IN THE MATTER OF ARBITRATION	)	
	)	
BETWEEN	)	**GRIEVANCE ID: Jeffrey Gifford**
	)	
OHIO DEPARTMENT OF REHABILITATION AND CORRECTIONS	)	**Grievance No. Discharge**
	)	**Grievance #DRC-2023-02764-07**
AND	)	**BEFORE: ROBERT G. STEIN, NAA**
OCSEA AFSCME LOCAL 11, AFL-CIO	)	**ARBITRATOR**
	)	
	)	

FOR THE UNION:

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INTRODUCTION

This matter came on for hearing before the arbitrator pursuant to the collective bargaining agreement ("Agreement" or "CBA") between the State of Ohio, Ohio Department of Rehabilitation and Correction ("Employer" "DRC" "Department"), and the Ohio Civil Service Employees Association, AFSCME Local 11 ("Union" or "OCSEA"). That Agreement was effective in February of 2021 and included the conduct which is the subject of this grievance. The Ohio Department of Rehabilitation and Corrections ("DRC") is the Employer in this matter and, in particular, its Franklin Medical Correctional Institution ("FMC"). The parties mutually selected Robert G. Stein to arbitrate this matter impartially under the Agreement. A hearing on this matter was conducted on April 29th and May 8th, 2024, and was held virtually. The parties mutually agreed to these hearing dates and that virtual format, and they were each provided with a full opportunity to present both oral testimony and documentary evidence supporting their respective positions. The hearing was not recorded via a written transcript and was closed upon the parties' submissions of post-hearing briefs.

No procedural or jurisdictional arbitrability issues have been raised, and the parties have stipulated that the instant matter is properly before the arbitrator to determine the merits.

Joint Stipulations

Issue: Was the Grievant removed with Just Cause, and if not, what shall the remedy be?

Classification: Safety and Health Officer

Length of service: 11 years (DOH=08/27/2012 DOR=09/26/2023)

Termination Date: 09/26/2023

Discipline: Active 5DWS for violations of SOEC Rules 14 and 24

Training:

(The Grievant was current with his training at the time of the incident)

Grievance filed: 09/29/2023.

VIOLATIONS OF RULES/STANDARDS OF EMPLOYEE CONDUCT FOUND BY THE EMPLOYER

(NUMBERED BY ARBITRATOR FOR PURPOSES OF ORGANIZATION ONLY)

The Grievant was removed on September 26, 2023, based upon the Employer's finding that he had violated several Standards of Employee Conduct (SOEC) rules. The Grievant was found to have:

> **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 45 B**. Without express authorization, giving preferential treatment to any individual under supervision of the Department, or any individual within 6 months following their release from custody or supervision of Department, but not limited to: the offering, receiving, or giving of anything of value.

(Pre-disciplinary Meeting Notice, p. 5 and 6 in the Arbitration Binder

I. RELEVANT CONTRACT LANGUAGE

Articles 24. 24.02, 36, Q

(p. 1 in the Arbitration Binder)

BACKGROUND

The individual filing the grievance in this matter is Jeffrey Gifford, also referred to as "Gifford" or "the Grievant". He was previously employed as a Safety and Health Officer with DRC.

Gifford commenced employment with DRC on August 27, 2012, and his employment was terminated on September 29, 2023. At the time of his termination, Gifford had completed over 11 years of service with DRC. Per the Employer's statement, the Grievant was dismissed for violating four employee conduct (SOEC) rules, specifically Rules 7, 8, 24, and 45B, detailed above. The alleged violations occurred on January 3, 2023, while Gifford was working first-shift hours at the FMC in Columbus, Ohio. According to the Employer an investigation was conducted following an incident on January 3, 2023 (time designations are based on the videos to identify approximate AM and PM times and to calculate duration). At the start of his shift, the Grievant brought a clear container of barbecued ribs into the institution, following FMC entry procedures. The container looked like a typical plastic container or Tupperware container used to store perishable items. Surveillance video shows the Grievant leaving his office later in the morning with a white cardboard box containing the plastic food container. At approximately 8:24 am, the Grievant arrived in the maintenance area and conversed with inmate "IP" Blevins while holding a cardboard box. The conversation lasted until 8:35:19 am. After the conversation, at 8:35:29 am, the Grievant opened a small white refrigerator (mini-RV sized) removed a food container from the white cardboard box and placed it in the refrigerator. Then, holding the empty cardboard box, the Grievant briefly stayed in the maintenance area until he left the camera's view. IP Blevins observed the Grievant walking to the fridge, taking out the food container from the cardboard box, and putting it in the refrigerator. At 8:40 am, with no one else in view of the camera, IP Blevins walked over to the refrigerator, removed the food container, got a new Styrofoam box from the area, put the ribs into the Styrofoam container, and placed it back in the refrigerator. Afterward, he thoroughly washed and dried the Grievant’s food container and placed it under the far end of the table where he initially sat. Several minutes later, around 9:41 am, IP Blevins took the empty food container from under the table and moved it to what seemed to be a maintenance utility cart. He then resealed it in front of, and with some assistance from, IP Yancey, before placing it on a lower shelf on the cart. At 10:06 am, IP Yancey moved the small utility cart out of the camera's view. At 11:11 am, the cart was returned to the camera's viewing area of the maintenance department, but the food container appeared to be missing from the cart.

However, at 10:10 am, IP Blevins was seen taking the empty food container to the Grievant's office.

The investigation by the Department concluded that on January 3, 2023, the Grievant brought a plastic food container into the institution for the benefit of inmates. The Grievant concealed the container in a cardboard box while in the maintenance department, waited until no one, except IP Blevins, was present, and then removed the container from the box and placed it in a small white refrigerator in the maintenance department. Subsequently, IP Blevins returned the food container to the Grievant and was later viewed by the Grievant, consuming the ribs. The Employer also claims that the Grievant lied about this incident during the administrative investigation, stating that the ribs were meant for staff in the maintenance department and not for IP Blevins. As a result, the Employer found that the Grievant had violated the DRC Rules and terminated his employment on September 26, 2023. On September 29, 2023, the Union filed a grievance on behalf of Gifford, claiming that the Employer did not have cause to remove Gifford. However, the matter remained unresolved through the grievance procedure. The Union then submitted the matter to final and binding arbitration. The parties have agreed that the matter is properly before the arbitrator for a determination on the merits."

SUMMARY OF THE EMPLOYER POSITION

The Employer presents several arguments, emphasizing what it believes is undeniable video evidence backed by colleagues' statements contradicting the Grievant's claims of innocence. The Employer concludes that the Grievant's behavior on January 3, 2023, along with previous disciplinary actions, shows that he "…can no longer be trusted in the workforce." (Employer opening statement, p. 3). Instead of summarizing the arguments and potentially distorting or truncating their content, the arbitrator has provided an exact account of the Employer's arguments as presented in its brief.

Argument

Arbitrator Stein, parties often arrive at Arbitration with only one or two witnesses each who provide testimony in direct conflict to each other. These cases also routinely lack clear unbiased evidence. That is not the case here. Management's case against the Grievant is built on clear video evidence and consistent testimony from multiple colleagues. Through this video evidence and testimony, Management

has proven the Grievant intentionally left ribs for IP Blevins to retrieve, then blatantly lied during the administrative investigation into the matter.

Did the Grievant show preferential treatment to Incarcerated Person Blevins?

Leaving Food

The Grievant's testimony and statements that he brought food in for co-workers on January 3, 2023, is not supported in any form. In fact, testimony clearly contradicted the Grievant's claims. The Grievant confessed to Mr. Stein that nobody advised him they did not get any of the ribs he brought in.

The Grievant testified he hid the ribs in a box because he did not want staff to know what he had. This statement proves Management's case that the ribs were intended for IP Blevins. All staff are required to carry clear bags/containers into the institution. Witnesses testified there has been no history of food coming up missing. With these facts in mind, why does it matter if fellow staff members saw what he had, **especially** if it was intended for them? The Grievant next offered testimony he did not want IPs to know what he had. This statement does not make sense for the reasons listed above as well as additional testimony that there were no incidents of IPs stealing from staff at FMC. The only logical explanation for placing the ribs in the white box is that the Grievant was attempting to conceal his wrongdoing. His statement that he did not want staff to see what he had, can in fact be believed with the above considerations.

A review of the Maintenance AM video (8:35:17-8:35:19 am) clearly shows IP Blevins give an approving head nod, say something and begin to intently watch the Grievant as well as keep an eye on the doorway to make sure nobody else was coming. This sequence of events demonstrates the food was in fact intended for IP Blevins.

The Grievant testified it was a common practice for IPs to clean staff items as an explanation for not questioning IP Blevins' returning of the Tupperware so quickly. Witnesses clearly testified there was no practice permitting IPs to clean or handle their belongings. IP Blevins bringing an empty Tupperware back, at 10:10 am (Video: Gifford Office 2) should have been a red flag for the Grievant if the food were truly left for staff. 10:10 am is mid-morning at best, and is well before lunchtime breaks are had by staff.

The sequence of events at approximately 1:30 pm in the Maintenance Department puts on full display that IP Blevins knew the Grievant approved of his eating the ribs. IP Blevins checked the doorway to see who was coming in. Realizing it was the Grievant, he continued consuming the ribs left by the Grievant. IP Blevins made no attempt to hide what he was doing from the Grievant while they were directly in front of each other.

The Union, at multiple points during testimony, inquired of witnesses if they were aware of any documents, pictures, video or testimony that illustrated or proved the Grievant directly gave IP Blevins this food. Video at approximately 1:30 pm in the Maintenance Department coupled with pictures 3, 4, 5, 6 and 7 are the next best thing. Video and pictures prove the Grievant left these ribs for IP Blevins, and IP Blevins knew they were for him.

If the Grievant left the food for staff, a reasonable and prudent person could expect him to tell Mr. Sparks who, when and where he notified of the food during the investigatory interview. One could also reasonably expect that employees interviewed within a few days of the incident would recall being offered something such as ribs, but not receiving any. The Grievant did not provide such statements. None of the witnesses supported his claims.

Proven Issues in Maintenance

Warden Heard testified that nearly immediately upon his arrival at FMC in October 2021 he became aware the Maintenance Department was an area wrought with staff problems. He introduced discipline issued to several maintenance staff members as evidence of his attempts to address significant wrongdoing, while affording staff the ability to correct their behavior. (JE, pp. 130-135.) Two truths can be garnered from his testimony and these documents. 1) There was a rampant problem of boundaries between staff and IPs and 2) Warden Heard was equally enforcing rule violations to systematically rid the area of these boundary issues.

Discipline was issued to Jason Cummings on January 30, 2022, for major contraband found in his desk on October 24, 2021. (JE, p, 130.) Discipline was issued to Mark Fisher on April 6, 2023, for giving popcorn to an IP. (JE, p. 130.) Discipline was issued to Bobby Yu on February 15, 2023, for giving an IP cake and coffee. (JE, p. 134.) The Grievant's actions are in lock-step with the other employees in the Maintenance Department, and he has provided no viable explanation.

Boundary Issues Between the Grievant and IP Blevins

IP Blevins and the Grievant, as evidenced by indisputable video evidence, had an overly friendly relationship. The two spent fifteen (15) minutes talking *to each other* in the Maintenance Department (8:23 am-8:38 am). Another staff member was present for the vast majority of this timespan and the Grievant barely acknowledged him. The two then spent *another* thirteen (13) minutes *alone* in the Grievant's office (10:10 am-10:23 am). This is nearly thirty minutes talking to each other in the span of less than two (2) hours. The Grievant admitted on cross examination that IP Blevins is not assigned to him as a worker. He also admitted he is not responsible for providing services or programming to the IP population. This means there was no business reason for him to spend this much time alone with IP Blevins.

Beyond the amount of time talking to each other to the point of ignoring others, video further supports IP Blevins' level of comfort with the Grievant at two (2) points. The first is when he (Blevins) enters the Grievant's office without knocking (Gifford's Office 2 10:10 am). Anybody who has spent any amount of time in an office setting will tell you, unless you are expecting somebody to visit, they are going to give an indication they need/want to enter your office such as a waive or head nod. IP Blevins makes no indication that he needs or wants to enter the Grievant's office. The Grievant's statements that he waived IP Blevins in would indicate the visit was an expected one, likely to receive the Tupperware back.

The second demonstration of IP Blevins' level of comfort occurs when he begins eating ribs and looks to see who is coming into the Maintenance Department, and the Grievant immediately appears. IP Blevins' level of comfort is on full display when he makes ***no attempt*** to conceal the ribs in his hands and mouth when the Grievant is directly in front of him. (Video: Maintenance PM 1:30:00 pm, Pictures 3, 4, 5.) This level of comfort between an IP and staff member is not happenstance and does not occur overnight.

Management has demonstrated through disciplinary actions of others that a pattern of boundary issues existed in the area. Management has further demonstrated boundary issues existed with the Grievant. A reasonable conclusion can be drawn that the Grievant was one of the bad actors in the Maintenance Department described by the Warden.

Failing to Author a Conduct Report

The events discussed and analyzed from 1:30:00 to 1:31:00 pm in video labeled Maintenance PM lead a reasonable and prudent person to believe the Grievant had to be aware IP Blevins was eating the ribs when he entered the Maintenance area. The Grievant left the food in a refrigerator a mere few inches away from where IP Blevins was standing, and IP Blevins had previously returned the cleaned-out Tupperware. If the Grievant did not see the ribs, he certainly must have smelled them. Upon encountering IP Blevins, the Grievant failed to address him, and failed to author a conduct report for theft.

When confronted with the evidence and allegation of providing food to IP Blevins during the investigation, the Grievant never claimed or stated "Blevins stole the food from the fridge!". This would have been a reasonable and expected reaction if the food had been left for staff. Even if the Grievant is to be believed that he did not see or smell the ribs, he never inquired or requested a conduct report to be issued for theft during his investigatory interview.

It is proven the Grievant showed Incarcerated Person Blevins preferential treatment on January 3, 2023, in violation of SOEC Rule 45B.

Did the Grievant lie during the administrative investigation?

Witness Testimony

During his administrative investigation, the Grievant stated at multiple points, variations of the statement "the food was for maintenance staff." (JE, pp. 48-52.) During the administrative investigation, all co-workers were asked the same question. No staff stated they were offered food from the Grievant on January 3, 2023. There were a total of seven (7) witnesses called to testify at the arbitration. No witness testified that they were offered food by the Grievant. To this date, the Grievant has yet to clearly identify who the food was offered to, when it was offered to them, or where he made the offer.

As discussed above, the Grievant provided statements during his administrative investigation about IPs cleaning staff's personal property. These statements were definitively proven false as well at the arbitration. During the same investigation, the Grievant stated he never brought items in for IPs. This is a false statement as Management has proven he in fact brought items in specifically to give to IPs.

Witness Motivation and Credibility

When arbitrators hear removal cases that are fortunate enough to have witnesses, the parties typically find themselves attacking credibility and motivation of opposing witnesses or defending their own witness' credibility and motivation. Arbitrators have long held that when there are conflicting stories among employees, the party with nothing to lose by telling the truth is the party to be believed. There is zero need for a discussion of witness credibility in this case. A total of seven (7) witnesses who testified in these proceedings were the Grievant's colleagues. Each witness reported either positive or neutral relationships with the Grievant. None of these employees have any reason to be dishonest about being offered food from the Grievant, or practices of cleaning of Tupperware. Yet, each witness' testimony directly and independently contradicted the Grievant's claims.

OCB award 2738 SEIU District 1199 and The State of Ohio, Department of Rehabilitation and Correction, Franklin Medical Center (Sellman 2024, attached) discusses witness credibility. Arbitrator Sellman opined "The determination that it was highly probable that Grievant engaged in the misconduct alleged was based upon an assessment of each witness' demeanor; consistency and corroboration of statements in interviews; and background and history." and "The consistency and corroboration of the statements in interviews of the two witnesses weighed in favor of the Victim and not the Grievant." (DRC

and SEIU/District 1199 (Sellman 2024), p. 22. Attached.). Mr. Stein, in this same award, Arbitrator Sellman referred to cases that you have referred to and discussed in prior rulings, which further explore witness credibility:

An accused employee is presumed to have an incentive for not telling the truth, and when [her] testimony is contradicted by one who has nothing to gain or lose, the latter is to be believed. United Parcel Serv., Inc. and Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen and Helpers of Am., Local 89, 66-2 ARB 8703 (Dolson 1966). One arbitrator noted: "In determining credibility, the arbitrator may consider not only the demeanor of the witnesses but the motivation of those witnesses, as well." Teamsters Local 688 and Meridian Med. Techs., 01-1 Lab. Arb. Awards (CCH) P 3815 (King, Jr. 2001). (DRC and SEIU/District 1199 (Stein 2023), p. 49.)

(*Id*. at 23, quoting DRC and SEIU/District 1199 (Stein 2023), p. 49. Attached.)

Continued Lies

Astoundingly the Grievant chose to lie at the arbitration. During direct examination, the Grievant adamantly proclaimed he did not, and would never give IP Blevins food because he knew it was against the rules. On cross examination, reference was made to the Grievant's prior discipline, and he was asked if he knew stealing was against the rules. He stated he knew it was. This advocate asked, "But you decided to do it anyway, right?" The Grievant's response was "I didn't steal anything; I was given food by my co-worker." Under direct examination, he had previously acknowledged he participated in the theft of food items, which was one of the reasons he chose to withdraw the grievance for theft. Additionally, Joint Exhibit, page 105 is a portion of the Hearing Officer's Report from the 5DWS issued in December 2021. It states, "Mr. Gifford admitted to stealing the candy bars." Joint Exhibit, page 112 is the investigative report associated with this discipline and states "The investigation revealed through video evidence that the Grievant was observed breaking open boxes and stealing candy bars." (JE, p. 112.) This is far cry from being handed a candy bar as stated at the hearing. Even if the Grievant's statement that a co-worker handed him these items of food were true, the Grievant's rationalization that being handed stolen items is somehow not stealing. is concerning at best.

It is proven the Grievant lied during his administrative investigation in violation of SOEC Rule 24.

Issues raised by the Union

Attempts to Pass Blame

As early as the investigatory interview, the Union attempted to deflect blame onto other Maintenance staff. (JE, p. 52.). At the Pre-Disciplinary Hearing, they did the same. (JE, p. 8.) The statement of grievance continues this attempt to pass blame. (JE, pp. 2-3.) At the arbitration, the Union went to great lengths during a video review with Mr. Sparks to point out all the wrongdoing in the Maintenance Department by other staff members. Former E-Board and current maintenance employee Mr. Gallant, who was called by the Union, openly disagreed with this defense. Additionally, Management Exhibit's 1, 2, and 3 all demonstrate a similar defense tactic used by the Union in defending discipline against employees disciplined for same and similar behavior.

On cross examination of Mr. Sparks, the Union tried to paint Mr. Bobby Yu specifically as one of the staff members complicit in IP Blevin's wrongdoing. In defense of Mr. Yu's discipline, the Union proclaims, "Yu is not the problem when it comes to maintenance." (Management Exhibit 3.) These statements from the Union cannot co-exist. Lastly, a video review conducted on redirect examination of

Mr. Sparks revealed Mr. Yu and other staff members accused of being complicit had obstructed views of the wrongdoing and at points, were upwards of 30 feet away from IP Blevins.

In a continued pattern of deflecting blame, the Grievant testified he believed staff in the Maintenance Department should have seen IP Blevins and IP Yancy eating this food at approximately 1:30-1:40 pm. On cross examination, he admitted these staff members were not on screen, were possibly in their caged office area, which is off screen, and had an obstructed view of the work area. Mr. Sparks testified the area off camera is a caged area with lockers and chest high shelves. The Grievant would have us believe staff in another room with obstructed views, have greater culpability for not addressing IP Blevins than he did when the two were a mere few feet apart.

Rules Infraction Board (RIB)

The Union went to great lengths to argue IP Blevins' conduct report was overturned, which would somehow absolve the Grievant from wrongdoing too. As the Warden's Administrative Assistant (AA), Mr. Sparks is responsible for overseeing the RIB process and assuring IPs are properly afforded rights during the process. He testified that the Conduct Report for IP Blevins was overturned during ODRC's legal review, specifically Mr. Vencot Brown, based on a procedural and technical issue, not a factual issue.

Mr. Brown did not state IP Blevins wasn't guilty of the accusations. Mr. Brown did not state the facility failed to prove its case against IP Blevins. Mr. Brown determined the facility erred procedurally in its handling of the conduct report, and as such the conduct report was overturned. (JE, p. 162.) Mr. Sparks acknowledged this error and accepted responsibility at the hearing. Mr. Sparks had only been in his current role a few weeks when this case arose and had limited experience in RIB prior to his current position. He has had no same/similar cases since this one, illustrating how rare this situation is.

The Union also went to great lengths to demonstrate IP Blevins admitted to theft of the food during the RIB appeals process. Both Mr. Sparks and Heard testified that the penalties for an IP vary depending on the rule violation. Establishing a relationship with a staff member, for example, would result in an IP being assigned a higher security classification. Higher security classifications require a move to an institution with restricted movement, and significantly less privileges. On the other hand, being found guilty of theft would result in local, temporary and less stringent restrictions. This is no different than an accused defendant agreeing to accept a plea deal for a lesser charge for a lighter sentence from a court. IP Blevins' willingness to admit to theft makes sense as he would receive less significant sanctions than establishing a relationship. Admitting theft (at least in Blevins' mind) might also alleviate his friend, the Grievant, from culpability and potential discipline.

Refrigerator

The "Inmate Refrigerator" in this case is simply a red herring thrown out by the Union. Management acknowledges through Mr. Schauseil there was no written procedure or policy for this particular refrigerator and has made no definitive assertion that the Grievant intentionally left his Tupperware in an "Inmate Refrigerator". The Grievant intentionally left food for IP Blevins in a secretive manner in the Maintenance Department, plain and simple.

Pre-Disciplinary Packets

The Union went to great lengths to discuss Pre-Disciplinary packets and differences contained therein, however parties agreed at the onset of the hearing there were no procedural issues. Any claim of a procedural error at this point is to be given no weight.

Management is permitted to reconvene Pre-Disciplinary hearings and parties agreed the matter was properly before the Arbitrator. The Grievant's removal was issued within sixty (60) days of the original hearing. (JE, pp. 5, 6, 7, 9.) Proper notice of rules cited on the NODA is demonstrated on the Pre-Disciplinary packets.

Management's right to reconvene hearings was supported in OCB award 2411 OCSEA and The State of Ohio, Department of Rehabilitation and Correction, Ohio Reformatory for Women. (Cole 2016, attached.) OCSEA argued a procedural error against the ODRC for Grievant Evan Nephew based on multiple Pre-Disciplinary Hearings being held. In her opinion, Arbitrator Sarah Cole opined Management did not violate the contract by reconvening the Pre-Disciplinary Hearing because discipline was issued after the second hearing, but before sixty (60) days had passed from the original date. (Cole 2016, p. 5.)

Unemployment Claim

The Union attempted to introduce an approved Unemployment Claim at the Arbitration. Per the decision in FMCS Case No. 99/7086 (Mead Corporation and United Paper workers International Union Local 731, Kiewicz 2000, attached), the document is to be given no weight. This award states Ohio Revised Code §4141.28(R) requires an Arbitrator to not give up their jurisdiction in light of the findings or decision (of an unemployment claim). Further, the ruling states that minus evidence the unemployment hearing considered a comprehensive record such as an arbitration hearing, the unemployment decision should not be given any weight.

Defending the Removal

Management carries a two-prong burden in defending the Grievant's removal. Management must first prove he committed the bad acts, then demonstrate the level of discipline is warranted. Management's burden of proof in this case is by a preponderance of the evidence, or, that it is more likely than not these bad acts occurred. As demonstrated and discussed above, Managmemnet has proven the Grievant showed preferential treatment to IP Blevins, then lied about his actions. As demonstrated below, the removal is warranted and supported.

Intolerance for Lying

Arbitrators have consistently opined lying is a *malum in se* behavior in the workplace, and requires no explicit notice to the egregiousness of the action. Submitted for review are several examples of arbitrators upholding removals of ODRC employees for violating, in part, SOEC Rule 24.

Award 827 arose from a grievance between OCSEA and The State of Ohio, Department of Rehabilitation and Correction, Toledo Correctional Institution. (Smith 2003, attached.) Grievant Cole Tipton a Correction Officer, lied about witnessing an unauthorized use of force. Arbitrator Anna DuVal Smith ruled "What he was terminated for was failing to intervene when he knew two other officers were putting inmates and staff in harm's way, and then lying about it. These are individually and collectively terminable acts, whether the charge cites two or three rules. While it is true the Grievant did come clean, and should be given credit for it, by itself this is not enough to mitigate the penalty." (Smith 2023, pp 5-6.)

Award 1680 is the award of a grievance between OCSEA and The State of Ohio, Department of Rehabilitation and Correction, Noble Correctional Institution. (Stein 2003, attached.) Grievant Steven West, a Correction Officer was removed for violations of SOEC Rules 24 and 40 (use of excessive force). The Grievant had been involved in a force incident with an IP and several witnesses saw the force. The

Grievant initially minimized his actions and did not fully disclose he had utilized force to gain compliance from the IP. A subsequent review of the incident revealed in fact a use of force had occurred. During the administrative investigation, the Grievant lied to the committee about his actions, which was contradicted by witnesses. In his award, Arbitrator Stein opined "The nature of this use of force by itself was not of an egregious nature and would not have supported a termination. However, what is egregious is the act of lying during conduct of official inquiries, particularly regarding conduct that matters greatly to the security of a correctional facility. When a Correctional Officer chooses to be dishonest and deceptive about this important matter, he places his employment at great peril." (Stein 2003, p. 9.)

Award 2161 introduces a case between SEIU District 1199 and The State of Ohio, Department of Rehabilitation and Correction, Trumble Correctional Institution. (Nowell 2012, attached.) In this case, Grievant Patricia Callahan was a Psych Assistant who was removed from the ODRC for violations of SOEC Rule 24 and 46A (Unauthorized Relationship). She had 16 years of service, and no active discipline at the time of her removal. Arbitrator Thomas Nowell sided with Warden Kelly that a dishonest employee becomes a threat to the safety of the facility, opining "The state depends on the truthfulness of its prison staff to maintain order and safety for inmates and employees. Once honesty is violated, trust is completely lost." (Nowell 2012, p. 11.) Arbitrator Nowell continued, stating the Grievant in that case would have survived a violation of SOEC Rule 46A, however "The Grievant violated Rule 24….This violation is fatal and the termination is sustained." (Nowell 2012, p. 12.)

Award 2589 is a case between SEIU District 1199 and The State of Ohio, Department of Rehabilitation and Correction, Toledo Correctional Institution. (Ruben 2019, attached.) Grievant Ricci Nolen was a Case Manager who was issued a removal for violations of SOEC Rules 24, 37 (any act that compromises an employee's ability to perform duties) and 39 (discredit to the employer). The facts that led to the removal involved an off-duty situation in which the Grievant's son went missing while the family was camping. The Grievant, certain he had been kidnapped, threatened fellow campers with a firearm. Her son was soon found playing with friends nearby. The Grievant, realizing the gravity of her actions, lied to both law enforcement and ODRC investigators when she stated she was not the one to brandish the weapon, but that it was her husband who brandished the weapon. Arbitrator Susan Grody Ruben only addressed the violation of SOEC Rule 24 in her award, stating: "Perhaps most seriously, the Grievant was charged with Rule violation 24" (Ruben 2019, p. 8), and "The Grievant's repeated, and material lies to both law enforcement and to ODRC investigators make her unfit to serve as an ODRC employee. For the proven charges, removal was appropriate. The Arbitrator understands the Grievant had serious concerns when her son went missing at the campground. Her serious concerns, however, did not give her license to lie during the subsequent investigations." (Ruben, p. 9.)

Award 2709 is a case between SEIU District 1199 and The State of Ohio, Department of Rehabilitation, Adult Parole Authority. (Stein 2023, attached.) The Grievant, Jane Fisher, a Parole Officer was removed for several violations of the SOEC to include rule 24. In his award, Arbitrator Stein opined: "A critical essence of the employment relationship has been destroyed when an employee deliberately deceives the [Employer]." and "An employer has the right to demand honesty and truthfulness from its employees in every aspect of their employment, and employees have that same right to expect management to be honest with them." (Stein 2023, pp. 51-52.)

The only common fact these grievances have with each other is that the employees were removed for violations of the SOEC to include Rule 24 (lying). This similarity is significant to the analysis, but equally significant are key differences. These cases involve: two (2) different unions; four (4) different arbitrators; four (4) different classifications; four (4) different worksites; and five (5) different underlying events that

were lied about. Equally notable for this analysis is that each classification has significantly different roles and responsibilities in the agency.

In each case, we see a charge of lying being upheld as a removable offense in and of itself. Grievant Callahan was an employee with sixteen (16) years of experience and no active discipline who was removed (in part) for an unauthorized relationship, but the act of lying became the overriding factor for the Arbitrator. Grievant Nolen was an employee experiencing a traumatizing event, who was unable to overcome lying about her actions. Grievant Fisher had no active discipline and approximately twenty-five (25) years of experience, but still could not overcome the act of lying. Grievant Tipton was an employee who admitted his wrongdoing nearly immediately after the initial lie, however the damage was already done. Grievant West's lie about a significant security concern proves to be the fatal act for an employee, not engaging in the security concern.

Comparing these cases to the Grievant: He is a mid-tenured employee. He had active discipline for lying. He lied about a significant security concern.

Attempts to Correct Behavior

Warden Heard clearly testified that the primary reason he chose to remove the Grievant was because he lied during his investigatory interview about his actions on January 3, 2023. Aggravating the situation was the fact that this was the Grievant's second act of lying in a short period of time. The initial incident of lying occurred on November 16, 2021, and the 5DWS was issued on December 20, 2021. The second occurrence of lying occurred a little over a year later, on January 10, 2023. (JE, pp. 118, 99 and 48.) The Grievant certainly had time to feel the force and effect of the original discipline, but it would still be recent enough to negate any argument from the Union that he "has been good for a while" to justify minimization of his actions.

On cross examination of the Grievant, this advocate established the Grievant is a restored citizen, meaning he was previously incarcerated with the ODRC. The decision to broach this topic was an incredibly difficult choice to make personally and professionally. The decision was made to bring it up because a critical point must be made. The ODRC, and Warden Heard himself, firmly believe in giving restored citizens an opportunity to be successful in life. This includes a practice of giving qualified and properly vetted restored citizens employment opportunities with the agency.

Mr. Heard could have terminated the Grievant for the first occurrence of lying in December 2021 and would have been justified in doing so. However, the Grievant's success is also the Ohio Department of Rehabilitation and Correction's success. So, a decision was made by Warden Heard to retain the Grievant. The Grievant was issued significant discipline, with a stern warning from Warden Heard. It was the hope of many that the theft and subsequent lies were simply terrible lapses in the Grievant's judgement and not a sign of things to come.

The ODRC has been good to the Grievant. While incarcerated he received a Boiler Operator's License, one that can be difficult to obtain for the general public. He was given an employment opportunity to put that certification to good use, which eventually turned into a lucrative career for him. He was earning approximately $75,000 per year. (CBA, pp. 264, 236.) (JE, p. 92.) The Grievant was given an opportunity to retain that lucrative career after violating two (2) significant rules of the SOEC in December 2021. Any statement that Mr. Heard or the ODRC is out to get him because of his past is ridiculous and insulting to the agency's efforts to help him succeed.

Grievant's Lack of Accountability

On direct examination from Mr. Stein, the Grievant testified this whole situation has been blown out of proportion and people "went crazy watching video." This is the same statement he made while he was being investigated for stealing from the employer in November 2021. At the Pre-Disciplinary Hearing for that incident the Grievant stated: "I feel in the beginning of this investigation that it was no big deal" and "When I went to the investigator's office, I never thought this was a big deal." (JE, p. 105.)

The Grievant has a proven desire to minimize significant incidents in the workplace and continues to refuse to take accountability for his actions. At the arbitration hearing, the Union illustrated and discussed the Grievant's withdrawal of his prior grievance for the 5DWS issued for lying and stealing. The Grievant testified he did this as a sign of contrition and acknowledgement of his wrongdoing in that instance. Acknowledging wrongdoing at the onset would have been a better illustration of his contrition.

Management's Position Summarized

Management's position is the Grievant had an unprofessionally close relationship with IP Blevins, showed him preferential treatment on January 3, 2023, and then lied to Mr. Sparks during the administrative investigation into the matter.

The relationship is demonstrated by three (3) key actions of IP Blevins which were captured on video: 1) an approving head nod and statement as the Grievant moves to place ribs in a refrigerator and immediately retrieving the ribs; 2) simply walking into the Grievant's office without knocking and 3) making no attempt whatsoever to hide the fact that he was consuming ribs the Grievant brought in.

Preferential treatment from the Grievant comes in two (2) forms. The Grievant: 1) left ribs for IP Blevins; and 2) failed to author a conduct report for stealing the ribs.

The Grievant's lies are proven through witness statements during the investigation and direct testimony at the arbitration hearing. No witnesses corroborated any of the Grievant's claims.

Closing

Mr. Stein, many arbitrators have given employees in marginal cases a clear message. If an arbitrator believes an employee can be salvaged, they will be given a second chance to resume their career. This is not one of those marginal cases and the Grievant cannot be salvaged. He has already been given two (2) opportunities to succeed with the ODRC, but he has proven he simply cannot be trusted. Returning him to work in any capacity will immediately put the agency at a distinct disadvantage from providing a safe and secure work environment. Further, an award that returns him to work will send a clear message to other staff that honesty is not a valued quality for employees in the Ohio Department of Rehabilitation and Correction.

We ask you to deny this grievance in its entirety.

SUMMARY OF THE UNION'S POSITION

The Union raised several arguments about the Employer's unfair and inconsistent investigation, which lacked physical evidence and witness corroboration. The Union claims that Gifford did not receive a fair and impartial hearing and that there was no physical evidence (such as letters, phone records, or witnesses) to support the Grievant's intent or the existence of a relationship between the Grievant and IP Blevins and IP Yancy. To accurately represent the Union's case without distorting or truncating its content, the arbitrator has provided a verbatim account of the Union's arguments as stated in its brief.

UNION CLOSING

Arbitrator Stein, management wants you to believe that the grievant Jeffry Gifford purposely brought in food for inmates Blevins and Yancy on January 3, 2023, and that he had a relationship with the two inmates. Managements' documentation in the pre-disciplinary packets does not support or prove a relationship.

Management did not show any physical evidence to prove a relationship. There were no phone records, letters or witnesses that provided incident reports or testimony of inappropriate conversations or relationships. Management did not even show in any of the pre-disciplinary packets that they had the inmates living area searched to attempt to produce a relationship. A thorough and completed investigation would have shown this as evidence.

The fact that Mr. Harris, institutional investigator, wrote the initial conduct reports on both inmates for rule 24C (Joint #7, pages 137 and 165) and the 2nd conduct report (page 147, Conduct Report Supplement) indicates that he had knowledge of the Disciplinary Action that was being alleged against Jeff Gifford; therefore, Jeff Gifford did not have a fair and impartial hearing as Mr. Harris was also the hearing officer for the Pre-Disciplinary Conference investigation of Gifford.

This is even more evident when Mr. Harris was ordered to rewrite the conduct reports by Administrative Assistant Sparks, who conducted the investigation on Jeff Gifford. DRC Legal concluded that this action violated policy (Joint # 7-page 162, Legal Services Decision on Appeal) stating that is not proper procedure. Mr. Sparks testified that it was miscommunication between Mr. Harris and himself. The fact that DRC Legal pointed out that for a conduct report to be rewritten, it must be rewritten within 7 days of the date of incident (January 3, 2023) to hearing officer hearing (January 6, 2023). Evidence shows that Sgt. Briggs held the hearing on January 6, 2023 (Joint 7-page 141, Hearing Officer report). The information in the documents clearly shows that Mr. Sparks ordered Mr. Harris to rewrite the reports on January 19, 2023, because Mr. Harris did not charge inmate Blevins with rule 48 (Joint 7- page 145, Warden Decision on Appeal); the conduct report would have to be rewritten by January 13, 2023.

Mr. Sparks' and Mr. Harris's inability to follow the AR's and policy caused the conduct reports to be overturned and dismissed by Legal. Management using the 2nd conduct report as part of the pre-disciplinary packet was misleading as there was no evidence to support a relationship.

What came out of the testimony of the conduct reports was inmate Blevins admitting to stealing the food, although he wasn't initially charged with rule 48. Please refer to Joint 7- page 141, hearing officers report (inmate statement, page 149). The inmate's statement said he had already been charged with stealing (page 161, starting in line 15 to the end, he admitted to stealing the food).

Warden Heard said that inmate Blevins pleaded to a lesser charge. Inmate Blevins was not charged under rule 48 even though he admitted to stealing. The RIB panel found Inmate Blevins guilty of rules 24c and 48 (refer to page 142, Disposition of the Rules Infraction Board (RIB), where it is checked at the bottom of the page). The penalty for Blevins was 90-day commissary restrictions. Mr. Sparks stated that there is a greater penalty for the inmate having a relationship but never states what that penalty is.

Mr. Sparks' investigation started with Jeff Gifford on January 10, 2023 (joint 2-pages 48-52), seven (7) days after the allegation was brought to management's attention (joint 2-page 31, incident report by Sheila Campbell). Jeff Gifford was allowed to continue to work. If Mr. Gifford was a threat to the security of the facility, why didn't management place him on administrative leave?

Mr. Sparks continued the investigation on January 18, 2023, with maintenance staff (Joint 2- pages 36- 62). All the maintenance staff were asked the same three questions; several didn't recall being there that day (Parker, Yu, Galvin). Mr. Sparks could have shown them their timecards at the interview, but instead management waited until the arbitration. Three maintenance staff thought they were there that day (Cummings, Gallant, Glass) and 1 knew he was there (Fisher). Three stated that Jeff Gifford has brought food for them in the past (Cummings page 37, Fisher page 40 and Galvin page 46). With his alleged experience as an investigator, Mr. Sparks only asked three questions to Cummings, Fisher, Gallant, Galvin, Glass, Paker and Yu. Mr. Sparks didn't get any physical evidence or testimony from the maintenance workers that supported violations of rule 45B, which the State relied on the most for Gifford's removal.

Mr. Sparks could have asked them about the refrigerators at that time. Management would like you to believe Mr. Schauseil, that a refrigerator was designated for inmates. Maintenance staff testified that no refrigerator was for inmates. Mr. Schauseil's testimony is not corroborated with any type of policy or directive. Mr. Schauseil was not interviewed by Mr. Sparks during and at the time of this investigation. Just other references of how management was not thorough and did not provide the information pertinent during this investigation to support the allegations.

Mr. Sparks continued the investigation on January 24, 2023, by interviewing Sheila Campbell, the Business Administrator 3 (joint 2-pages 32-34). Management failed to ask any questions to her about who "brought it to her attention" ("it was brought to my attention" referring to page 31, Incident Report dated January 4, 2023, for alleged incident January 3, 2023). The interview only gave her opinion and no physical evidence to support the intent or a relationship.

Mr. Sparks submitted his Investigation Summary report (joint 2- pages 26-30) dated January 16, 2023, and signed January 24, 2023, without any physical proof, incident reports or documentation of a nexus between the two inmates and Jeff Gifford.
Mr. Sparks had eight months to provide some type of physical evidence of letters, phone records or witnesses that could support the relationship. As you review the packet, you only find opinions. Mr. Sparks

never indicated his alleged experience of recognizing body language in his report. With Mr. Sparks' alleged experience, you would not think that he could not follow the policy when it came to the time frames of the conduct reports or ordering the original report to be rewritten.

Management could not physically show a relationship between the two inmates and Jeff Gifford for rule 45B: Without express authorization, giving preferential treatment to any individual under the supervision of the Department, or any individual within 6 months following their release from custody of Department, but not limited to: The offering, receiving, or giving of anything of value.

Management cannot prove a violation of rule 45B, which would infer Jeff Gifford did not violate a policy that management referenced under rule 7: Failure to follow post orders, administrative regulations, policies, or written or verbal directives. Mr. Sparks never told him that he could not bring food in for the staff or talk to inmates.

Management also cannot prove a violation of rule 8: Failure to carry out a work assignment or the exercise of poor judgement in carrying out an assignment. Management never gave Mr. Gifford an assignment to complete and did not show this evidence in the pre-disciplinary packet or provide testimony. If the State is relying on the video of Gifford getting the part and his actions, why didn't the State treat all employees similar for their actions?

Management does not show or explain that Jeff Gifford violated rule 24: interfering with, failing to cooperate in, or lying in an official investigation or inquiry. Warden Heard could not support the allegations of a relationship. Warden Heard's testimony for the removal was that Jeff Gifford was deceitful. The Warden testified that there was a big problem with the maintenance area, "guys sabotaging parts" and he was taking steps to clean up the area, but no other staff received any type of corrective action or investigation into their conduct for this day. Mr. Sparks, Hearing Officer Harris and BA3 Campbell reviewed the videos; Bobby Yu watched the inmate clean the container and gets coffee from the staff coffee pot (video AM 8:40:56 to 8:45:45), TWL staff Parker comes in the area, an inmate pushes a unsecured hand held radio to him and TWL staff Parker hands the radio to Cummings, then Parker watches the inmates take the container from the desk and places it on maintenance staff work cart (video AM 9:39:28 to 9:42:21).

Management is relying on 5 seconds of video to show Jeff Gifford did not do anything when inmate Blevins was eating the ribs, because he was focused on the task of getting the correct part to fix the issue and silence the alarm. Management ignores other staff violating rules in the videos. They are also counting on the video of the inmate returning the container to Jeff Gifford (video office). The State asked questions on the location of his office compared to the maintenance area. Management failed to describe when the inmate returned the container, that the inmate was escorted by an unidentified maintenance staff member and they had to go through three (3) locked doors, and past an unidentified supervisor in an office.

Management is counting on the opinions that were given as responses to their investigation questions to show just cause instead of providing concrete physical evidence or statements to prove just cause.

Management attempts to discredit Jeff Gifford by working as the TWL Building Construction Superintendent, a supervisors' position, when he was an Air Quality Technician 2, by showing his EHOC (joint 4-pages 91-94) although management has knowledge that Jeff Gifford received 58 hours of

compensatory time as back payment from April 1, 2020 to August 29, 2020, which was resolved by a grievance being filed for that time (Grievance DRC-2020-03846-06, settled on December 16, 2020 by LRO 3 Don Overstreet). This is the reason it does not show on the EHOC. Page 95 shows the TWL changes on March 19, 2018, to September 19, 2018; then on August 30,2020, Human Resources corrected their error and properly paid Gifford to January 16,2021 as a TWL for the supervisor position. Jeff Gifford was then promoted on January 17, 2021, to the Safety and Heath Coordinator position.

Jeff Gifford has been truthful during the investigation and has testified of his past struggles and how he has worked to make a career with the state starting August 27, 2012. He has furthered his education to promote up through the maintenance department from a Boiler Operator to Air Quality Tech 2 (which requires licensure and certifications) to his current position as Safety and Health Coordinator.

Jeff Gifford explained the circumstances of his 5-Day Working Suspension that occurred on November 10,2021, to filing the grievance to hopefully have it reduced from being active for three (3) years down to two (2) years. Then after Warden Heard denied the requested resolution, Gifford decided to withdraw the grievance after the step 2 process. This discipline was his first in over 9 years of service.

The testimony of staff interviewed provided no physical evidence of a relationship between the two inmates and Jeff Gifford. Several staff members stated that Jeff Gifford has brought food in the past to share with staff. Others even stated that they have shared food with staff in the past.

Based on the three packets issued, not a single document was used that showed a factual Nexus between the inmates and Jeff Gifford. As to be provided per contract article 24.05 (contract pages 93-94) Pre-Discipline, page 94: When the pre-disciplinary notice is sent, the Employer will provide a list of witnesses to the event or act known at that time and documents known at that time used to support the possible disciplinary action. If the Employer becomes aware of additional witnesses or documents that will be relied upon in imposing discipline, they shall also provide a copy to the Union and the employee prior to the meeting.

In Mr. Harris's Pre-Disciplinary Meeting, the Hearing Officer report (Joint 2-pages 7-10) date of hearing August 23, 2023 and signed on page 10, dated September 1, 2023) shows on page 9 that management found just cause for rule 38: Any act, or failure to act, or commission not otherwise set forth here in which constitutes a threat to the security of the facility, staff, any individual under the supervision of the department, or a member of the general public. That information was not on any notice to the Union or the employee. Mr. Harris signed and dated the Hearing Officer Report before the last Pre-Disciplinary Hearing meeting on September 11, 2023.

Mr. Stein, at the beginning of this arbitration and to every witness, you explained that we are trying to get the truth. The truth is, Jeff Gifford has changed his past and moved forward with his career working for the State. Until Warden Heard arrived, Jeff Gifford had displayed an impeccable work record and promoted up through the ranks. Jeff Gifford has completed two TWL supervisor periods over the maintenance department.

Jeff Gifford's intent was to bring food in for the staff as he had done in the past, nothing more and nothing less. Management did not provide any physical evidence or direct testimony of a relationship. Management representatives gave you opinions and what appears to be.

For these reasons, the Union believes management did not meet the burden of proof to meet just-cause to support the removal.

*Th*e Union respectfully request that you grant the grievance before you, and that the Employer reinstate the grievant to his position as a Safety and Health Coordinator and for the §§grievant to be made whole, with no break in seniority, by receiving leave accruals, payment of union dues and wages with the deduction of his unemployment.

DISCUSSION

By way of a short historical review, the term "just cause" is said to have dated as far back as the year 1562 as found in the publication of the Statue of Laborers". (Delmendo, "*Determining Just Cause: An Equitable Solution for the Workplace" (66 Wash. L. Rev. 831, 832. (1991)* *From approximately 1562 to the mid-1800s, it is said to have served as a deterrent for employers to discharge employees without having a reasonable cause. (Blackstone Commentaries 425 (1847) (discussing 5 Eliz1., Ch. 4 The Statute of Laborers) In 1877, it was largely replaced by the employment-at-will doctrine only to again reappear in the 1930s along with the active period of unionization bolstered by the passage of the National Labor Relations Act.* Just cause" imposes on management the burden of establishing (a) that the standard of conduct being imposed is reasonable and is a generally accepted employment standard that has been communicated to the employee and (b) that the evidence proves that the employee engaged in the misconduct that did occur. The proof must satisfy the question of any actual wrongdoing charged against an employee and the appropriateness of the punishment imposed. *Int'l Assoc. of Machinists and Aerospace Workers Union, Dist. 160 and Intalco Aluminum Corp*., 00-2 Lab. Arb. Awards (CCH) P 3608 (Nelson, 2000). *Phillips Chem. Co*. *and Pace, Local No, 4-227, AFL-CIO,* 00-2 Lab. Arb. Awards (CCH) P 3553 (Taylor, 2000).

"While it is not an arbitrator's intention to second-guess management's determination, he does have an obligation to make certain that a management action or determination is reasonably fair." *Ohio Univ. and Am. Fed'n of State, County, and Mun. Employees, Ohio Council 8, Local 1699*, 92 LA 1167 (1989). In the absence of contract language expressly prohibiting the exercise of such power, an arbitrator, by his authority and duty to resolve fairly and finally disputes, has the inherent power to determine the sufficiency of a case and the fairness of disciplinary action or penalty imposed. *CLEO, Inc. (Memphis/Tenn.) and Paper, Allied-Indus., Chem., and Energy Workers Int'l Union, Local 5-1766*, 117 LA 1479 (Curry, 2002).

An arbitrator must consider employer policies, rules, statutes, and regulations to decide if a discharge was justified. The "just cause" principle protects employees from unfair disciplinary actions while upholding the employer's rights to enforce standard employment practices. In this case, the Greivant was accused of violating Rules 7, 8, 24, and 45B. Notably, Rules 24 and 45B relate to trust and security, which are fundamental to the core functioning of a law enforcement agency. The Employer holds specific rights under the Agreement (Joint Ex. 1), including the right to discipline employees, provided these rights are not used unreasonably, arbitrarily, or improperly (Municipality of Anchorage, Alaska, and International Association of Fire Fighters, Local 1264, 115 LA 190, Landau, 2001).

It's important to note that a significant part of this case relies on video evidence. The videos only captured behavior without sound. Therefore, additional interpretive evidence to establish convincing proof of intent or motive is needed. It's crucial to consider the overall circumstances at the time carefully. The Employer relied upon video and circumstantial evidence to support its theory in this case. If deemed plausible, circumstantial evidence can be a reliable basis for inferences made from observable behavior and other relevant evidence, such as timing, credible testimony actions and inactions. There is no dispute about what the video evidence shows, however, the disagreement centers upon the motive, which in combination with the video relies upon circumstantial evidence as an interpretative source. When faced with substantially different interpretations of the meaning of what is viewed, an arbitrator must look for coherence. Circumstantial evidence is considered relevant when it aligns with the facts shown in the video. (Derine v. Delano 271 Ill. 166, 179, 111, N.E. 249 (1916); 31 C.J.S. Evidence §2 (1964)) It can also serve as the basis for drawing logical conclusions. (Problems of Proof in Arbitration Proceedings of the 19th Annual Meeting of NAA, 98 (BNA Books, 1967) Therefore, it is necessary to assess the circumstances in order to understand the significance of the observed behavior concerning the alleged rule violations made by the Employer. It needs to be determined if the circumstantial evidence presented by the Employer meets the requirements of a just cause standard and assess the reasonable inferences that can be made from these circumstances."(Farm Stores, 81 LA 344, 347 (Hanes, 1983), Southwest Bell Tel., 84 LA 583, 585 (Penfield, 1985). However, to be persuasive, circumstantial evidence must be meaningful, noting the "just cause" standard rejects finding

someone guilty based on weak or inconclusive observable events that are often comprised of suspicion or speculation of wrongdoing and are readily subject to one or more rational alternative explanations. (South Penn Oil Co. 29 LA 718, 721 (Duff, 1957).

Unlike criminal cases, court cases where a finding of beyond a reasonable doubt must be established, in labor relations, a satisfactory finding of culpability for rule violations requires a sufficient basis of practical probabilities from which reasonable inferences can be made in determining the truth of the matter. (Frontier Airlines 82, LA 1283, 1288 (Watkin, 1984); Westinghouse Elec. Co., 48 LA 211, 213 (Williams, 1967) Getting as close to the truth as possible is an arbitrator's "north star."

The video clearly shows the Grievant bringing a plastic container of barbeque ribs into FMC on the morning of January 3, 2023, and it is supported by sufficient direct (video) and circumstantial evidence (testimony) that the Grievant has displayed this gesture of generosity toward some of the maintenance employees on multiple occasions (p. 37, 40, 42, 46, 55, 58, 61). Several employees (including Cummings) provided statements and testimony that the Grievant and other employees have brought food to share with some maintenance staff in the past.

However, on January 3, 2023, despite the Grievant's insistence that he was bringing food exclusively for the maintenance department staff, there was no confirmation from any witnesses that they knew the Grievant had brought barbequed ribs for them or any other maintenance staff on that day. The circumstantial evidence provided by credible testimony does not support the Grievant's account. The lack of any notice to the maintenance employees about the kind gesture undermines the Grievant's claim, especially considering that he had the opportunity to do so, as shown in the video. The video shows that the Grievant entered the maintenance area at 8:23 a.m., stood for over 12 minutes in the maintenance area holding a plain white box that contained the plastic box of ribs in the presence of maintenance employee Gallant and briefly in the presence of another employee, Fisher, who entered the area at 8:34 a.m., got coffee and quickly left. During this nonproductive and seemingly awkward period, the Grievant could have at least told one or two of the maintenance employees that he had brought in ribs for them, as he has in the past. Gifford stated in the investigation that the ribs were for "any staff member who wanted

them." (p. 50) IP Blevins was in the area the entire time, and the video shows the Grievant conversing with him.

If the Grievant had verbally stated to maintenance staff in the area that the ribs were for them, at the same time, he would have effectively put inmates who were within earshot (IP Blevins) on notice of this. During the investigation, Gifford also admitted that in the past, he "occasionally would call them [maintenance staff] to inform them he brought in food. (p. 50) He also could have quickly done this on January 3, 2023, while not alerting inmates that he brought in ribs for staff. (p. 50) With what appeared on the video to be an absence of maintenance staff in the immediate area, the Grievant at 8:35 then moved to the small white refrigerator, took the ribs out of the white box, and placed the ribs (still in the original Plexi glass container) in the small white refrigerator. Investigator Sparks testified and stated in his findings that when observing the Grievant standing in the maintenance area holding the white box, he appeared to be uneasy. (p. 8) The video evidence supported this conclusion and was not discredited by any other circumstantial evidence. A careful and repeated view of the video confirms Spark's observations. It reveals that the Grievant, while standing in the maintenance department, is holding the white box under his arm, rocking back and forth, wiping his brow. The Employer argues that the ribs were not intended for the maintenance staff but for the inmates, especially IP Blevins. DRC bases this conclusion on circumstantial evidence of behavior and timing in conjunction with what the video reveals. The Employer believes that this argument is more believable than the Grievant's claim that the ribs were only meant for the staff and that he intentionally concealed them from the inmates by placing the plastic container in a plain white box. It is the role of an arbitrator to observe the hearing witnesses and to determine who among them is telling the truth. *Givaudin Corp.,* 80 LA 835, 839 (Deckerman 1983).

The arbitrator must also consider all investigative statements obtained, any relevant information gathered from fellow employees, and all other evidence submitted by the parties. *Minn. Teamsters Pub. and Law Enforcement Employees Union, Local No. 320, and City of Champlin, State of Minn.,* 00-2 Lab. Arb. Awards (CCH) P 3499 (Berquist 1999). To do so, an arbitrator must consider whether conflicting statements ring true, weigh each witness's demeanor while he or she testifies, and use certain guidelines to determine credibility—the self-interest or bias of a witness, the presence or absence of corroboration, and the inherent probability of the specific testimony

offered. *CLEO, Inc. (Memphis, Tenn.) and Paper, Allied Indus., Chem., and Energy Workers Int'l Union, Local 5-1766*, 177 LA 1479 (Curry, 2002). Arbitration is the last step in the grievance process and serves as a means of attempting to ensure the truth of the matter. When conflicting accounts of an incident exist, all the evidence and feasible corroboration become crucial in resolving contradictions between fact and fiction. (TRW, Inc., 69 LA 214, 216-17 (Burris, 1977)

The Employer's interpretation of the video evidence becomes more believable when we consider the actions of the individuals involved. After the Grievant places the ribs in the small white refrigerator and returns to his office, IP Blevin takes the ribs, puts them in a Styrofoam container, and then appears to wash and dry the Grievant's plastic container thoroughly. He then hides the container under a table in the maintenance area and later moves it to a small maintenance cart. Finally, he takes the cleaned container to the Grievant's office and stays there for about 13 minutes before leaving. This series of events does not align with the Union's explanation that IP Blevin stole the ribs and shared them with another staff member. Furthermore, it seems unlikely that an inmate would steal ribs, wash, and return the container to the staff member who supposedly brought them in for the staff. The circumstantial evidence further supports the Employer's conclusion that the ribs were intended for IP Blevin in the first place. The Grievant's inaction and lack of any notable concern regarding IP Blevin's quick return of the Grievant's plastic container are not the responses expected of a staff member who was initially concerned about his offer of food garnering the attention of inmates rather than staff.

The video shows what happened later that day (at 1:30 pm) when the Grievant re-entered the maintenance area. His actions add even more support to the plausibleness of the Employer's theory of what happened in this case, rendering the Grievant's account less probable. In the video, IP Blevins is seen openly eating ribs within direct eyesight of the Grievant from a distance of several feet as he enters the maintenance area and then up to what appears to be less than 2 feet directly in front of IP Blevins. The Union's argument that the Grievant did not see IP Blevins eating ribs because he was focused on responding to an alarm and looking for a smoke head is less convincing than the Employer's theory in interpreting this behavior. While it is possible for employees to be so focused on accomplishing tasks that they can miss what is right in front of them, the totality of the circumstances undermines the Grievant's claim of inattentiveness. The

Grievant went to the trouble of bringing ribs for the maintenance staff, supposedly attempting to hide the ribs from inmates working in maintenance. Just over an hour and a half later, the very container that initially contained the ribs is returned to him empty and clean by the inmate, who the Grievant acknowledged was in the maintenance area when he clandestinely attempted to place the ribs in the small white refrigerator. This close-in-time event is another point in time that should have raised the attention of the Grievant. IP Blevins was immediately in front of him, casually consuming ribs. Again, this was an inmate the Grievant stated he tried to avoid alerting by hiding the ribs in a plain white box, and the very inmate who returned the empty container that had contained the ribs.

The Union contends that the Employer did not provide any physical proof of a nexus between the two inmates in this case (e.g., phone records, letters, witness statements) and that the Grievant did not have a fair and impartial hearing due to his involvement with writing the initial conduct reports on IP Blevins and Yancey regarding rule 24C involving the ribs and because Mr. Harris, Institutional Investigator, was the hearing officer for Gifford in the instant matter regarding the investigation conducted by Sparks. I understand the Union's concern regarding the optics of what occurred regarding the due process errors and outcomes in addressing IP Blevins and Yancey's actions. Yet, their confession of theft does not disprove the Employer's conclusions that the ribs were brought in for inmates and not for staff.

It is crucial to base one's judgment on evident video observations and circumstantial evidence representing the most natural and sufficiently probable explanation of what occurred in a given situation, rejecting alternative, less natural, and more improbable theories. (Dietrich Indus., 83 LA 287, 289 (Abrams, 1984); Kraft, Inc., 82 LA 360, 365 (Denson, 1984). The video and the circumstantial evidence provide a more believable and probable explanation of the events and provide a better basis for establishing the truth of the matter as proffered by Investigator Sparks' conclusions and adopted by ODRC in this case.

The second aspect of evaluating a just cause for an action is determining if the punishment matches the offense (proportionality). In a labor relations context, proportionality considers the nature of the offense, the employee's work history, and how similar cases have

been handled in the past (THEODORE J. ST. ANTOINE, THE COMMON LAW OF THE WORKPLACE, THE VIEWS OF ARBITRATORS 184-187, Bureau of Nat'l Affairs, 2nd ed. 2005).

The disciplinary notice of January 25, 2023, alleges that both direct and circumstantial evidence supports the Employer's claims, details of which can be found on page 23. The actions of the Grievant are colored by his active history of disciplinary record for a previous Rule 24 violation for which he admitted he was dishonest and initially concealed his behavior. In the current case, violations of Rules 7 and 8 have been identified, along with another Rule 24 violation related to concealment. A Rule 45B violation related to giving preferential treatment to inmates is a serious security matter of particular concern.

From the evidence, it is clear that the Grievant, after years of incarceration, seemingly turned his life around and was a successful ODRC employee for over 11 years, having been promoted several times and even placed in two TWL positions. However, the weight of the evidence uncovered by Inspector Sparks supports the Employer's finding of DRC Rule violations under a cause standard. There is insufficient evidence to disturb the Employer's actions in this matter.

AWARD

1. Grievance denied.

2. If the Grievant resigns in writing, backdated to the date of termination, to ODRC no later than 30 calendar days from the date of this Award with the intervention and assistance of the Union, then his termination will be considered a resignation for future employment references. The termination will remain if the Grievant fails to meet this deadline by 5 pm on Friday, August 2, 2024.

Respectfully submitted to the parties this ____ day of July 2024.

_____

Robert G. Stein, Arbitrator

AFFIRMATION

I Robert G. Stein , affirm that I am the individual described in and who executed the foregoing instrument which is my Opinion and Award.

Dated July 3, 2024.

_____

Robert G. Stein