#14172

OPINION AND AWARD

IN THE MATTER OF THE ARBITRATION BETWEEN
Ohio Department of Rehabilitations and Corrections—Northeast Pre-Release Center

-AND-

OCSEA/AFSCME, Local 11

APPEARANCES

Northeast Pre-Release Center
Rhonda Bell, Labor Relations Officer/Management Advocate
Linda V. Bond, Administrative Assistant 4, Personnel/DRC
Jack A. Duns, DWA
Valerie Eaton, Management Representative
Kelly Foster, OCB Representative
Eric L. Moore, Bureau Chief—Department of Youth Services
Luis L. Vizcarrondo, Third-Shift Lieutenant

For OCSEA
James L. McElvain, OCSEA Staff Representative
Arnold Frye, OCSEA Chapter 1835 President
Jerome Harris. Grievant

Case-Specific Data
Date of Hearing: November13, 2000
Date of Award: November 24, 2000
Type of Grievance: Discharge/Unauthorized Relationships/Exchange of Greeting Cards
Grievance No. 27-17 (5-30-98) 820-01-03
Decision: Grievance Sustained in Part and Denied in Part

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

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IX. Preliminary Statement

The Ohio Northeast Pre-release Center (NEPRC or the Employer) is a branch of the Ohio Department of Correction and Rehabilitation (DRC) and a party to a collection-bargaining relationship with the Ohio Civil Service Association, Local 11 (the Union), which represents NEPRC's corrections officers. NEPRC is a minimum closed facility for women, located in Akron, Ohio.

On March 25, 1998, the Grievant was placed on administrative leave for violating Rule No. 46a of the Employer's Standards of Employee Conduct. On April 8, 1998, the Grievant was formally charged with violating Standards of Employee Conduct Rule No. 46a. On April 16, 1998, the Grievant's pre-disciplinary hearing was scheduled for April 20, 1998, but was not held until April 22, 988. On May 9, 1998, the Pre-disciplinary Hearing Officer found just cause for disciplining the Grievant.[1] On May 26, 1998, Warden Rose notified the Grievant that he would be removed effective May 29, 1998.[2] The Union filed Grievance No. 27-17 (5-30-98) 820-01-03, on May 30, 1998, claiming the Grievant was terminated in violation of Article(s) 2.01, 2.02, and 24 of the Collective Bargaining Agreement and other relevant articles or sections thereof.[3] The Employer failed to submit a timely answer to the Union's Step-three appeal, thereby triggering a Step-4 appeal, on August 7, 1998.[4] On December 21, 1998, the Union appealed the Grievant's removal to arbitration,[5] and the Employer and the Union (the Parties) selected the Undersigned from their panel of arbitrators.

An arbitral hearing was scheduled for November 13, 2000 before the Undersigned, at the NEPRC in Akron, Ohio. All parties relevant to the resolution of this dispute were present at that hearing, and the Parties had a full and fair opportunity to present any admissible evidence and arguments supporting their positions in the instant dispute. Specifically, the Parties were permitted to make opening

[1] Joint Exhibit No. 3D.
[2] Joint Exhibit No. 3E.
[3] Joint Exhibit No. 4A.
[4] Joint Exhibit No. 4B.
[5] Joint Exhibit No. 4C.

statements and to introduce admissible documentary and testimonial evidence, all of which was available for relevant objections and for cross-examination. Finally, the parties had a full opportunity either to offer closing arguments or to submit post-hearing briefs and opted for the latter. The Undersigned received the last closing brief on or about December 9, 2000, when the arbitral record was officially closed. Due to severe computer-related problems, the award and opinion in this matter are untimely, for which the Undersigned deeply apologizes.

X. The Facts

This dispute began to take shape, on April 17, 1997, when Mr. Duns received an inter-office communication from the Senior Officer at Akron I (Mr. Robert B. Parenti), alluding to documentation supporting a former parolee's (Michelle Holley) and another offender' (Ms. Ethel Johnson) allegations that the Grievant was involved with Ms. Betances.[6] That inter-office memorandum triggered Mr. Duns' investigation of the Grievant. At some point during his investigation, Mr. Duns placed a watch on Ms. Betances' mail, resulting in her mail being examined before it was delivered to her.

NEPRC launched an investigation of the Grievant after Mr. Duns received Mr. Robert Parenti's memorandum, claiming that the Grievant was involved with Ms. Betances. In addition, Mr. Duns received kites from Ms. Betances' roommate, inmate Lawson, alleging an affair between the Grievant and Ms. Betances.

On August 3, 1997, the Employer received a letter from Ms. Betances' roommate, claiming that Ms. Betances and the Grievant were laughing in the shower at approximately 4:15 a.m. The letter also claimed that the Grievant subsequently remarked that Ms. Betances "wore him out."[7] Finally the letter alleged that the Grievant remains in Ms. Betances' room from 15 to 20 minutes during which time he and Ms. Betances watch television and touch.[8]

[6] Joint Exhibit No. 31.
[7] Employer Exhibit No. 1.
[8] *Id.*

On the other hand, Ms. Betances' best friend and fellow inmate (Ms. Quiones) said that Ms. Betances denied having a sexual relationship with the Grievant but that Ms. Betances was out of place in the Grievant's area almost every night during the past summer months.

Yet, Ms. Quiones denied any knowledge of either a relationship or an exchange of cards between the Grievant and Ms. Betances.[9] In addition, another inmate, Ms. Biaschocea lacked any knowledge of a relationship, phone calls, or the exchange of cards, between Ms. Betances and the Grievant.[10] Ms. Biaschocea was neither a close friend nor an associate of Ms. Betances.

On or about January 6, 1998, Lt. Luis Vizcarrondo counseled the Grievant for having permitted inmates to be out of place in areas of the institution for which the Grievant had responsibility.[11] That counseling session occurred after Inspector Merva received kites stating that the Grievant engaged in the foregoing activity. On February 26, 1998, Lt. Vizcarrondo was making his security rounds when he saw Inmate Betances, who resided in L-Unit, out of place in F-Unit, for which the Grievant was then responsible. Lt. Vizcarrondo informed the Grievant that Ms. Betances' unauthorized presence in F-Unit violated Rule #25 "Being out of place" and constituted a Class-11 violation. Also, Lt. Vizcarrondo instructed the Grievant to return Ms. Betances to the L-Unit. However, when Lt. Vizcarrondo returned to F-Unit he discovered Ms. Betances standing at the control desk, in F-Unit. This time, Lt. Vizcarrondo escorted Ms. Betances to an isolation area, where she was confined until the Employer could investigate her being out of place. The arbitral record indicates that it is not unusual for inmates to be out of place and that Ms. Betances had been observed out of place in the Grievant's work area on several occasions.

On February 26, 1998, Mr. Duns intercepted three greeting cards addressed to Ms. Betances through the United States mail.[12] On February 27, Mr. Duns issued a conduct report on Ms. Betances

[9] Employer Exhibit No. 2.
[10] Employer Exhibit No. 3.
[11] "Out of place" defines a situation in which an inmate is in a physical location without official authorization to be there.
[12] Joint Exhibit No. 3M.

and submitted the greeting cards along, with a copy of his and the Grievant's fingerprints, to the Ohio Bureau of Criminal Investigation (OBCI) for examination. The Conduct Report accused Ms. Betances of "establishing or attempting to establish a personal relationship without the authorization of the managing officer including but not limited to. . . ."[13]

On March 6, 1998, a former inmate of Ms. Betances (Ms. Montanez), told Mr. Duns that Ms. Betances was always in the Grievant's face when he worked in the unit. Ms. Montanez also allegedly heard rumors that Ms. Betances went into other units to make telephone calls and that there was a relationship.[14]

On March 10, 1998, Mr. Duns interviewed Ms. Rodriguez who became Ms. Betances roommate approximately one month before her interview with Mr. Duns. Ms. Rodriguez said that: (1) Ms. Betances was always talking about the Grievant, (2) Ms. Betances said that the Grievant sent her greeting cards for her birthday and for Valentines Day, and signed the cards "popi," (3) Ms. Betances said that the Grievant sent her a container of Victoria's Secret body splash, and (4) Ms. Betances has a gold, heart-shaped that the Grievant allegedly sent to her. In addition Ms. Rodriguez said that she wrote Ms. Betances' mother a letter, alerting her to imminent shipments of jewelry that the grandmother was to send to Ms. Betances.[15] Mr. Duns testified that he found a container of Victoria's Secrets body splash in Ms. Betances' room.

Also, on March 10, 1998, Ms. Rodriguez offered the following statements. From her arrival at NEPRC, in January 27, 1997, she suspected that the Grievant and Ms. Betances had a relationship, a suspicion she verified upon becoming a roommate with Ms. Betances. According to Ms. Rodriguez, Ms. Betances visited the Grievant every day and commented on her visits, sometimes praising the Grievant's advice and voicing admiration for him. Ms. Rodriguez also alleges that the Grievant sent Ms. Betances

[13] Joint Exhibit No. 7B. (Ellipses in original).
[14] Employer Exhibit No. 4.
[15] Employer Exhibit No. 5.

three valentine cards, which he signed "Papi," and perhaps some cards for her birthday. Finally, Ms. Rodriguez suspects that the Grievant gave Ms. Betances a ring diamond-heart ring, heart chains, and two gold rings.[16]

On March 17, 1998, OBCI submitted a report containing its findings on the fingerprints Mr. Duns had sent. The report indicated that OBCI had found "two . . . partial latent fingerprints with sufficient ridge detail for fingerprint comparisons."[17] More important, OBCI concluded that the fingerprints were from the Grievant's right and left thumbs.[18]

On March 25, 1998, Warden Norman Rose notified the Grievant that he had been charged with engaging in an unauthorized relationship and was, therefore, being placed on administrative leave pending investigation of that charge.[19]

On March 30, 1998, Mr. Duns and the Grievant had an interviewed, during which Mr. Duns asked the Grievant had he "ever communicated with Ms. Betances through the U.S. Mail?"[20] The Grievant offered the following reply:

> Not knowingly corresponded with her. Let me explain. This is March. Back at the beginning of February on my way to work. I stopped at the store and there was an individual there who approached me. At the time I was looking for some cards for my daughter for Valentine's Day. The individual approached me and asked me where did I work. This individual was a Latino male. He then asked me did I know several people down here. One of which was inmate Betances. He was looking for a card to send her. I guess for her birthday or something and what I gathered was he was not on her visiting list or anything like that but she had corresponded with this individual. So I did talk with the individual and he said do you know her and I was like yeah. He said do you know what she would like and I just *picked up several cards* and yeah and handed them to the individual.[21]

[16] Employer Exhibit No. 6.
[17] Employer Exhibit No. 8.
[18] Employer Exhibit No. 8.
[19] Joint Exhibit No. 3B.
[20] Joint Exhibit No. 3F at 3.
[21] *Id.* at 3. (emphasis added).

On March 31, 1998, Mr. Duns submitted to Warden Rose a summary and a transcript of the March 30 investigatory interview with the Grievant.[22] On April 8, 1998, the Grievant received the following Notice of Alleged Charges from the Executive Supervisor.[23]

> On March 25, 1998 information was received that Officer Jerome Harris has violated Standards of Employee Conduct Rule # 146a: Unauthorized relationships, the exchange of personal letters, pictures, phone calls or information with any individual under the supervision of the Department, or friends or family of same without express authorization of the Department. The above rule violation deals with a relationship involving inmate Betances #038696.[24]

On April 16, 1998, Warden Rose notified the Grievant that a pre-disciplinary conference would be held, on April 20, 1998, to consider the charge that the Grievant violated Standards of Employee Conduct Rule No. 46a.[25] The pre-disciplinary hearing was actually held on April 22, 1998 and, on May 9, 1998, the Pre-disciplinary Hearing Officer found just cause for disciplining the Grievant.[26] On May 26, 1998, Warden Rose notified the Grievant that he would be removed effective May 29, 1998.[27]

The Union grieved this decision, on May 30, 1998, in Grievance 27-17 (5-30-98) 820-01-03, claiming the Grievant was terminated in violation of Article(s) 2.01, 2.02, and 24 and other relevant articles or sections.[28] The Employer failed to submit a timely answer to the Union's Step-three appeal, thereby triggering a Step-4 appeal on August 7, 1998.[29] On December 21, the Union appealed the Grievant's removal to arbitration.[30]

[22] Joint Exhibit No. 3F.
[23] Joint Exhibit No. 3A.
[24] Joint Exhibit No. 3A.
[25] Joint Exhibit No. 3C.
[26] Joint Exhibit No. 3D.
[27] Joint Exhibit No. 3E.
[28] Joint Exhibit No. 4A.
[29] Joint Exhibit No. 4B.
[30] Joint Exhibit No. 4C.

XI. Relevant Contractual and Regulatory Language

Standards of Employee Conduct
Unauthorized Relationships

Rules	Conduct Prohibited	Penalty Range 1st Violation	Penalty Range 2nd Violation	Penalty Range 3rd Violation
46a	The exchange of personal letters, Pictures, phone calls, or information with any individual under the Supervision of the Department or friends or family of same without ex-press authorization Of the Department	I-5/R	5-10/R	R
46b	Engaging in any other unauthorized personal or business relationships with any current cr former individual under the supervision Of the Department or friends or family of same.	1-5/R	5-10/R	R

ARTICLE 24 - DISCIPLINE 24.01 - Standard

Disciplinary action shall not be imposed upon an employee except for just cause. The Employer has the burden Of Proof to establish just cause for any disciplinary action.

24.02 - Progressive Discipline

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

A. one or more oral reprimand(s) (with appropriate notation in employee's file);
B. one or more written reprimand(s);
C. working suspension;
D. one or more fines in an amount of one (1) to five (5) days, the first fine for an employee shall not exceed three (3) days pay for any form of discipline: to be implemented only after approval from OCB.
E. one or more day(s) suspension(s)
F. termination

IV. The Issue

Whether the removal was for Just Cause, and if not what should the remedy be?

V. Summaries of Parties' Arguments

A. Summary of the Employer's Arguments

1. The Grievant manifestly attempted to exchange personal greeting cards with an inmate of NEPRC.

2. That attempt violated Rule No. 46a, which contemplates both exchanges of personal letters as well as attempts to effect such exchanges.

B. Summary of the Union's Arguments

1. Rule 46a does not mention *attempts* to exchange information and, therefore, mere attempts to do so do not violate that Rule.

2. The Employer could (and should) have charged the Grievant with a lesser offense such as that under rule 46b or with Failure of Behavior.

VI. Discussion and Analysis

A. Procedural Issues

The Union alleged and established "surprise evidence." Specifically, the Union established and the Employer admitted that the Employer introduced several exhibits into the record that the Employer had previously failed to share with the Union. For example, the Employer adduced for the first time at the arbitral hearing several pieces of evidence that Mr. Duns acquired during his investigation—Employer Exhibits No. 1-6. It is not necessarily a harmless *nontrivial, or in consequential* procedural error to conceal, withhold, or otherwise to deny evidence that the other party requests during the several stages of the Parties' negotiated grievance procedure. The remedies for such a procedural error can range from barring the surprise evidence from the arbitral record to suspending (or even rescheduling) a hearing if necessary to allow the aggrieved party to review the evidence in question and prepare a response thereto. In the instant case, the Union was offered the latter two remedies and was in fact given a recess during which to review the surprise evidence so as to adequately respond thereto.

B. Analytical and Evidentiary Overview

In the instant dispute, a determination of whether the Grievant was removed for just cause involves an examination of whether the Employer's evidence demonstrates, by a preponderance of the evidence in the record as a whole, "exchanged" the greeting cards with Ms. Betances. Also, if Rule 46a has been violated, there is still the issue of penalty assessment. It is upon these issues that the Arbitrator now focuses.

C. Probativeness of the Employer's Evidence

1. Evidence of a Relationship Between Ms. Betances and the Grievant

a. The Inter-Office Memorandum

Much of the Employer's evidence alleges a relationship—sexual and/or plutonic—between the Grievant and Ms. Betances. However, the Employer did not charge the Grievant with such a relationship. Therefore, any relationship that the Employer establishes can shall be used only as a factual basis for inferring motive. Standing alone, a relationship between the Grievant and Ms. Betances does not *necessarily* demonstrate that the Grievant sent the cards.

Evidence that the Employer introduced from Mr. Duns' investigation is largely hearsay and sometimes double hearsay. For example, Mr. Parenti's memorandum to Mr. Duns addresses what inmates told Mr. Parenti.[31] Mr. Parenti's statement constitutes hearsay, assuming that his informants actually observed what they alleged, and double hearsay if they did not. Neither Mr. Parenti nor his informants appeared before the Undersigned at the arbitral hearing in this matter. Consequently, Mr. Parenti and his informants deprived a terminated Grievant of the right to confront his accusers and to have his union cross-examine them. As matters stand, then, absent independent corroborative evidence of a relationship between the Grievant and Ms. Betances, neither Mr. Parent's statements nor the informants'—taken together or separately—have probative force or credibility. And so it is with the statements of other informants like, Mses. Rodriguez. Montanez, and Biaschocea.

[31] Joint Exhibit No. 31.

2. Ms. Betances' Being Out of Place in Grievant's Areas

Lt. Vizcarrondo credibly testified that, on February 26, 1998, he observed Ms. Betances out of place in the Grievant's work area and that the Grievant failed to correct that situation despite Lt. Vizcarrondo's specific request to do so. Furthermore, inmate informants alleged that Ms. Betances was often out of place in the Grievant's work areas. However, as pointed out above, the informant's hearsay statements need independent corroboration. Nor does Lt. Vizcarrondo's observation of Ms. Betances in the Grievant's work area provide that corroboration, since the date(s) that he saw Ms. Betances out of place do not correspond with the dates that the informants allegedly saw her out of place. Furthermore, Lt. Vizcarrondo also testified that inmates are on frequently out of place in NEPRC. As a result, Lt. Vizcarrondo's infrequent observations of Ms. Betances out of place in the Grievant's work area do not demonstrate a relationship between the Grievant and Ms. Betances.

D. The Greeting Cards and Grievant's Explanation

Without more, the greeting cards have some probative capacity on several levels. First, they establish a basis for inferring a relationship between Ms. Betances and the Grievant. The language in the cards themselves is sufficiently emotional and personal to support an inference that the person who sent them more likely than not had a personal friendship with Ms. Betances.[32] A few excerpts from the cards establish the point: "I want to love every part of you." I want to curl up next to your voice and marry your smile and run away with you and love your shadowy places." I want to be there with you during the times when you felt most alone to hold you and kiss your tears and tell you all the kind of things you should've been told."[33] and then there is the "Culinary delight" entitled Daydream Du Jour:

"[A] huge slice of sleepy-late mornings

[32] Observe, however, that the cards are insufficient to establish an inferential sexual relationship. Nor has the Employer formally accused the Grievant of engaging in a sexual relationship with Ms. Betances.

[33] Joint Exhibit No. 3M.

Smothered in hot, spicy kisses,
a generous helping of crazy hugs
gently seasoned with a whisper of sweet nothings,
a ladle-full of long lingering
glances, poured over a side order of sighs
cuddling a la carte
mooning a la mode
an amusing ambrosia
of embracing, hand-holding,
Butterfly-kissing, neck-nibbling,
and "Sole" tenderizing
and (speciality of the house)
a make-you-weak-in-the-knees
"Passion Parfait"
Served with a garnish of giggles.
No limit
to going back
for
Seconds and thirds![34]

Surely whoever sent these cards hardly views himself as a mere casual acquaintance or friend. On their face, the cards betray the sender's state of mind with respect to Ms. Betances. Therefore, the issue becomes whether evidence in the arbitral record supports a reasonable inference that the Grievant more likely than not is the sender.

First, a comment is indicated about the evidentiary and procedural considerations that factor into an assessment of this issue. The Employer undoubtedly has the burden of persuasion as to whether the Grievant was terminated for just cause and whether he "exchanged" personal cards with Ms. Betances, in violation of Rule 46a. However, during the arbitral hearing, the Employer demonstrated with the

[34] *Id.*

[35] The Union objects to this conclusion on the grounds by stressing that the report of OBCI is hearsay because the finger print expert who examined the cards did not present himself/herself for cross examination at the arbitral hearing. However, there is independent evidence to corroborate the hearsay report of the OBCI in this case. The Grievant has admitted in his interview with Mr. Duns and while testifying before the Undersigned that he touched the cards. Such an admission makes it highly likely that an examination of the cards for finger prints would reveal the Grievant's.

OBCI's Report (and the Grievant's tacit admission) that the Grievant touched the cards in question.[35] Under these circumstances, the fact that the Grievant touched the cards manifestly supports a reasonable inference that more likely than not he sent the cards to Ms. Betances.

Nor can the Grievant ignore that inference. Instead he must rebut that inference by adequately explaining how his fingerprints got on the cards. In other words, he can extricate himself from this web of culpability only by demonstrating that the circumstances under which his finger prints were placed on the cards tend to remove or rebut the reasonable inference that he either sent them or was somehow involved in sending them.

The Grievant has failed to adduce such an explanation. Indeed, three reasons synergistically combine to drain his explanation of credibility. First, there is the far-fetched, highly unsatisfactory explanation of how the Grievant's fingerprints got on the cards. This explanation leaves too many questions unanswered. For example, why did a Latino stranger happen to approach the Grievant in the first instance? Why would the Grievant have failed to report such an inquiry? Finally, why would the Latino think that the Grievant somehow knew something about Ms. Betances' taste in very personal (if not intimate) greeting cards?

Second, these unanswered questions rest against a backdrop of persistent suspicions and allegations about the Grievant and Ms. Betances. Given this backdrop, it is a credulity-taxing coincidence that a Latino stranger would appear virtually out of nowhere, ask the Grievant about Ms. Betances, enlist the Grievant assistance in selecting intimate greeting cards for Ms. Betances, an then vanish back into the ether whence he came. Compounding the difficulty of this situation for the Grievant is that of all the

[35] The Union objects to this conclusion on the grounds by stressing that the report of OBCI is hearsay because the finger print expert who examined the cards did not present himself/herself for cross examination at the arbitral hearing. However, there is independent evidence to corroborate the hearsay report of the OBCI in this case. The Grievant has admitted in his interview with Mr. Burns and while testifying before the Undersigned that he touched the cards. Such an admission makes it highly likely that an examination of the cards for finger prints would reveal the Grievant's.

women at NEPRC, the Latino just happened to focus on Ms. Betances, the one inmate with whom the Grievant is suspected of having an unauthorized relationship. Equally, puzzling is that the Grievant assisted the stranger apparently without asking a single question or even being able to recall the location of the incident.

In the Grievant's favor is the Union's argument that if the Grievant had sent the cards, one might reasonably expect to find more than two latent thumbprints on three cards. This argument is not without a certain seductive persuasiveness. The problem is that the Grievant's explanation of how those two thumbprints happen to be on the cards is so devoid of credibility as to preclude further inquiry. In other words, utter lack of facial credibility creates such a depth of incredulity as to preclude further serious consideration of possibilities. Ultimately, then the Arbitrator simply cannot accept the Grievant's explanation of how his fingerprints happen to be on the cards. Therefore, the reasonable inference from the existence of the fingerprints—that he sent the cards—remains in force.

E. Whether Attempted Exchange is Distinguishable from Actual Exchange

Although both Parties have mounted persuasive arguments on this issue, the Employer's argument prevails. The Union contends that assuming arguendo the Grievant attempted to exchange personal cards with Ms. Betances and that attempt hardly constitutes "exchange," under Rule 46a. Furthermore, according to the Union, Rule 1 and Rule 46a are "catchall" provisions whose individual scopes naturally contemplate attempted exchanges. The Employer argues that the attempted exchange is indistinguishable from and inextricably linked to "exchange," under Rule 46a, especially where, as here, the attempted exchange would have come to fruition but for Mr. Duns' interception of the greeting cards.

The Parties' arguments on this issue overlap to some extent, since both implicitly concede that the penalty table contemplates "attempts to exchange." The argument differ only as to which provision in the penalty table addresses these attempts. The Employer finds that "exchange" in Rule 46a implies "attempts to exchange". The Union's stricter interpretation of Rule 46a precludes even an implicit recognition of attempts to exchange therein. However, the Union finds that Rules 1 and 46b impliedly address attempts to exchange.

Thus, the basic issue of whether the Grievant was terminated for just cause resolves itself into whether the scope of "exchange," in Rule 46a, was intended to contemplate "attempts to exchange" and hence the Grievant's unsuccessful attempt to mail greeting cards to Ms. Betances.

The issue is one of interpretation or construction because the Parties' arguments reveal a latent ambiguity in Rule 46a, which explicitly prohibits "exchanges" but makes no mention of "attempted exchanges." The latent ambiguity is, of course, whether "exchange" was intended to include "attempts to exchange." To determine whether Rule 46a contemplates attempts to exchange, one must apply traditional canons of interpretation and commonsense and.

The Employer's interpretation is more persuasive. The basis for this conclusion essentially lies in the weakness of the Union's interpretive approach. The Union argues that language in Rule 46b covers "attempts to exchange" while that in Rule 46a covers only the actual "exchange." Observe, first, that Rules 46a and 46b are captioned under the title of "Unauthorized relationships"[36] Thus, the Employer manifestly intends to address more than one type of unauthorized relationship. Second, most of the relationships that are banned here are established from inferences of varying strengths drawn from demonstrated behavioral facts like the exchange of personal letters. Thus, on its face, Rule 46a bans relationships that may be reasonably inferred from the actual "exchange" of personal letters, etc. In other words, the actual exchange of personal letters is inferential proof of an unauthorized relationship. In contrast, Rule 46b bans "*any other* unauthorized personal . . . relationships. . . ."[37]

This language and the physical proximity of Rule 46a and Rule 46b are fatal to the Union's argument on this issue. At the core of the Union's argument is an implied, functional and/or conceptual distinction between an actual "exchange," in Rule 46a, and an "attempt to exchange." Therefore, if one followed the Union's logic, there are two different unauthorized relationships: one for attempted

[36] Joint Exhibit No. 5 at 9. Also recall that, in the instant case, the Arbitrator has held that the three greeting cards themselves establish the Grievant and Ms. Betances had a "relationship."

[37] *Id.*

exchanges and another for consummated exchanges. However, given the physical proximity of Rules 46a and 46b and the language in Rule 46b, it is more reasonable to view the attempt to exchange and the actual exchange as inextricably linked to the *same* unauthorized relationship. Any distinction between those relationships is a artificial and, hence, without a difference.

Regarding their proximity, Rule 46b follows directly after Rule 46a and, therefore, both Rules are reasonably viewed as being integral parts of the same specific regulatory scheme. More important, the additive phrase "any other" is decisive insofar as it reflects two intents: (1) to address unauthorized relationships not *explicitly or impliedly* covered in Rule 46a, and (2) to act as a "catchall" or safety-net in banning those *additional* relationships. Thus, contrary to the Union's position, Rule 46b neither expresses nor implies an intent to address attempts to exchange. Instead, it bans relationships in addition to the one that is banned by either actual or attempted exchanges. Consequently, the Arbitrator holds that the Grievant's attempt to exchange the greeting cards—my mailing them to Ms. Betances— is impliedly banned under Rule 46a. This is not to say, however, that *conduct* which constitutes an actual exchange is *always* the *same* as conduct that constitutes an attempt to exchange. Instead, the holding is that Rule 46a covers both types of conduct.

The Union also argues that attempts are covered by the "failure of good behavior" language in Rule 1.[38] On its face, "failure of good behavior" arguably covers any and all types of misconduct, implied or explicit, in the entire penalty table. However, the Employer took pains to specify certain types of misconduct and, in most instances, to discipline the specific types more severely. Therefore, it is reasonable to conclude that "failure of good behavior" is intended to serve as a "catchall" for misconduct not expressed or implied elsewhere in the penalty table.

VII. Penalty Decision

The upshot is that the Grievant violated Rule 46a because his mailing of three greeting cards to

[38] Joint Exhibit No. 5 at 1.

Ms. Betances constituted an "attempted exchange," which itself is banned as an unauthorized relationship under Rule 46a. Because the Grievant has engaged in misconduct that is subject to discipline under the Employer's table of penalties, some discipline is warranted. The remaining issue is whether the decision to terminate the Grievant is unreasonable, arbitrary, or capricious. To assess this issue, the Arbitrator must review the mitigative and aggravative circumstances in this case.

A. Mitigative Circumstance

The Grievant's performance record is mixed. Although his performance met or exceeded expectations on April 13, 1996 and 1997. His performance appraisal for April 23, 1998 is confusing. There seems to be two appraisals for this period, one with performance falling below some levels of expectations and another one apparently for the same period in which all ratings either met or exceeded expectations. The Arbitrator gives the Grievant the benefit of the doubt here and holds that the Grievant has a satisfactory performance record.

During his tenure with the Employer, the Grievant was officer of the month. [39] In addition he was: (1) a member of the Hostage Negotiating Team, (2) a member of the Critical Incident Management Exercise Design Team, and (3) an Incident Service Trainer.[40]

Although an employee's tenure on the job can mitigate the severity of an imposed measure of discipline, the Grievant's 4.3 (approximately five) years of seniority is too short to exert a strong mitigative force, though it is not a nullity.

B. Aggravative Factors

Aggravative factors include the Grievant's written reprimand, on July 16, 1997, for violation of Rule No. 25—"Failure to immediately report a violation of any work rule, law, or regulation."[41] Also, the nature of the offense established in the instant dispute aggravates the Grievant's situation. In this

[39] Union's Opening statement.
[40] *Id.*
[41] Employer's Post Hearing Brief.

respect, the Arbitrator recalls the Employer's arguments detailing the reasons that relationships between correction officers and inmates are absolutely intolerable in any corrections facility. The Arbitrator agrees that such relationships are indeed intolerable in the sense that they must be disciplined and deterred. However, under the circumstances, the Arbitrator cannot agree that the balance of aggravative and mitigative circumstances in this case warrant removal.

The Employer's own penalty table is a major factor in this conclusion. Penalties for a the first violation of Rule 46a range form a one-day suspension to termination.[42] Penalties for a second violation of Rule 46a range from a five-day suspension to termination.[43] Finally an employee who violates Rule 46a for a third time is summarily discharged.[44] Thus, the Employer's penalty table does not call for termination on for the first violation of Rule 46a. Nor did the Employer adduce evidence or assert arguments to show that the circumstances surrounding the Grievant's misconduct so aggravate the situation as to warrant removal upon this first violation of Rule 46a.

On the other hand, Article 24.02 of the Collective Bargaining Agreement explicitly requires the Employer to adhere to "the principles of progressive discipline. In this case, the Arbitrator can see no reason for not following progressive discipline.

This is not to say that the Grievant should not receive a stiff dose of discipline, only that removal is not indicated. Consequently, the Arbitrator feels that an extensive suspension should serve the goals of progressive discipline by: (1) impressing upon the Grievant the importance of avoiding unauthorized relationships with inmates, and (2) protecting the Employer's interest in the specific and general deterrence of such unauthorized relationships. According, the Arbitrator holds that a one-year suspension will adequately serve those goals and interests.

The Employer shall, therefore, reinstate the Grievant to the position that he occupied before his

[42] Joint Exhibit No. 5 at 9.
[43] *Id.*
[44] *Id.*

removal. The Grievant's reinstatement shall be with full seniority and all related benefits as if he were never removed in the first instance. In other words, the Grievant shall be made whole. Nevertheless, any backpay owed to the Grievant shall be reduced by the amount of earnings he received, or with due diligence could have received, in alternative employment from the date of his discharge (May 29, 1998) to the date the Employer reinstates him pursuant to this opinion and award. Finally, the Arbitrator retains jurisdiction of this matter until the Employer fully implements this opinion and award.

VIII. The Award

For all the foregoing reason, the Grievance is **sustained** in part and **denied** in part.20