule No. 24—"Interfering with or failing to cooperate in official investigation or inquiry," (2) Rule No. 46(b)—"Unauthorized personal or business relationship(s) with any current or former individual under the

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[24] *Id.* (emphasis added).

[25]

[26] *Id.* (emphasis added).

[27] *Id.* (emphasis added).

[28] *Id.* (emphasis added).

supervision of the Department or friends or family of the same," and (3) Rule No. 16—"Misusing official position for personal gain to include but not limited to the accepting or soliciting of bribes in the course of carrying out assigned duties." Because the Employer alleges these charges, it also bears the burden of persuading the Arbitrator of their validity. Likewise, the Union bears the burden of persuasion with respect to its allegations and defenses. The foregoing charges are discussed in turn below.

B. "Rule No. 24—Interfering with or Failing to Cooperate in Official Investigation or Inquiry"

The charge that the Grievant refused to cooperate during an official investigation is premised solely on Mr. Ashbridge's statement. Specifically, Mr. Ashbridge asserts that, while interviewing the Grievant, she allegedly said: "She didn't have time to answer these questions and she was going to leave the interview."[29] At that point, Mr. Ashbridge placed a tape recorder on the table before the Grievant and reminded her that because she was on administrative leave and still on MCI's payroll, she was obliged to remain and answer his questions. On its face, the Grievant's statement is more akin to a threatened refusal than to an actual one, since she never actually attempted to leave the interview. Nor is it clear that but for Mr. Ashbridge's proper reminder, the Grievant would have terminated the interview.

Furthermore, Mr. Ashbridge's account does not stand unchallenged. Also present at the interview was the Grievant's OCSEA representative, Mr. James P. Hogan, whose recollection of the Grievant's statement differs significantly from Mr. Ashbridge's. According to Mr. Hogan, the Grievant told Mr. Ashbridge to, "Quit pussyfooting around and ask what you want. I have to attend class today."

Although semantically different, these statements communicate essentially the same basic idea: The Grievant's understandable, albeit bluntly articulated, desire to complete the interview as soon as possible. In other words, Mr. Logan's version reveals the Grievant's growing restiveness with what she rightly or wrongly perceived as something of an inquisitional "shell game." Ultimately, then, although the Grievant's

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[29] Employer Exhibit No. 1 at 7.

alleged statement has an uncooperative tinge, it simply does not clearly cross the threshold that separates the grudgingly cooperative from the plainly uncooperative. Accordingly, the Arbitrator holds that the Employer failed to prove that the Grievant refused to cooperate in (or was insubordinate during) the investigative interview.

C. Rule No. 46(b)—"Unauthorized Personal or Business Relationship(s) with Any Current or Former Individual Under the Supervision of the Department or Friends or Family of the Same."

This charge encompasses three types of alleged misconduct: (1) the Grievant's alleged sexual relationship with Inmate Stokes (a personal relationship) and her failure to write a ticket on Inmate Stokes, who was allegedly twice "out of place" in her area, (2) the Grievant's alleged trafficking in drugs (a business relationship), and (3) the Grievant's alleged acceptance of a $260.00 money order from Ms. Scott (a personal/business relationship with Ms. Scott and, implicitly, with Inmate Askew).

1. Uncorroborated Hearsay of The Grievant's Relationship with Inmate Stokes

Although some of the evidence that MCI offers to establish the Grievant's relationship with Inmate Stokes rests entirely on uncorroborated double hearsay and inferences therefrom, other evidence, in the record—together with credibility assessments—establishes some relationship between the Grievant and Inmate Stokes.

Before discussing the type of relationship established between the Grievant and Inmate Stokes, some discussion of the unestablished relationship is indicated. First, the record does not establish a sexual relationship between the Grievant and either Inmate Stokes or any other inmate. Nor is there credible evidence to establish that Inmate Stokes was twice out of place in the Grievant's area. The problem is that evidence offered to support these allegations is either hearsay or double hearsay which, standing alone, warrants little, if any, probative weight. For example, Mr. Ashbridge testified that Captain Wamsley said that Officer Pierce wrote a statement that Inmate Stokes went "out of place" to see the Grievant in her work

area.[30] Mr. Ashbridge's testimony is hearsay (as would be Captain Wamsley's if he had testified at the arbitral hearing). In other words, Mr. Ashbridge's testimony is an out-of-hearing statement, uttered by someone other than the witness testifying (Mr. Ashbridge), and offered to prove the *truth* of the matter asserted therein.[31] Mr. Ashbridge could not testify as to any personal observations of Inmate Stokes out of place. Relying on this type of evidence to sustain charges is patently unfair to both the Grievant and the Union. It would deny the Union an opportunity to cross-examine the individuals who allegedly personally observed Inmate Stokes out of place. In this respect, it has been aptly observed that:

> Unless corroborated by truth-tending circumstances in the environment in which it was uttered, . . . hearsay is unreliable evidence and should be received with mounting skepticism of its probative value as it becomes *more remote and filtered.* If a witness can testify at the hearing and does not, his statements outside the hearing should be given no weight, indeed, should even be excluded if there appears to be no therapeutic, nonevidentiary reason to admit it.[32]

In short, one can seldom premise an entire charge on hearsay testimony, albeit from a distinguished investigator. Yet, in this case, double hearsay is the primary—if not the only—evidence MCI offers in support of the foregoing very serious charges against the Grievant. Finally, suffering from the same evidentiary deficiency are charges that the Grievant had sexual relations with inmates—including Inmate Stokes—and was smuggling drugs into MCI. Regarding the drug-smuggling charge, for example, Mr. Ashbridge testified that a third party told him that the Grievant was smuggling drugs into MCI and having sex with inmates.

To cure the hearsay problem, those who allegedly observed the misconduct—Officer Pierce and other informants—should have attended the arbitral hearing, taken the oath, testified about their personal

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30 Employer Exhibit No. 1 at 1.

31 MARVIN HILL, JR. & ANTHONY V. SINICROPI, EVIDENCE IN ARBITRATION 42 (1980).

32 *Id.* at 50.

observations, and have those observations tested in the crucible of cross-examination.[33] Arbitral jurisprudence has long declared that the probative vitality or life force of hearsay is independent, corroborative evidence, without which hearsay remains a vacant, impotent evidentiary vessel.

2. Probative Evidence of The Grievant's Relationship with Inmate Stokes

Credible testimonial and circumstantial evidence in the record clearly establish that the Grievant talked to Inmate Stokes and more likely than not was acquainted with him. During her interview with Mr. Ashbridge, the Grievant said that she did not even talk to Inmate Stokes. Yet, during her testimony before the Undersigned, she admitted that she casually talked with Inmate Stokes. Furthermore, the Grievant's first name (Felisha) and her purported date of resignation from MCI were found on Inmate Stokes' doodle sheet. While testifying at the arbitral hearing, Inmate Stokes, sought to explain this matter by describing the Grievant as someone he had "*known*," as distinguished from someone with whom he had talked. It is unlikely that an inmate comes to "know" a Corrections Officer merely through their professional interactions in a correctional institution. The upshot is that the Grievant's scribbled named and purported date of resignation on Inmate Stokes' doodle sheet together with Inmate Stokes' description of his relationship with the Grievant show that more likely than not she and Inmate Stokes were acquaintances. Also, the Grievant's conflictive description of the level of her interaction with Inmate Stokes as well as her conflicting statements elsewhere in this dispute seriously cripple her credibility in this matter. Finally, the foregoing considerations tend to strengthen the credibility of Mr. Ashbridge's statement that Inmate Stokes viewed the Grievant as a friend and planned to "look her up" after his release. Consequently, the Arbitrator finds that the Grievant and Inmate Stokes were at least acquaintances. Acquaintance is defined as: "Knowledge of a person acquired by a relationship less intimate than friendship. 2. A person whom one knows. 3. Knowledge or information

[33] Similarly, Mr. Ashbridge testified that Captain Wamsley told him that an unidentified informant told Captain Wamsley that he (the informant) saw Inmate Stokes entering the Grievant's area and no ticket was written.

about something or someone."[34] Clearly, as defined here, the Grievant's acquaintanceship with Inmate Stokes is a *personal relationship* which Rule 46(b) contemplates and prohibits.

3. The Grievant's Relationship with Inmate Askew

Notwithstanding Inmate Askew's denials, preponderant, credible evidence in the record establishes that he and the Grievant had a business/personal relationship, albeit not necessarily sexual. One notes, at the outset, that Inmate Askew is basically an incredible witness, not because he is an inmate but because he adamantly denied having a relationship with Corrections Officer Caplinger. Yet, she admitted having associated with Inmate Askew and resigned her position at MCI because of that relationship. Given Inmate Askew's largely irrefutable mendacity in that matter, the Arbitrator credits Inmate Askew's statements or testimony only when independent corroborative evidence, reason, or logic supports them. To make matters worse, the Grievant's contradictory statements about her relationship with Inmate Stokes and elsewhere in this dispute as well as her receipt of the $260.00 Money Order basically eviscerates her credibility.

Turning to the existence of a relationship between the Grievant and Inmate Askew, the Arbitrator finds that, on its face, the Grievant's version of her relationship with Inmate Askew conflicts with his and that Inmate Askew's version suffers from internal inconsistencies. First, the Grievant told Mr. Ashbridge that she gave him the newspaper clipping because the *inmates* were asking about it. In contrast, Inmate Askew told Mr. Ashbridge that he gave the Grievant the news clipping so that she could write an incident report as a defense for possible future charges. In further contrast, Inmate Askew offered a different explanation when he testified at the arbitral hearing, stating that he walked up to the Grievant, gave her the newspaper clipping, told her to take a look at it, and simply walked away.

Those two statements describe very different encounters. The statement to Mr. Ashbridge explicitly suggests that a specific purpose motivated Inmate Askew to give the clipping to the Grievant. Also, Inmate Askew's statement to Mr. Ashbridge suggests that his interaction with the Grievant involved more than

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[34] AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 16 (2nd ed. 1992) (emphasis added).

simply walking up to her, handing her the newspaper clipping, and walking away. Inmate Askew's testimonial account of his interaction with the Grievant differs sharply with his statement to Mr. Ashbridge.

Furthermore, inconsistencies between the Grievant's and Inmate Askew's stories together with the inconsistencies in Inmate Askew's version lend relative credibility to Mr. Ashbridge's report of his interview with Inmate Askew, on October 12, 1999. During that interview, Inmate Askew loosely referenced or alluded to his dealings with the Grievant. Standing alone, these intimations hardly establish a relationship with the Grievant. However, Inmate Askew also told Mr. Ashbridge that he dealt with the Grievant through a contact—presumably Ms. Scott—in Washington Court House. Subsequently, Mr. Ashbridge discovered the $260.00 Money Order, which is independent evidence of at least one link between Ms. Scott and the Grievant and which tends to corroborate Inmate Askew's statement to Mr. Ashbridge. Also, during the interview with Mr. Ashbridge, Inmate Askew implied without explicitly admitting that he had paid the Grievant for drug moves.

Standing alone, that hint is not probative evidence, but it acquires probative value in light of two established facts in the record. First, the Grievant accepted and deposited the blank $260.00 Money Order from Ms. Scott. Inmate Askew claims the Grievant did not know who sent the Money Order and that he was merely trying to "hook" the Grievant as a future victim for blackmail. In the final analysis, however, that explanation is incongruous with Inmate Askew's arduous attempts to defend the Grievant by proclaiming her innocence. Why would Inmate Askew want to risk being disciplined for someone whom he viewed as a relatively cheap pawn or conduit to work his will? The $260.00 Money Order makes more sense when viewed as some type of payoff or compensation. That perspective better explains Inmate Askew's desire to support and protect the Grievant. In that way, he keeps the Grievant either employed at MCI or otherwise—and elsewhere—available to him. His defense of the Grievant would logically serve either, or perhaps both, of those ends. Finally, during his interview with Mr. Ashbridge, Inmate Askew acknowledged his awareness that the Grievant had given Mr. Ashbridge the newspaper clipping, about which only the

Grievant, Mr. Ashbridge, and the Warden had knowledge. The foregoing evidence and reasoning persuade the Arbitrator that the Grievant and Inmate Askew had a business/personal relationship in violation of rule 46(b).

D. Rule No. 16—"Misusing official position for personal gain to include but not limited to the accepting or soliciting of bribes in the course of carrying out assigned duties"

The charge of accepting the $260.00 Money Order ostensibly violates at least the *spirit* of Rule Nos. 46(b) and 16. Commonsense teaches that, absent express authorization to do so, accepting money from either an inmate or an inmate's conduit clearly constitutes an unauthorized personal or business relationship with that inmate. Similarly, accepting the accepting money from an inmate constitutes misuse of a Corrections Officer's official position. Finally, a Corrections Officer who deposits into his/her bank account funds from an inmate thereby presumably derives "personal gain" from the misuse of his/her official position. As pointed out earlier, the record establishes that the Grievant deposited in her bank account the $260.00 Money Order that Ms. Scott sent her on or about August 25, 1999, thereby establishing the element of "personal gain."

Nevertheless, the Grievant is guilty of no misconduct absent proof that she deposited the Money Order with culpable knowledge. That is, she deposited the Money Order with actual or constructive knowledge that it was tainted—directly or indirectly linked to inmates—or with a strong actual or constructive suspicion of that fact. MCI offers essentially two arguments to establish culpable knowledge.[35]

First, MCI alleges that on or about August 22, 1999, the Grievant telephoned Ms. Scott and left her home address. If established, this assertion would directly and irrefutably establish the Grievant's actual culpable knowledge. The Grievant simply denies that she made the telephone call.

The difficulty for MCI is that evidence in the record does not support an inference that the Grievant was the caller. Ms. Scott could only state that the caller claimed to be the Grievant. Ms. Scott either could not or

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[35] Because MCI has the burden of persuasion on this issue, reasonable doubts about the existence of the Grievant's culpable knowledge will be resolved against MCI.

would not positively identify the Grievant as the caller. Instead, Ms. Scott could only state that someone who claimed to be the Grievant telephoned Ms. Scott, left the Grievant's address, and told Ms. Scott to send a blank Money Order to that address. Similarly, that the Grievant subsequently accepted and deposited the Money Order also fails to support a reasonable inference that the Grievant telephoned Ms. Scott on or about August 22, 1999. MCI, and not the Union, has the burden of removing any residual uncertainty about the identity of the caller, with doubts to be resolved against MCI. Therefore, the Arbitrator holds that MCI failed to prove that the Grievant called and gave her address to Ms. Scott.

Alternatively, MCI would presume the existence of culpable knowledge. Here MCI argues that, under the circumstances of this case, the Grievant (or any other reasonable person) would have looked at the return receipt (receipt) to determine the sender's identity. The Grievant denies that she looked at the receipt or that she should have done so because she assumed that her grandmother sent the blank Money Order in the envelope with no return address. The Grievant's argument is in the nature of an affirmative defense for which she bears the burden of persuasion.

MCI established that Inmate Askew "lent" Ms. Scott approximately $3000.00, which she agreed to "repay" by forwarding portions of that sum to individuals whom Inmate Askew designated. Accordingly, the record establishes that Inmate Askew instructed Ms. Scott to send the Grievant a blank Money Order for $260.00 via certified mail in an envelope without a return address. Finally, MCI demonstrated that the Grievant: (1) accepted the blank Money Order, (2) filled it out in her name, (3) deposited $260.00 in her bank account, (4) denied any knowledge of the Money Order during an interview with Mr. Ashbridge, and (5) acknowledged having received and deposited the Money Order. On its face, this evidence supports an inference that the Grievant should have at least been highly suspicious that the Money Order was tainted, whether or not she actually viewed the sender's name on the opposite side of the receipt.

The next issue is whether this inference survives the credibility and probativeness of the Grievant's affirmative defense. The essence of the Grievant's defense is that her grandmother's prior transfers of funds

effectively suspended the natural curiosity or suspicion that a reasonable Corrections Officer (or a reasonable person) would entertain upon receiving a certified letter in an envelope without a return address, containing a blank Money Order.[36]

The Grievant's defense fails for several reasons. Evidence in the record does not support the Grievant's argument, which turns on the frequency and format of the grandmother's transferrals. Regarding frequency, other matters equal, the more frequent the grandmother's purported transferrals, the less suspicious or curious the Grievant (or any similarly situated reasonable person) would be about the arrival of Ms. Scott's letter. Evidence in the record does not establish sufficient frequency of transferrals to suspend a reasonable person's natural suspicions. This is *especially true for corrections officers,* given the realities of their work environment and the rigor of MCI's rules regarding relationships with inmates. The arbitral record contains three dates on which the Grievant received funds transferrals from her grandmother: September 22, 1997, February 19, 1999, and November 24, 1999.[37] Only one those transfer bears the sender's name—Ms. Laurie Harding. Presumably Ms. Harding is the Grievant's grandmother. On or about

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[36] The Arbitrator is unpersuaded by MCI's argument that any person in the Grievant's position would have taken time to look on the receipt to determine the sender's identity. The problem with this line of reasoning is that it implicitly assumes that recipients of certified mail invariably have an opportunity to view the sender's name on the underside of the receipt. Conversely, the Arbitrator takes arbitral notice that such an assumption or presumption is ill founded. Although the arbitral record does not describe the postman's interaction with the Grievant regarding the receipt, the Arbitrator has received innumerable certified letters from employers and unions over a 12-year span. During that time, one discerns a clear pattern in the delivery of certified mail. The postman initially hands the recipient the certified package and asks the recipient to print his/her name on the aforementioned top line and to sign on the line immediately below. Next the postman takes the package from the recipient, tears off the receipt along the perforations, and hands the package to the recipient. In other words, unless the recipient specifically asks to see the sender's name and address, he will not see them.

In most cases, this is not a problem because the sender's identity is revealed on the package's return address. In the instant, case, however, the envelope in question lacked a return address. Therefore, unless the Grievant already knew the sender's identity—a fact not implicit in MCI's argument—the Grievant would have had to view the receipt. Again, MCI has the burden of persuading the Arbitrator of the validity of this position, with doubts being resolved against MCI.

[37] Union Exhibit No. 5.

September 22, 1997, Ms. Laurie A. Harding sent the Grievant what appears to be a $297.00 Money Order.[38] On or about February 19, 1999 and November 24, 1999, the Grievant received $70.00 and $100.00, respectively, though the documents do not identify the sender.[39]

These three, broadly-spaced transfers are too sparse to establish a pattern of sufficient strength to justify a reasonable assumption that the grandmother might have sent the $260.00 Money Order. Indeed, when Ms. Scott mailed the letter, on or about August 25, 1999, the Grievant had received only two of the foregoing transfers: September 22, 1997—approximately two years earlier—and February 19, 1999, approximately six months earlier. Under those circumstances, no reasonable person under the same or similar circumstances as the Grievant—a Corrections Officer—would have assumed that Ms. Scott's letter was from a grandmother.[40]

Nor does the issue of format assist the Grievant. Again, other matters equal, the best evidence for the Grievant would be that the grandmother's format for transferring funds was the same as or very similar to that of Ms. Scott's letter and money order, i.e., no return address and a blank Money Order. Unfortunately, for the Grievant, the arbitral record does not address the format of the Grievant's transfers, and as far as the Arbitrator can determine from the record, it appears that the grandmother filled out the documents.[41] Therefore, the Arbitrator has no basis from which to make any reasonable inferences about the similarity or difference in format between Ms. Scott's certified letter and the grandmother's transferrals.

Finally, the Grievant did not seem terribly committed to adducing all the evidence at her disposal in support of her case. The Grievant's responses to the Arbitrator's questions at the second arbitral hearing

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[38] Although it is not clear that Ms. Harding is indeed the Grievant's grandmother, for analytical purposes, the Arbitrator assumes that she is.

[39] *Id.*

[40] Because the record does not specifically state who made the other two transfers, one must assume arguendo that the grandmother sent them.

[41] Union Exhibit No. 5.

suggest that the Grievant apparently considered and rejected the option of trying to secure other evidence that would tend to support her defense. For example, she decided not to secure any records that her bank(s) might have to show other transfers by her grandmother. Instead, the Grievant stated that she could not afford the bank's fee of approximately $5.00 per page to photocopy records, especially since she used several banks. Similarly, the Grievant opted not to try to obtain copies of her grandmother's records, showing the transferrals. The Grievant said that her grandmother was too ill or frail to be drawn into this matter.

At the very least, the Grievant's response is puzzling. First, her very livelihood—and perhaps her professional reputation—is at risk. Second, after opting to use her Union's time and resources to challenge MCI's disciplinary decision, it seems odd for her to forego arguably critical evidence that might explain her apparently culpable behavior at a pivotal juncture in this case. In addition, if the Grievant's grandmother regularly contributed to the Grievant's education and could recall the approximate dates of *some* of her gifts to the Grievant, then the Grievant could have narrowed the bank's search to perhaps a few pages, thereby reducing the cost securing and photocopying the relevant transactions.

Furthermore, reason suggests that a grandmother who cares enough to fund substantial portions of her granddaughter's education would go to considerable lengths to render any assistance she could to avoid having the granddaughter's professional reputation tarnished and her livelihood interrupted. Finally, the Grievant's credibility is a factor here also. Her earlier contradiction—claiming ignorance and then enlightenment about the Money Order—adds a certain hollow ring to her explanation. More than mere bad judgement exists here.

The upshot is that the Grievant's defense does not rebut the inference of culpable knowledge stemming from MCI's evidence. This is a very close decision, however. Nevertheless, the Arbitrator is persuaded that the Grievant—or a similarly-situated, reasonable Corrections Officer—would have been

suspicious of Ms. Scott's letter.[42] Nothing in this case warrants the suspension of that suspicion. As an ordinary reasonable civilian—not to mention a Corrections Officer—under the circumstances, the Grievant clearly should have either presented the Money Order to her superiors or contacted her grandmother, or both, to remove the residue of natural suspicion that the surrounding circumstances triggered.

As a result, the Arbitrator holds that the Grievant violated at least the spirit or intent— if not the letter—of Rules 46(b). Restated, more likely than not the Grievant should have known or reasonably suspected that the Money Order was tainted. Although that is not the same as actual culpable knowledge, it is more than MCI can or should be asked to reasonably tolerate in its Corrections Officers.

VII. Penalty Decision

Because the Grievant, a Corrections Officer, established relationships with inmates and accepted money under highly suspicious conditions, some measure of discipline is warranted. Therefore, the only remaining issue is whether the proven misconduct warrants the discipline imposed or some lesser measure of discipline. Assessment of this issue requires an examination of the aggravative and mitigative factors in this case.[43]

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[42] This is not to say that the Grievant accepted the letter and deposited the Money Order with actual knowledge that it was "dirty." In the Arbitrator's view, evidence in the record simply does not support that position.

[43]

Work Rules		1st	2nd	3rd		4th
#16	"Misusing official position for personal gain to include but not limited to the accepting or soliciting of bribes in the course of carrying out assigned duties,"	5-10/R	R			
#24	"Interfering with or failing to cooperate in official investigation or inquiry,"	WR/R	3-5/R	5-10/R	R	(continued...

A. Mitigative Factors

Often an employee's tenure with a company constitutes a mitigative factor. In this case, however, that is not true. The Grievant had served with MCI for approximately 22 months when she was removed on November 25, 1999. Job performance can be another mitigative factor. Again, however, the record in this case does not help the Grievant because the record contains nothing about her job performance. One operative mitigative factor in this case is that MCI proved only some of its charges, i.e., engaging in unauthorized relationships and accepting money—not necessarily bribes—for personal gain.

B. Aggravative Factors

Nevertheless, the charges or portions thereof established here are serious. It is not unreasonable to conclude that such misconduct adversely affects MCI's confidence and trust in the Grievant as a Corrections Officer. The seriousness of the established offense regarding the Money Order is self-evident. MCI simply cannot tolerate its corrections officers accepting money under the circumstances established in this case, unless perhaps those officers can explain away the suspicion. Furthermore, given the nature of the offense, the environment in a correctional institution, and the Grievant's position therein, MCI is unlikely ever to trust the Grievant as a Corrections Officer.

Another aggravating factor is the Grievant's active disciplinary history. The record shows that she has two episodes of active discipline. On June 15, 1999, the Grievant received a one-day fine for violation

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[43](...continued)

#46	"Engaging in any other unauthorized personal or business relationship(s) with any current or former individual under the supervision of the Department or friends or family of the same."	1-5/R	5-10/R	R		

July 4, 1999, she received an oral reprimand for violating rule No. 7.[44] Reinstatement of the Grievant under these circumstances would effectively relegate MCI to monitoring her, while she, as a Corrections Officer, supposedly monitors the inmates, an intolerable situation. The balance of mitigative and aggravative factors in this case do not justify modification of MCI's decision to terminate the Grievant. In other words, the measure of discipline—removal—imposed under the circumstances of this case is not unreasonable, arbitrary, or capricious.

VIII. The Award

For all the foregoing reasons, the Grievance is **DENIED**.

Notary Certificate

State of ~~Indiana~~ Ohio)
)SS:
County of Franklin

Before me the undersigned, Notary Public for Franklin County, State of ~~Indiana~~ Ohio, personally appeared Robert Brookins, who swears under oath and under penalty of perjury that the contents of this document are true and accurate and were prepared solely by Robert Brookins who hereby acknowledges the execution of this instrument this 18 day of December 2000.
Signature of Notary Public: _____
Printed Name of Notary Public: _____
My commission expires: _____
County of Residency: _____

JILL E. FROMENT
NOTARY PUBLIC, STATE OF OHIO
MY COMMISSION EXPIRES SEPT. 12, 2001

Robert Brookins

[44] "Failure to follow post orders, administrative regulations, policies, procedures or directives." *Id.*