

**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
MARION CORRECTIONAL INSTITUTION**

APPEARANCES

FOR OCSEA

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Coleman, Adanma (Witness)
Crawford, Shala (Grievant)
Miller, Brian (Co-Chair)
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FOR OHIO DRC

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Vaughan, Allison, Assistant Chief, Bureau of Labor Relations ,ODRC
Wainwright, Lyneal, Warden, Marion Correctional Institution (2016-2021)
Walker, Leon, Investigator, Marion Correctional Institution

HEARINGS HELD

May 26, 2023, July 17, 2023

GRIEVANCE NUMBER

DRC-2022-04860-04

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I. INTRODUCTION

The parties to this disciplinary dispute are the Marion Correctional Institution (MCI), a branch of the Ohio Department of Rehabilitation and Correction (ODRC¹ and the Ohio Civil Service Employees Association, Local 11, AFSCME (“Union” or “OCSEA”), the exclusive bargaining representative for Correctional Officer Sala Crawford (“Grievant”).²

The Grievant was a General Activity Therapist 2 with approximately ten years of seniority and no active discipline when ODRC removed her on May 6, 2022, for having violated the following 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 46A Unauthorized Relationships: The exchange of personal letters, pictures, phone calls, or information by any means with any individual currently under the supervision of the Department, or any individual within 6 months following their release or supervision of the Department, or friends or family of the same, without express authorization of the Department.
- Rule 50 Any violation of ODRC 124.34 . . . And for any competency, inefficiency, unsatisfactory performance, dishonesty, drunkenness, immoral conduct, insubordination, discourteous treatment of the public, neglect of duty, violation of such sections or the rules of the Director of Administrative Services or the commission, or any failure of good behavior, or any other acts of misfeasance, malfeasance, or nonfeasance in office.

At the time of her removal, the Grievant had no active discipline in her personnel file.³

II. THE FACTS

A. THREE PACKAGES OF GIFTS

Between May 24, 2019 and May 7, 2021, Mr. Lidell Hilson (Mr. Hilson), a parolee under ODRC’s supervision, sent the Grievant three packages containing gifts. Although Mr. Hilson

¹ Hereinafter referenced as “Management.”

² Hereinafter referenced as, “Parties.”

³ Grievance trail, at 2 of 3.

named the Grievant as the intended recipient of the gifts, he specifically *addressed* the gifts to MCI. Ultimately, the presence of these gifts in MCI triggered the instant dispute.

On May 24, 2019, MCI received the first package, containing a letter and some compact discs. The handwritten letter stated how much Mr. Hilson cared for the Grievant and wanted to be with her. After their administrative investigation, Investigators Leon Walker and Jeremy Hecker⁴ The Investigators determined that the Grievant and Mr. Hilson never had any type of relationship.⁵ Management destroyed the first package as “unwanted” mail.

On June 19, 2020, MCI received the second package, which contained a \$1000.00 necklace and other gifts. When the package arrived, Investigator Walker was serving as mail room supervisor, and the Grievant was working overtime in the mail room. Investigator Walker *notified* the Grievant of the second package and its contents. Shortly thereafter, the Grievant and the Investigators discussed the disposition of the necklace.

During their conversation, Investigator Walker advised the Grievant to keep the necklace: “If you don’t do it, I’m gonna do it.”⁶ Evidence in the arbitral record establishes *ambivalence* as to whether Investigator Walker spoke in *jest*. In any event, Investigator Walker ultimately gave the necklace to the Grievant, requesting that she return it to Jared jewelry store (“Jared”), where Mr. Hilson had purchased it, and get the store to *refund Mr. Hilson’s credit card* for the price of the necklace.

The Grievant returned the necklace to Jared, which refused to refund the price of the necklace to Mr. Hilson’s credit card but offered the Grievant a gift card worth approximately \$1,049.98.⁷ The Grievant deliberated on the offer for one day, after which she accepted the gift card. Then, she

⁴ Hereinafter, referenced individually as Investigator Walker and collectively as “the Investigators.”

⁵ Joint Exhibit, at 35.

⁶ Joint Exhibit, at 39.

⁷ Joint Exhibit, at 26. In one of her investigator interviews, the Grievant said she received “\$800 credit toward a ring.” Joint Exhibit, at 38.

added approximately \$400.00 to it and purchased a ring for her spouse.

Management remained unaware of the foregoing transaction by the Grievant until the third package arrived at MCI on May 27, 2021. That package contained five compact discs, a Mother's Day card with a handwritten note, a black fur coat (Crista Furs, St. Louis), and a \$250,000 Mutual of Omaha accidental death insurance policy, listing the Grievant as the primary beneficiary.⁸

On September 2021, Investigator Hecker informed the Grievant that another package had arrived in her name. The Grievant asked Investigator Hecker if she could keep the fur coat because Investigator Walker had allowed her to keep the necklace. Investigator Hecker denied the Grievant's request.⁹ To confirm the Grievant's allegation, Investigator Hecker consulted Investigator Walker, who denied allowing the Grievant to keep the necklace.¹⁰ Indeed, Investigator Walker disavowed any knowledge that the Grievant had kept the necklace. Nor did Investigator Walker find any of the packages to contain either *major* or *minor* contraband. He opined that the mailroom housed only *minor* contraband.¹¹

B. FAILURE TO FOLLOW DIRECT ORDER

On October 28, 2021, the Grievant filed an incident report, claiming that an inmate ("Informant") had accused Investigator Walker of distributing recycled cell phones to inmates.¹² Ultimately, that incident report triggered an administrative investigation, during which Warden Hill telephoned the Grievant to get the alleged informant's name. Fearing for the informant's well-being, the Grievant agreed to supply that information in writing rather than on the telephone. Warden Hill then asked the Grievant if she was disobeying a direct order. The Grievant said she

⁸ Joint Exhibit, at 42.

⁹ *Id.*, at 42.

¹⁰ Joint Exhibit, at 42.

¹¹ Joint Exhibit, at 39-40.

¹² Joint Exhibit, at 12.

would provide the informant's name in writing. Shortly thereafter, the Grievant telephoned Warden Hill to ask if she would be fired for disobeying a direct order, and the Warden summoned her to his office. Before leaving for Warden Hill's office, the Grievant reduced the requested information to writing and placed it on her person.

The Grievant arrived at Warden Hill's Office to find that he had summoned Phillip Rader, a Union Representative (Mr. Rader), to represent her during her meeting with Warden Hill. The Grievant had not requested a union representative because she did not believe she had done anything wrong. When the Grievant entered Warden Hill's office, he began reading from a document with the intent of placing her on administrative leave. The Grievant asked Warden Hill why he was placing her on administrative leave, and he ordered her to stop interrupting him. On October 28, 2021, Warden Hill placed the Grievant on administrative leave.¹³ While escorting the Grievant from the facility, Mr. Rader advised the Grievant to give the Warden what he requests. The Grievant responded that she did nothing wrong "Fuck it. I'll take this on the chin."

III. PROCEDURAL HISTORY

During the administrative investigation, Management discovered that the Grievant had accepted Jared's gift card and that Investigator Walker was involved with the three packages and had violated some of MCI's regulations.¹⁴ On April 22, 2022, Management summoned the Grievant to a pre-disciplinary hearing, during which Management leveled the above-referenced charges against her.¹⁵ On May 6, 2022, Management *removed* the Grievant from her position as General Activity Therapist 2.¹⁶ On June 7, 2022, the Union filed Grievance N0. DRC-2022-04860-

¹³ Joint Exhibit, at 53.

¹⁴ Joint Exhibit, at 17.

¹⁵ Joint Exhibit, at 10-12.

¹⁶ Joint Exhibit, at 1.

04 (Grievance”),¹⁷ challenging MCI’s disciplinary decision as excessive and for other than just cause.

During the administrative investigation, Management also disciplined Investigator Walker for his involvement with the gifts.¹⁸ However, instead of removing Investigator Walker, on April 5, 2022, Management imposed the disciplinary measures set forth in the following agreement:

The employee [Leon Walker] agrees to waive his right to a pre-disciplinary meeting and accept a five (5) day working suspension . . . And a transfer from the Marion Correctional Institution as Correction Warden Assistant to the Correctional Reception Center in the position of Correction Specialist for violation of . . . [the following rules]. . . .¹⁹

Management denied the Grievance, the Parties reached impasse, and secured the Undersigned to resolve the dispute via a virtual arbitral hearing. During that hearing, the Parties raised no jurisdictional procedural issues. Their 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 those Briefs.

IV. ODRC REGULATORY PROVISIONS

ODRC 31 – SEM – 01²⁰

D. Conflict of Interest and Supplemental Compensation

1. Prohibitions. . .

- a. A DRC employee is prohibited from accepting or soliciting a substantial and improper thing of value from any improper source.

* * * *

2. Application of prohibitions

¹⁷ Grievance trail, at 2 of 3.

¹⁸ Management’s Post-hearing Brief, at 27-28.

¹⁹ Id.

²⁰ Joint Exhibit, 372

* * * *

c. Gifts: “. . . DRC employees shall not *personally* accept any gift valued at more than \$20 (\$20) from anyone except close family and personal friends. Token gifts of appreciation worth (\$20) or less may be accepted.”²¹

V. THE ISSUE

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

A. SUMMARY OF PARTIES’ MAJOR ARGUMENTS

1. SUMMARY OF UNION’S ARGUMENTS

1. Management did not follow its policies and procedures, and this investigation was not conducted fully and fairly.
2. The Grievant was the first to report the incident to the Adult Parole Authority and repeatedly declared she wanted nothing that Mr. Hilson sent into MCI.
3. Investigators Walker and Heckler violated MCI’s regulations by specifically addressing core circumstances surrounding the gifts.
4. But for Investigator Walker’s violative language and conduct, the Grievant would not have been associated with the three packages, let alone losing her job because of them.
5. Management imposed disparate treatment on the Grievant relative to that imposed on Investigator Walker.
6. Despite the absence of any evidence supporting an unauthorized relationship between the Grievant and Mr. Hilson, Management refused to drop that charge and, ultimately, found the Grievant guilty of that charge.
7. Neither Rules 6, 7, nor 8 contemplates removal for a first offense.
8. As a ten-year employee with no active discipline and good evaluations, the Grievant deserves a chance to carry on her career with ODRC.

B. SUMMARY OF MANAGEMENT’S ARGUMENTS

1. Because their investigations reveal no unauthorized relationship between the Grievant and Mr. Hilson, investigators Walker and Hecker never classified the gifts as contraband.
 - a. Mr. Hilson’s gifts do not “squarely fall under *any ODRC* policy.”
 - (1) [A]ll DRC employees, including the Grievant, received training on ethics every year.
 - (2) SOEC prohibits employees from accepting gifts from those under the Department’s supervision. The

²¹ Joint Exhibit 372 (emphasis added).

- (3) SOEC and ethics policy prohibits employees from accepting gifts over a nominal amount.
- b. Nor does the Mail room's policy "address a scenario like this one. "Nothing in the policy addresses how to handle employee mail, including mail sent in from offenders."
2. "According to . . . [Investigator Walker], the Department's security . . . [Mail room's] policy. . . addresses how to handle contraband *confiscated from an inmate* and they *did not fit* the definition of *major* contraband. ...[t]he items *were not confiscated from an inmate*. They were *sent in through FedEx*. Additionally, items did not come into the institution because they were sent to the *warehouse (outside the institution)* to be processed."
 3. Management justly disciplined Investigator Mr. Walker for his violations by imposing a [five-day working suspension], stalling his career growth by disallowing him ever again to hold the investigator position.
 4. "The . . . [G]rievant had shipped packages back at . . . [Investigator Walker'] direction before. He had no reason to think she would not do so this time."
 5. Mr. Walker did not give the . . . [G]rievant the necklace to keep. Mr. Walker acknowledged that he did not specifically tell her to mail the item back but to return it. He said the box contained a receipt, and he assumed the store could put the money back on Offender Hilson's card."
 6. "Mr. Walker gave the . . . [G]rievant the necklace to return because she was working overtime in the mailroom assisting due to the staff shortages resulting from COVID-19. Because he did not specifically tell her to mail it back, it was *not unreasonable* for the Grievant to believe that she should return it in person."
 7. "Maybe their *judgment* was not the best, but neither . . . [of the Investigators] gained financially."
 8. "Investigator Walker. . . thought the grievant, who frequently worked overtime in the mailroom during this timeframe, would either return the items to the offender or destroy them."
 9. "Mr. Walker is not similarly situated to the Grievant, and his mistakes do not negate the Grievant's egregious misconduct. Investigator Walker did not:
 - a. accept gifts from an offender, compromising his ability to do his job.
 - b. accept something of substantial value from someone under our supervision, violating his ethical obligation as a public employee.
 - c. lie.
 - d. interfere with an investigation.

e. obtain a financial gain at the expense of a mentally ill offender.”

10. Once the . . . [G]rievant was told that the money could not be put back on Offender Hilson’s credit card, she did not bring the item back and advise Mr. Walker that the item could not be returned.”
11. If the . . . [G]rievant did not see anything wrong in this behavior, then she does not have the character to be an DRC employee.
12. “The . . . [G]rievant knew that she was not permitted to keep the necklace or return the necklace and get a credit. Even with the acknowledged **joking** about her keeping it, she knew that it was wrong, and she knew that it was a violation. In her second interview, she stated, “I knew better.”
13. “The . . . [G]rievant denied knowing who . . . [Mr. Hilson] was when testifying, but during her interview, she stated, “All I know is he had high waters and he itches a lot. They call him itchy.” (Jt. Exhibit Pre-disciplinary packet, Crawford 1st interview, marker 11:28). She went on to describe him as an “older weird man.”
14. The Grievant tried to secure the Life insurance policy and the fur coat Mr. Hilson sent her.
15. The Grievant was insubordinate because she disobeyed Warden Hilson’s direct order to submit the name of the inmate whistleblower.

VI. EVIDENTIARY PRELIMINARIES

Because this is a disciplinary dispute, Management has the burden of proof/persuasion and, therefore, must demonstrate by **preponderant evidence**²² in the arbitral record as a whole that the Grievant was terminated for just cause. Doubts about the existence of just cause shall be resolved against Management. Similarly, the Union must shoulder the burden of persuasion for its allegations and defenses, doubts about which shall be resolved against the Union.

²² At the inception of the hearing, the Union raised, and the Parties discussed, the propriety of elevating the measure of persuasion for Management from **preponderant** to **clear and evidence** because the Grievant was exposed to some publicity after her removal, thereby enhancing the risk of public stigma that could undermine her prospects for future employment. The parties agreed to discuss this matter further at the end of the hearing. However, that discussion never materialized. After reading through the Parties’ files, the Undersigned determined that an elevation of the measure of persuasion to clear and convincing evidence was not indicated.

VII. DISCUSSION AND ANALYSIS

A. REGULATORY ENVIRONMENT

1. DEFINITION OF CONTRABAND

As acknowledged in Management’s Post-hearing Brief, the manner in which Mr. Hilson’s gifts entered MCI and were subsequently mishandled exposed loopholes in MCI’s regulatory screen.²³ Specifically, Management acknowledges that regulations in neither MCI in general nor the mailroom in particular contemplated how Mr. Hilson’s gifts reached the Grievant.

Indeed, the very definition of *contraband* confused MCI’s investigators.²⁴ Mailroom regulations classify mail as contraband based in part on whether it reaches the inside of MCI or remains in a warehouse. The distinction between *major and minor* contraband confounded investigative efforts to classify Mr. Hilson’s gifts. These interpretive hurdles contributed to—if not caused—erroneous classifications and subsequent mishandling of the gifts.

The struggles of Investigators Walker and Hecker to recognize the gifts as either major or minor contraband typifies the regulatory ambiguity in this dispute. Management stresses the amount of ethical training the inspectors and the Grievant received. However, without greater clarity in the regulatory, training will not substantially improve the investigative problems that surfaced in this dispute. Although not *outcome-determinative*, these investigative missteps created a procedural headwind for the Grievant.

2. SCOPE OF ODRC 31-SEM-01

ODRC 31 – SEM – 01 (D) (1) (“ODRC-31”) explicitly governs employees’ rights to accept gifts. Generally, ODRC–31 prohibits employees “from *accepting* . . . a substantial and improper thing of value from *any improper* source. When *applied*, however, ODRC

²³ Management Post-hearing Brief, at 25.

²⁴ Joint Exhibit, at 27.

provides “. . . DRC employees shall not *personally accept* any gift valued at more than \$20 (\$20) from anyone except close family and personal friends. . . .”²⁵ ODRC-31 *globally* prohibits employees from accepting *any substantial* and *improper* thing of value from *any improper* source.

3. IMPACT OF GIFT CARD ACCEPTANCE ON ODRC-31

The issue here is whether the Grievant’s acceptance of the gift card violated ODRC-31. Although the *general* language of “ODRC-31 *explicitly* prohibits employees from accepting *any* gift from *any* improper source, the ensuing *application* of that provision *only* prohibits employees from *personally* accepting *any gift of value*. . .” Yet, on its face, the applicational provision *only* forbids employees from *personally* accepting gifts of value. “*Personally*” places Mr. Hilson’s gifts without the scope of ODRC-31. The Grievant received the necklace from Investigator Walker, who specifically alerted her that Mr. Hilson had mailed it to her. Such conduct by an investigator/supervisor could, and likely did, smudge the line between legitimately accepted gifts and illegitimately accepted ones.

Investigator Walker further confounded the meaning of “accept” under ODRC-31 by “*jokingly*” declaring that he would keep the necklace if the Grievant refused it. The most strenuous analytical efforts would likely fail to *squeeze* the *manner* in which the Grievant received the necklace into the narrow portal of *personally* accepting it from Mr. Hilson. Based on the foregoing analysis, the Arbitrator holds that the Grievant’s acceptance of the gift card did not *violate* ODRC-31.

²⁵ Joint Exhibit 372 (emphasis added).

4. ODRC STANDARDS OF EMPLOYEE CONDUCT (SOEC)

Management argues that the Grievant's acceptance of the gift card violated several standards of employee conduct. The Arbitrator will now address these arguments.

5. FAILURE TO FOLLOW POST ORDERS, ADMINISTRATIVE REGULATIONS, POLICIES, OR WRITTEN OR VERBAL DIRECTIVES

Other than ODRC-31, nothing in the arbitral record *specifically* addresses an employee's duty to follow post orders, administrative regulations, policies, or written verbal directives. This global regulation does not explain *how* the Grievant "*personally*" accepted either the necklace or the gift card from Mr. Hilson when she actually received the former from Investigator Walker and the latter from Jared. Consequently, the Arbitrator holds that Management did not prove that the Grievant violated ODRC-31.

6. RULE-8 FAILURE TO CARRY OUT A WORK ASSIGNMENT OR THE EXERCISE OF POOR JUDGMENT IN CARRYING OUT AN ASSIGNMENT

Preponderant evidence in the arbitral record as a whole establishes that the Grievant exercised "*poor judgment*" when she sought to obey Instructor Walker's request by returning the necklace to Jared for a refund to Mr. Hilson's credit card. That "poor judgment" occurred when the Grievant accepted the gift card instead of returning the necklace to Instructor Walker. Even though Instructor Walker never *specifically* instructed the Grievant what to do if Jared refused her offer, an intact moral/ethical fabric (*sound judgment*) should have resulted in her returning the necklace to Investigator Walker. That said, the difficulty for Management is that Instructor Walker *lacked the authority* to issue this assignment to the Grievant in the first instance. Second, he should have issued an alternative plan should Jared reject the initial offer. In her investigatory report, Ms. Emily Paine (Program Administrator 3) ("Investigator Paine") stated in relevant part:

Investigator Walker improperly provided the jewelry to . . . [the Grievant]. *He should have disposed of the jewelry himself. Neither explanation* provided by him regarding

how the jewelry was to be handled – returned to sender or working with the retailer to credit . . . [Mr.] Hilson’s account –.[is] . . . acceptable. In either scenario, he failed to follow up to *ensure* the jewelry made it back to . . . [Mr.] Hilson or was returned to the retailer and. . . [Mr.] Hilson’s account credited. He *improperly released* the jewelry into the *possession* of . . . [the Grievant] . . . when he should have *secured the jewelry as contraband* and determined how to properly dispose of it *himself*, or seized it as evidence for an administrative, or potentially criminal investigation.²⁶

Investigator Walker *lacked the authority* request/order the Grievant to return the necklace to Jared. Although such regulatory/authoritative overreach certainly *mitigates* the Grievant’s subsequent *poor judgment*,²⁷ it can neither *justify* nor excuse it. Consequently, the Arbitrator holds that the Grievant *violated* Rule 8.

7. RULE 24 INTERFERING WITH, FAILING TO COOPERATE IN, OR LYING IN AN OFFICIAL INVESTIGATION OR INQUIRY

Preponderant evidence in the arbitral record as a whole does not support the accusation that the Grievant *failed to cooperate* in an official investigation or inquiry. Instead, the record shows that, during her interviews with Investigator Paine, the Grievant gave straightforward responses, some of which arguably undermined her self-interest.²⁸ The majority, if not all, instances in which Management alleges that the Grievant *interfered* with the investigation derive from conclusions that the Grievant *intentionally* refused to cooperate in the investigation.

Evidence in the arbitral record does not support that allegation. Management credited other employees’ testimonies without preponderant evidence to substantiate such

²⁶ Joint Exhibit, at 46 (emphasis added).

²⁷ One can reasonably conclude that *but for* Instructor Walker’s initial conduct and verbiage, the Grievant would have been spared the concomitant stress and trauma of this dispute.

reliance. The Grievant offered *straightforward* responses to virtually all, if not all, questions that Investigator Paine posed to her.²⁹

Furthermore, although the instant dispute is rife with “he said, she said,” Investigator Paine neither explicitly nor implicitly *accused* the Grievant of either intentionally or unintentionally interfering with the administrative investigation. Absent *independent, corroborative* evidence to support crediting one employee’s testimony over that of another, one has only *external inconsistencies* that seldom constitute *preponderant evidence* of either *deliberate* interference.

The same can be said for allegations that the Grievant *lied*. Without independent, corroborative evidence, neither internally nor externally inconsistent testimony *automatically* demonstrates mendacity, though such testimony can *tarnish* credibility. Allegations of mendacity inherently *presuppose intent*. Nevertheless, internal inconsistency can flow from *legitimate* memory lapses, which, as noted above, can erode *credibility* but, without more, hardly demonstrate the requisite *intent* to establish mendacity. Given the foregoing discussion, the Arbitrator does not find preponderate evidence in the arbitral record as a whole that the Grievant lied during her investigatory interviews.

8. 46A -Unauthorized Relationships: The *exchange of Information. . . by any means with any individual currently under the supervision of the Department, or any individual within 6 months following their release or supervision of the Department. . .*

For the reasons discussed below, this charge is bereft of evidentiary substantiation and, therefore, *puzzling*. In its Post-hearing Brief, Management *acknowledged* that the

²⁹ See, e.g., Joint Exhibits, at 36, 38, 45, 46, 49.

Investigators found *no unauthorized* relationship between the Grievant and Mr. Hilson.

Consequently, the Arbitrator holds that, in this dispute, no unauthorized relationship between the Grievant and Mr. Hilson has been established.

9. 50 – Any violation of ODRC 124.34. . . and for incompetency, inefficiency, unsatisfactory performance, dishonesty, . . . , insubordination . . . neglect of duty . . . or any failure of good behavior, or any other acts of misfeasance, malfeasance, or nonfeasance in office.

With respect to the instant dispute, the relevant prohibitions in ODRC 124.34 (“ODRC 124”) are *dishonesty, immoral conduct, and insubordination*, each of which is discussed below.

a. Dishonesty/Immorality

Management accuses the Grievant of being dishonest, immoral, and unfit to serve as an employee in ODRC.³⁰ As discussed earlier in this opinion, the Grievant exercised *poor judgment* in accepting the gift card. However, the environment within which the Grievant found herself—Instructor Walker’s conduct and “jokes” and Jared’s refusal to credit Mr. Hilson’s credit card—constituted a “perfect storm” that left the Grievant’s moral/ethical compass (“compass”) *temporarily and partially* dysfunctional.³¹ The Grievant’s compass was only “Temporarily/Partially” dysfunctional because she showed signs rehabilitation during a subsequent interview with Instructor Paine:

“I tried to get it credited to keep it i Joint Exhibit, at 39.n the store, and maybe they can transfer it back. They said it’s mine. It’s mine, so I just left the credit there for a day, and I was like, you know, I am just gonna go ahead and do it. And I did it. I should never did it. It was a bad fucking mistake on my part. I know better.”³²

Recall that when Instructor Walker presented the Grievant with the first gifts, she emphatically rejected them. At that point, her verbal declaration aligned with her conduct. Subsequently, Investigator Walker presented the Grievant with an expensive necklace. Again,

³⁰ Management’s Post-hearing Brief, at 48.

³¹ The Arbitrator uses “Temporarily/ Partially” because, as discussed later in this opinion, the Grievant began to rehabilitate her moral/ethical compass during a subsequent interview with Instructor Paine:

³² Joint Exhibit, at 39.

the Grievant's verbal and behavioral response aligned. She rejected the necklace. Thus far, the Grievant's compass was operationally intact.

At this point, Instructor Walker placed the necklace in the Grievant's possession and "jokingly" insisting that he would keep the necklace if the Grievant did not. The Grievant's compass remained fully functional. She fully intended to refund the price of the necklace to Mr. Hilson's credit card. Unfortunately, Jared rejected that transaction, counteroffering to give the Grievant a gift card. Still, the Grievant's compass remained steadfast and functional. She did not immediately accept the gift card. Instead, she returned home, considered Jared's counteroffer, and, subsequently, accepted the gift card. The Grievant had somehow convinced herself that she was entitled to the gift card. That decision was *morally and ethically wrong*.

Subsequently, when the Grievant learned that Mr. Hilson had sent her a fur coat and a life insurance policy, she approached Investigator Hecker and explicitly asked if she could keep the fur coat. This was not the behavior of a person trying to be *furtive or deceitful*.³³ Indeed, the Grievant explicitly referenced Investigator Walker's conduct and verbal statements as evidence that she was somehow entitled to the fur coat. At this point, the Grievant's moral/ethical compass had shut down. She had lost her way. Based on the foregoing analysis and discussion, the Arbitrator is convinced that the Grievant is fully amenable to rehabilitation if, indeed, she has not already embraced that status.

b. Insubordination—Refusal to Follow a Direct Order

Warden Hill accused the Grievant of failing to obey a direct order (insubordination) when she declined to name an inmate (whistleblower). She feared for the inmate's safety in the correctional facility. Warden Hill had requested the inmate's name during a telephone

³³ Management's Post-hearing Brief, at 6.

conversation with the Grievant. She clearly expressed her willingness to supply the information but in a face-to-face forum rather than on the telephone. Warden Hill then asked the Grievant if she was disobeying a direct order. She reiterated her willingness to comply with his request in a different form. Shortly after that conversation ended, the Grievant telephoned Warden Hill to ask if she would be fired, and he summoned her to his office.

Upon arriving at Warden Hill's office, the Grievant met a Mr. Wallingford a Union Representative that Warden Hill had summoned to represent her while she met with Warden Hill. The Grievant informed Mr. Wallingford that she required no representation because she had committed no violation. When the Grievant met Warden Hill, he started reading from a form that would place her on administrative leave. She attempted to inform him that she had the information he requested in her pocket, Warden Hill instructed her not to interrupt him. It is unclear whether the Grievant ever offered Warden Hill the information he requested.

Management claims that the foregoing facts constitute a refusal to follow a direct order, which suggests a charge of insubordination. The Union stresses that Warden Hill never informed the Grievant that disobeying a direct order could expose her to severe disciplinary measures.

The Union prevails on this issue. Most mainstream arbitrators support the Union's argument. Management must *clearly inform* employees who hesitantly respond to direct orders that they are risking severe discipline.

To establish a charge of insubordination, Management must state the order *clearly and unambiguously*, thereby ensuring that the employee heard and understood the order. If the employee clearly heard and understood the order and refused to comply, Management must clearly and unambiguously notify the employee that such disobedience will likely trigger

disciplinary measures. Finally, if the employee persists in refusing to follow the direct order, Management will have just cause to discipline the employee for insubordination.

In the instant case, Warden Hill never gave the Grievant the indispensable clear warning of impending discipline. Consequently, preponderant evidence in the arbitral record as a whole establishes neither insubordination nor failure to follow a direct order.

VIII. PENALTY ASSESSMENT

Preponderant evidence in the arbitral record demonstrates that the Grievant *accepted* the gift card that Jared offered as a quid pro quo for the necklace. Therefore, some measure of discipline is indicated. She was not entitled to the gift card. This is not because she violated a *clear and unambiguous* regulation. She did not. Nevertheless, one can hardly excuse the Grievant's decision to accept the gift card.

Assessment of the proper measure of discipline requires the Arbitrator to balance the relevant *aggravative and mitigative* factors that prompted Management to select termination as a measure of discipline. The Arbitrator shall not modify a disciplinary measure unless it is unreasonable, arbitrary, capricious, discriminatory, in bad faith, or abusive of discretion.

A. AGGRAVATIVE FACTORS

The pivotal aggravative factor is the Grievant's acceptance of the gift card. The Union, Management, and the Grievant acknowledge that accepting the gift card was morally and ethically wrong and, under certain circumstances, could warrant removal.

B. MITIGATIVE FACTORS

The relevant facts and circumstances surrounding the Grievant's removal also reveal *substantial* mitigative factors, which the Arbitrator has enumerated earlier in this decision. Summarily, those *mitigative* factors involved the regulatory environment, Instructor Walker's verbiage and conduct with respect to the necklace, and Jared's refusal to accept the Grievant's clear and unambiguous request to refund Mr. Hilson's

credit card. The other pivotal *mitigative* factors are: (1) the Grievant's unvarnished expression of humility and regret for having accepted the gift card in the first instance. She knows that was a profound mistake; (2) The Grievant's ten years of service at MCI; and (3) The Grievant's discipline-free personnel record.

C. REASONABLE MEASURE OF DISCIPLINE

The foregoing balance of mitigative and aggravative factors convinces the Arbitrator that the Grievant is a prime candidate for *rehabilitation*, a process that she likely has already initiated. Under these circumstances, retention of the Grievant is highly unlikely to undermine any of DRC's myriad legitimate operational interests.

IX. THE AWARD

For all the reasons set forth in this opinion, the Grievance is, hereby, **SUSTAINED IN PART AND DENIED IN PART**. The Arbitrator hereby requires Management to **reinstate** the Grievant to her position as **General Activity Therapist 2 (GAT2)** with **no loss** of either **seniority** or **medical benefits**. However, the Grievant's reinstatement will be **without back pay**.



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