

#1497

OPINION AND AWARD

IN THE MATTER OF THE ARBITRATION BETWEEN
SOUTHEASTERN CORRECTIONAL INSTITUTION
-AND-
DISTRICT 1199/SEIU

APPEARANCES

For Southeastern Correctional Institution

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William Fodor, Labor Relations Specialists/OCB
Thomas Ratcliffe, Institution Investigator
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Jon C. Friggins, Sr., BA-3
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John Hyme, Witness

For District 1199/SEIU

Lee Avis, SEIU 1199/Administrative Organizer
Matt Mahoney, Administrative Organizer 2nd Chair
Judy Cole, Grievant

Case-Specific Data

Hearing Held
March 21, 2001

Case Decided
May 18, 2001

Arbitrator: Robert Brookins, J.D., Ph.D.
Subject: Removal—Dishonesty
Grievance No. 27-24 (7-6-99) 586-02-12

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I. Preliminary Statement

The parties to this dispute are the Southeastern Correctional Institution ("SCI" or "the Employer"), a branch of the Ohio Department of Rehabilitation and Corrections (DRC) and the Ohio Civil Service Employees Association/AFSCME (OCSEA) Local 11 ("the Union").

On June 10, 1999, SCI placed the Grievant on administrative leave, pending completion of an administrative investigation.¹¹ Subsequently, SCI officially notified the Grievant of a pre-disciplinary hearing to be held on June 15, 1999 at 2:00 p.m.¹² The Pre-Disciplinary Hearing Officer found that the Grievant had violated the following Standards of Employee Conduct: Rule No. 1—"Dishonesty and failure of good behavior," Rule No. 16—"Misusing official position for personal gain," and Rule No. 34—"Intentional misuse of state or federal funds." As a result, the Pre-Disciplinary Hearing Officer found that SCI had cause to discipline the Grievant.¹³ On or about June 22, 1999, the Grievant was notified that she would be terminated, effective July 1, 1999. On July 5, 1999, the Employer received Grievance No. 27-24 (17-6-99) 586-02-12 ("the Grievance").¹⁴ After receiving no step-3 response from SCI, on August 25, 1999, the Union registered its intent to arbitrate the Grievance.¹⁵

The Union and SCI (the Parties) agreed to hold an arbitral hearing before the Undersigned, on March 21, 2001, at SCI's facility. All parties relevant to the resolution of this dispute attended the arbitral hearing. The Undersigned presided over that hearing and afforded the Parties a full and fair opportunity to present any admissible

¹¹ Joint Exhibit No. 2 at 34.

¹² Employer Exhibit No. 2 at 35.

¹³ Joint Exhibit No. 2 at 101.

¹⁴ *Id.* at 121-122.

¹⁵ *Id.* at 123. The Union used the following number for the Grievance: 27-24-990706-0586-02-12.
Id.

evidence and arguments, supporting their positions in the instant dispute. Specifically, the Parties were permitted to make opening statements and to introduce admissible documentary and testimonial evidence, all of which was available for relevant objections and for cross-examination. Finally, the parties had a full opportunity to submit closing arguments or post-hearing briefs and opted for the former.

II. The Facts

Part of DRC's mission is to afford offenders some sense of responsibility and to help them to become productive citizens. As a branch of DRC, SCI shares the common mission of ensuring the effective, safe, and humane supervision of its adult offenders. The Ridgeway Jaycees, ("Jaycees") is an inmate program that seeks to further this mission as evidence by the following passage in its constitution:

The purpose of this organization is to provide the young men constituting its membership with training and experience in leadership, individual development, and community development. To effect constructive change in our community; Southeastern Correctional Institution; and surrounding communities, and to aid charitable organizations; and through so doing to instill a sense of civic awareness in its members.¹⁶

Accordingly, the Jaycees employ fund-raising events to assist in the rehabilitation of its offenders by igniting a philanthropic flame in offenders. SCI monitors and controls the Jaycees.

From November through December 1997, the Grievant was the Jaycee Advisor.¹⁷ On or about December 8, 1997, the Jaycees decided to "give three food baskets to

¹⁶ Joint Exhibit No. 2 at 81.

¹⁷ *Id.* at 46.

¹⁸ Joint Exhibit No. 2 at 108. The statement authorizing this project is set forth below.

To: Mr. R. Hurt, Warden S.C.I

From: Ridgeview Jaycees

Re: Christmas food boxes

The Ridgeview Jaycees propose to give three (3) food boxes to needy families. The boxes will

needy families. . . .¹⁰⁸ As the Jaycee Advisor, the Grievant was entrusted with the duties purchasing the food, identifying three needy families, and assuring that those families receive the food.¹⁰⁹ The Grievant was initially authorized to purchase approximately \$300 worth of food but ultimately spent approximately \$179.00.¹¹⁰ Funds for the food baskets came from the Jaycee's account which is funded by inmates' dues and contributions.¹¹¹ Subject to the approval of the Warden, the Jaycees membership, the Grievant, as the Jaycees Advisor, had final approval of the distributions of funds for the food gifts.¹¹² The Grievant claimed that the Jaycees management told her to give the food baskets to a needy family of her choice.

The record reveals no written rules for identifying the proper recipients of Jaycees' gifts. However, before the Grievant distributed the food baskets, she explicitly consulted Mr. Jeff Wolfe (the Deputy Warden of Operations at that time) and Major Nichols for permission to give the food baskets to members of her family. Both gentlemen specifically told her that she may not so distribute the food baskets.

Nevertheless, the Grievant ignored these specific instructions. In December

each be \$100.00 of packaged and dry foods. This food will be purchased by the Jaycees advisor (Mrs. J. Cole) and she will also deliver the boxes to the three families.
This is a community service project being done by the members of the Ridgeview Jaycees.

Thank you for your cooperation in this matter.

Signed by
Warden Hurt
J. Wolfe, Deputy Warden Operations
Mr. M. Claridge, Deputy Warden Business Administration
J. Cole, CPS, Advisor Ridge way Jaycees

Although this exhibit is not dated, the Arbitrator used the date listed in Warden Hurt's affidavit (Joint Exhibit 2, item No. 7, at 2) as an indication of approximately when the Jaycees decided to give the food baskets.

¹⁰⁸ Joint Exhibit No. 2 at 108.

¹⁰⁹ *Id.* at 65 & 96.

¹¹¹ *Id.* at 52-53.

¹¹² *Id.* at Section 2.

1997, she gave one food basket to her sister-in-law, Ms. Michelle Miller.^{\13} The Grievant gave the second food basket to her brother, Jerry Miller^{\14} and the third to Mr. Harold Bobo, a who shared the same residence with the Grievant's mother.^{\15}

The Grievant was forthright at least about the names, addresses, and neediness of these recipients, placing this information together with "thank you" from the recipients into the Jaycees' files. Specifically, she received a "thank you" note from her brother Mr. Miller (spelled "Gerry" Miller on the note)^{\16} and from her mother who signed the note "Ms. Buddy and Ruth Bobo."^{\17} However, the Grievant failed to indicate her relationship to the recipients.

Consequently, the Employer did not discover the identity of the recipients and the Grievant's alleged misconduct until approximately April 1999, after Ms. Peggy Roth (the Grievant's successor Jaycee Advisor) informed Mr. Thomas J. Ratcliffe (Institutional Investigator) that the Grievant had given food baskets to her family. SCI then launched an administrative investigation, a part of which involved Mr. Ratcliffe's investigatory interview of the Grievant, on April 4, 1999.

Upon completing its administrative investigation, SCI decided to terminate the Grievant for violating the following Standards of Employee Conduct: (1) Rule 1, Any violation of Ohio Revised Code 124.34 to wit, dishonesty and failure of good behavior, (2) Rule 16, Misusing official position for personal (family) gain, and (3) Rule 34, Intentional misuse of State or federal funds.^{\18}

III. Relevant Contractual Language

^{\13} Joint Exhibit No. 2 at 46-47 & 109.

^{\14} *Id* at 48, 109.

^{\15} *Id.*

^{\16} *Id* at 93.

^{\17} *Id.* at 94.

^{\18} Joint Exhibit No. 2 at 120.

Article 8

8.01 Standard

Disciplinary action shall be imposed upon an employee only for just cause.

8.02 Progressive Discipline

The principles of progressive discipline shall be followed. These principles usually include:

- A. Verbal Reprimand
- B. Written Reprimand
- C. A fine in an amount not to exceed five (5) days pay
- D. Suspension
- E. Removal

The application of these steps is contingent upon the type and occurrence of various disciplinary offenses.

The employee's authorization shall not be required for the deduction of a disciplinary fine from the employee's paycheck.

8.03 Pre-Discipline

Prior to the imposition of a suspension or fine of more than three (3) days, or a termination, the employee shall be afforded an opportunity to be confronted with the charges against him/her and to offer his/her side of the story. This opportunity shall be offered in accordance with the "Loudermill Decision" or any subsequent court decisions that shall impact on pre-discipline due process requirements.

DRC Policy 302-01

12. No *inmate group* shall purchase for an *employee*, nor shall any employee accept any *gifts* (watches, rings, etc.) from an inmate group, except for properly approved plaques or certificates of recognition awarded to individuals for their assistance and guidance.¹¹⁹

Ridgeway Jaycees Constitution

Section 2. The Board of Directors shall have control of the management an property and business of this organization, subject to the will of the membership and the approval of the Warden of this institution. Funds of the organization shall be withdrawn from the accounts with which they are on deposit by the joint signature of the President, the Jaycee Clerk, and as approved by the *appointed*

¹¹⁹ (emphasis added).

¹²⁰ (emphasis added).

IV. Summaries of the Parties' Arguments

A. Summary of the Employer's Arguments

1. The Grievant misused state funds to purchase food for her relatives and ate some of the food, herself
2. Because the food baskets constitute gifts, the Grievant violated DRC Policy 302.01 ("Section 302.01") by distributing the food baskets to her relatives and by consuming some of the food herself.
3. Absent Policy 302.01, by distributing the food baskets to her relatives, the Grievant violated the specific instructions of management.
3. The Grievant realized personal gain by distributing the food to her relatives and by eating some herself.
4. Because the Grievant is not similarly situated to any particular employee, she is not a victim of disparate treatment.
5. Removal is the proper here, given the seriousness of the Grievant's misconduct and the burden upon SCI of trying to protect her from the inmates.

B. Summary of the Union's Arguments

1. Because the food was not purchased with state funds, the Grievant did not misuse state funds.
2. The Grievant did not violate DRC Policy 302.1 and was, in fact, disciplined for conduct (distributing gifts, food baskets, to needy families) that is proscribed by no written rules.
3. The Grievant realized no personal gain from distributing the food baskets to needy families.
4. The Grievant is a victim of disparate treatment.
5. The Grievant's removal is improper because it offends the principle of progressive discipline and because it is tardy.
6. The Grievant was twice promoted and maintained a blemish-free disciplinary record, until the instant dispute.

V. The Issue

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

VI. Discussion and Analysis

¹²⁰ (emphasis added).

Because this is a disciplinary dispute, SCI has the burden of persuasion. To satisfy that burden, SCI must establish its charges against the Grievant by preponderant evidence in the record as a whole.

A. Preliminary Considerations

There are essentially two threshold issues here. First, whether the Grievant intended for members of her family to receive the food baskets. If evidence in the record demonstrates that for some reason beyond the Grievant's control the food baskets ultimately went to members of her family, then the Arbitrator can find no reason to discipline the Grievant. Second, irrespective of the Grievant's intent, whether members of her family were the final recipients of the food baskets. As the reigning Jaycees advisor, the Grievant's duty was assure that the food baskets reached qualified needy families, a duty, which, in the Arbitrator's view, was nondelegable, especially to the Grievant's relatives or to friends thereof.

B. Guidelines for Distribution of Food Baskets and Other Jaycees' Gifts

The Union stresses that the Employer had not written rules regarding the distribution of food baskets to needy families, and, therefore, the Grievant was removed for other than just cause. In response, the Employer points to DRC Policy 302-01 (Section 302.01), which provides in pertinent part: "No *inmate group* shall purchase for an *employee*, nor shall any employee accept any *gifts* (watches, rings, etc.) from an inmate group, except for properly approved plaques or certificates of recognition awarded to individuals for their assistance and guidance."²¹

Generally, before disciplining their employees, employers must clearly articulate

²¹ Joint Exhibit No. 2 at 25. (emphasis added),

and promulgate work rules that notify the employees of the acceptable behavioral boundaries.¹²² However, some behavioral boundaries—striking a supervisor or theft—are sufficiently manifest as to require no forewarning. In the instant case, evidence demonstrates that both standards are satisfied. First, Section 302.01 does address the Grievant's the distribution of the food baskets, which, for reasons discussed below are reasonably deemed to be gifts from inmates. Whether or not the Grievant had actual notice of Section 302.01, it is fair to conclude that she should have been aware of it, especially as a Jaycees Advisor. The Grievant was an advisor in December 1997 and the effective date of Section 302.01 is June 20, 1997.¹²³

Second, even absent Section 302.01, it is not too far-fetched to conclude that any reasonable employee in the Grievant's position would or should understand the potential conflict of interest, difficulties, and concerns where a Jaycees Advisor who is charged with distributing that organization's gifts to the needy gives those gifts to her relatives, irrespective of the neediness of those relatives. Nor is much reflection required to appreciate the difficulty with allowing the Grievant to give food baskets or other Jaycees' gifts to her family simply because she could not locate proper recipients.

Third, the Grievant had actual knowledge that her behavior was improper because she actually inquires about the propriety of distributing the food baskets to her relatives. During her interview with the Highway Patrol, the Grievant stated that she had asked Mr. Jeff Wolfe, Deputy Warden of Operations and Major Nichols for permission to give the food baskets to members of her family and that both men had explicitly forbade her to give the baskets to relatives or relations.¹²⁴ The Grievant's

¹²² See, e.g., Adolph M. Koven & Susan L. Smith, *Just Cause the Seven Tests* 27-81 (Donald F. Farwell, ed., 2d ed. 1992) (emphasis added).

¹²³ Joint Exhibit No. 2 at 25.

¹²⁴ *Id.* at 113.

inquiry reveals her uncertainty about the propriety of giving the food baskets to her family. However, the response she received effectively lifted that fog of uncertainty, by apprising her of the standard and simultaneously obliging her compliance thereto.¹²⁵

In contrast, throughout her investigatory interview, the Grievant maintained that the Jaycees essentially gave her carte blanche to distribute food baskets to needy families as she saw fit. However, there is no independent evidence in the record to corroborate that point. Based on the foregoing reasons and evidence, the Arbitrator holds that the Grievant had sufficient notice about the distribution of the food baskets to be held accountable for impermissibly distributing them.

Fourth, the record contains another piece of evidence that supports an inference that the Grievant recognized the impropriety of her actions. During the pre-disciplinary hearing, the Grievant said "[H]er family knew that they couldn't keep the boxes because it was a conflict of interest. . . ."¹²⁶ In other words, the Grievant's family was aware of a conflict of interest that precluded them from keeping the baskets for themselves. If the Grievant's family recognized the conflict of interest, it is not unreasonable to infer that the Grievant also recognized that conflict before she gave them the food baskets. Finally, given this manifest conflict of interest, why did the Grievant make the special effort to categorize Mr. Bobo and Mr. Miller as "needy?"

In fact, during her interview with Mr. Ratcliffe, the Grievant stated that she gave the baskets to her family members because she was aware of no qualified recipients

¹²⁵ Because the Employer did not charge the Grievant with insubordination or failure to follow a direct order, those subjects are omitted here.

¹²⁶ Joint Exhibit No. 2 at 100.

¹²⁷ Specifically, the Grievant stated:

I called several other places. I called Community Action, and they said they had their Christmas packages out already. And I called a couple other organizations that they gave me, but, Avert and them said, and Wally said, well we have to give three food boxes a year or we could give up to so much money and

(other than her family members) and did not wish to drive around town to locate any.¹²⁷ Thus, the Grievant violated Mr. Wolf and Major Nichol's partly for lack of knowledge and partly for her own convenience.

C. Whether the Grievant Intended Food Baskets For Her Relatives

SCI contends that the Grievant intended to give the food baskets to her relatives, despite having received specific instructions to the contrary from Mr. Wolf and Major Nichols. The Union, counters that the Grievant intended to give the food baskets to qualified nonfamilial recipients and in fact that is what happened.

Preponderant credible evidence in the arbitral record demonstrates that the Grievant intended to give at least two of the food baskets to her relatives. The resolution of this issue turns entirely on relevant, credible evidence in the arbitral record. Unfortunately, for the Grievant, inconsistencies in her statements in the record, her testimony before the Undersigned, and her documentary evidence effectively erode her credibility.

1. The Grievant's Prior Inconsistent Statements

Prior inconsistent statements plague the Grievant's assertions in the arbitral record. First, the Grievant asserted that after she was unable to find nonfamilial needy recipients, she decided to take matters in her own hands and give the baskets to needy families she happened to know. Thus, the Grievant said: "I left it up to myself to, I found three need [needy] families"¹²⁸ Also, the Grievant submitted documentation indicating that she gave the food baskets to several recipients, one of whom was Mr.

distribute it within. Well, I didn't want to drive all over town, so I left it up to myself to, I found three need families. . . .*Id.* at 50.

¹²⁸ Joint Exhibit No. 2 at 50.

Bobo whom the Grievant characterized as being a "cancer patient from St. James Cancer Center. Has family."¹²⁹ Next, the Grievant indicated that she gave a food basket to Mr. Miller,¹³⁰ the Grievant described as a "laid off construction worker with family. Recovering alcoholic who keeps having relapses. . . ."¹³¹ Finally, the Grievant states that she gave a food baskets to Ms. Miller who, according to the Grievant, is a "low income family with many children husband is alcoholic having problems recovering. . . ."¹³²

Although the Grievant explicitly identified the recipients of food-basket recipients, she neglected to specify those recipients were either blood relatives, in-laws, or close friends of her blood relatives. Also, in each case, the Grievant stressed the hardships in the recipients' lives, apparently to establish their "neediness," which, the Grievant apparently thought entitled them to receive the food baskets. Here, the question that tends to illuminate the Grievant's intent is why would she emphasize the recipients' neediness if, as she later asserts, she intended for the recipients to serve as mere conduits, passing the food baskets onto other needy families?

Subsequently, during her investigatory interview with Mr. Ratcliffe, the Grievant again painted the recipients as needy, thereby demonstrating their entitlement to the food baskets. Thus, Grievant stated:

Harold Bobo was very needy. He's a cancer patient. He was suppose to die four years ago, they were having a hard time. They were needy, and um, Baltimore. Jerry's [the Grievant's brother] an alcoholic and a laid off construction worker with two kids. They were in need of food and couldn't get any help. Michelle [Miller, the Grievant's sister-in-law] and Carl said

¹²⁹ *id.* at 109.

¹³⁰ The Arbitrator is not sure of the proper spelling of Mr. Miller's Christian name, since it appears in the record spelled with a "J" and a "G."

¹³¹ Joint Exhibit No. 2 at 109.

¹³² Joint Exhibit No. 2 at 109.

that they had a family up in Columbus, in which they gave that to. I didn't even meet the family or nothing. But they all sent thank-you letters in for them.¹³³

The following exchange between the Grievant and Mr. Ratcliffe also evinces that when she gave the food baskets to the foregoing recipients, the Grievant fully intended for those recipients to keep the baskets for themselves.

Mr. Ratcliffe: So Package #1 [a food basket] went to Harold Bobo, that was intended for that household.

Judy: Correct.

Mr. Ratcliffe: Jerry Miller is your brother and the package #2 [a food basket] is intended for that household

Judy: Yes.

Mr. Ratcliffe: And the third package [a food basket], that is your sister-in-law, but that was intended for your sister-in-law to take it to another family?

Judy: Yes, and they did.¹³⁴

According to this passage, the Grievant gave one food basket to Mr. Bobo an occupant of her mother's house) and the basket was intended for Mr. Bobo's family. Similarly, the Grievant admitted that she gave the second food basket to her brother for his household and the third basket to Ms. Miller, her sister-in-law, to give to another needy family and that Ms. Miller did that. Thus, the Grievant: (1) admitted giving the food baskets to her relatives, (2) admitted that the food baskets were intended for those households, and (3) sought to defend her decision by arguing that the relatives were, in fact, needy, stressing the neediness of those relatives in justification of her decision to give the food baskets.

¹³³ *Id.* at 50-51.

¹³⁴ Joint Exhibit No. 2 at 48.

The latter point affords a glimpse into the Grievant's state of mind when she gave the food baskets to the foregoing recipients. The primary criterion for dispensing food baskets is "neediness." Therefore, one can reasonably interpret the Grievant's stressing the neediness of her relatives as an attempt to justify the decision to give the baskets to her relatives in the first instance.

2. The Grievant's Subsequent Statements

During her interview with the Highway Patrol, the Grievant made statements that directly contradict the substance and inferences to be drawn from the foregoing statements she made during her earlier investigatory interview with Mr. Ratcliffe. For example, during the interview with the Highway Patrol, the Grievant claimed she left two food baskets "at her mother's house; one for a family that her mother knew and one for a family living beside Michele and Carl Miller in Columbus."¹³⁵ In two respects this statement contradicts statements she made in the investigatory interview. First, the clear impression from the Grievant's statement in the investigatory interview is that she left only one food basket with Mr. Bobo. Second, the Grievant's statements in that interview afford absolutely no hint that she intended either for her mother or for Mr. Bobo to pass the food basket along to a "needy" family. Indeed, as previously mentioned, the Grievant emphasized the neediness of Mr. Bobo and indicated that the food basket given to him was intended for his household, of which the Grievant's mother was a member.

The same is true of the Grievant's statements, during her investigatory interview, about her brother, Mr. Gerry (or Jerry) Miller: "and um . . . Jerry's an alcoholic and a laid off construction worker with two kids. They were in need of food and couldn't get any

¹³⁵ Joint Exhibit No. 2 at 100.

help." During the investigatory interview, the Grievant flatly agreed that the food basket given to Mr. Miller was intended for his household:

Mr. Ratcliffe: "Okay. Jerry Miller is your brother and the package is intended for that household?

The Grievant: "Yes."

Nevertheless, at her pre-disciplinary hearing, the Grievant said she "dropped one box off at her brother Gerry's house for an ex-girlfriend who was on welfare with no assistance."¹³⁶ If the latter statement is true, then why, during the investigatory interview, would the Grievant stress Mr. Miller's neediness and, hence, his qualification to receive the food basket? Furthermore, the Grievant's statement during her investigatory interview revealed no intent for Mr. Miller to give the food basket to his former girlfriend.

The record reveals another inconsistency—the availability of Community Action in December 1997, as a recipient of the food baskets. During her investigatory interview, the Grievant said: "I called Community Action, and they said they had their Christmas packages out already."¹³⁷ The reasonable inference here is that Community Action either would (or could) not or could no longer accept food baskets from the Grievant or could no longer distribute them. In contrast, during her interview with the Highway Patrol, the Grievant stated that "My mother and brother took it [a food basket] to Community Action." This apparently occurred after the Grievant's alleged unsuccessful attempt to give the food baskets to Community Action. Evidence in the record does not explain why that organization could not accept food baskets from the Grievant but did subsequently accept them from her mother and brother.

¹³⁶ *Id.* at 100.

¹³⁷ Joint Exhibit No. 2 at 50.

The final problem of credibility for the Grievant involves her insistence, during the arbitral hearing, that the transcript of the investigatory interview¹³⁸ did not reflect her exact words. This assertion prompted the Parties to give the Undersigned a copy of the audio tape of the actual investigatory interview. The Arbitrator has listened painstakingly to that audio tape while simultaneously following along in the transcript thereof. The transcript accurately reflects the tape recording of the exchanges between the Grievant and Mr. Ratcliffe, during the investigatory interview. For example, in the arbitral hearing, the Employer questioned the Grievant about the following passage in the transcript, which the Grievant specifically denied having made, claiming that the transcript was in error:

Mr. Ratcliffe: That's your brother. Tell me about that one.

Judy: Well, he was-a need family in Fairfield count and that's who I gave the package to.¹³⁹

Having listened to the tape recording of this passage, the Arbitrator can say with the utmost certainty that the statement attributed to the Grievant is a word-for-word reproduction of what she said.

D. Identities of Ultimate Food-Baskets Recipients

Here, the Employer claims that the Grievant's relatives (and not some non-relatives) were the ultimate recipients of the food baskets, but the Union contends that other needy families unrelated to the Grievant received the food baskets. Preponderant evidence in the arbitral record as a whole establishes that the Grievant's relatives ultimately received at least two of the food baskets. Nevertheless, the Grievant insists that she gave all three food baskets to her relatives to be distributed to other needy families. The Grievant insists that both her mother and sister-in-law gave

¹³⁸ *Id.* at 44-59.

¹³⁹ *Id.* at 47-48.

the food baskets they received to other needy families. During her interview with the Highway Patrol, for example, the Grievant stated that the baskets were distributed as follows: "One to my brother, Jerry Miller. The other two went to my mothers which she gave one to a needy family and my sister-in-law came down and got one for her neighbor. My brother went to his ex-girlfriend and her kids, It was suppose to. My mother and brother took it to Community Action."⁴⁰ Based on this statement, the Grievant's mother and sister-in-law distributed two food baskets to needy families and her mother and brother distributed the other food basket either to her brother's former girlfriend or to Community Action.

In support of these accusations, the Grievant offered several letters and thank you notes from relatives and others. On March 19, 2001, for instance, Mr. Gary K. Knechk—who is not the Grievant's relative—wrote a notarized letter stating that he received a food basket from Ms. Ruth Ann Miller (the Grievant's mother) for Christmas 1997.⁴¹ Similarly, on March 20, 2001, Ms. Michelle Miller (the Grievant's sister-in-law) declared that the food baskets the Grievant gave her "at Christmas time were given to our neighbors and a family in need. Both of the families were in need."⁴²

Unfortunately for the Grievant the character of these letters and the weight of other contradictory evidence in the record largely deprives the letters of probative credibility with respect to the true identity of the recipients of the food baskets. First, standing alone, the letters are mere hearsay. As hearsay the letters can acquire probative credibility as to the matter asserted therein if and only if the arbitral record contains independent corroborative evidence supporting those assertions.

⁴⁰ Joint Exhibit No. 2 at 112.

⁴¹ Union Exhibit No. 1.

⁴² Union Exhibit No. 2.

The record is bereft of such evidence, however. For example, no actual or alleged—qualified or unqualified—recipient of a food basket attended the arbitral hearing to testify before the Undersigned. Yet, the obvious probative value of such testimony from a qualified recipient hardly needs to be articulated. And as discussed above, the Grievant's prior inconsistent statements have left her with precious little credibility as a witness in this dispute.

E. Other Evidence About Recipients' Identities

Also, independent evidence in the record establishes that the Grievant's relatives received some of the food baskets for their own consumption and that the Grievant ate some of the food. Mr. John Hyme, the Grievant's former boyfriend, offered unrebutted testimony at the arbitral hearing that he actually ate some of the food in the food basket the Grievant delivered to Mr. Bobo and her mother, Ruth Ann Miller. Moreover, Mr. Hyme testified that the Grievant also consumed some of the food. Two events seemed to have motivated Mr. Hyme to report this incident. First, the Ohio Highway patrol assured Mr. Hyme that he would avoid criminal charges if he voluntarily revealed what he knew about distribution of the food baskets. And, second, the Grievant's successor Jaycee Advisor asked Mr. Hyme about the food baskets. Ultimately, a written reprimand was the price Mr. Hyme paid for consuming food from the food basket. The Union sought to impeach Mr. Hyme's testimony by contending that he had physically abused the Grievant and that, as a couple, they experienced a "rocky" relationship. Nor did the Employer seek to rebut the Union's contention here. If the Arbitrator were to accept the Union's argument here as factual, other evidence in the record supports the conclusion that the Grievant's relatives were the end recipients of at least two food baskets.

Statements from the Grievant's relatives as well as those from the Grievant herself tend to corroborate Mr. Hyme's testimony. Specifically, the thank you notes

from the Grievant's relatives do not suggest that the relatives simply passed the food baskets to other needy families. For example, Mr. Miller wrote: "Thank you for the food basket gift for Christmas it was greatly appreciated."⁴³ Who appreciated it, Mr. Miller or some other recipient? On its face, the note suggests that Mr. Miller appreciates the food basket. Similarly, Ms. Buddy Ruth Bobo (another name for the Grievant's Mother) wrote: "We would like to thank you for the food basket and quilt. It was very much needed and appreciated. Thanks again."⁴⁴ The foregoing question about Mr. Miller's note also applies here. Still, the Grievant's explanation is that she asked her family members to write the notes in behalf of the (third-party) "needy" families who actually received the food baskets.

This explanation is simply too porous. Why would the true, "needy" recipients of the food baskets express their gratitude for the gifts by writing their own thank you notes? Indeed, one would fully expect these recipients to have displayed some gratitude coming to the arbitral hearing and testifying in the Grievant's behalf. Finally, on its face, the language of the foregoing notes does not suggest that the authors were writing on behalf of another recipient but in their own behalf.

F. Violation of Section 302.01

SCI charges that the Grievant violated Section 302.01, which provides in relevant part: "No *inmate group* shall purchase for an *employee* nor shall any employee *accept any gifts . . .* from an inmate group. . . ."⁴⁵ Specifically, SCI argues that the food baskets constitute "gifts," which were purchased with inmates' funds and which the Grievant accepted by eating some of the food and distributing the rest to her relatives.

⁴³ Joint Exhibit No. 2 at 93.

⁴⁴ *Id.* at 94.

⁴⁵ Joint Exhibit No. 2 at 25.

The threshold question here is whether inmates purchased the food. Evidence in the arbitral record establishes that funds to purchase the food came from the Jaycees' account, comprising inmates' monetary contributions. Thus, inmates "purchased" the food in question.

The next issue here is whether the food was a "gift" to the Grievant which she *accepted* by: (1) distributing the food to her relatives, and (2) consuming some of the food herself. Conversely the Union argues first that even if the Grievant distributed the food baskets to her relatives, that gesture does not convert the food baskets into gifts to the Grievant. Second, the Union contends that the Grievant did not eat any of the food.

The Arbitrator has held that the Grievant intentionally distributed the food to her relatives and now holds that the Grievant ate some of the food. The rationale for the former holding has been explained.¹⁴⁶ The basis for the latter is that Mr. John Hyme offered credible, unrebutted testimony that he, the Grievant, and her mother ate food from one of the food baskets. Despite the Grievant's vigorously denial, the Arbitrator finds Mr. Hyme's testimony more credible because, as discussed above,¹⁴⁷ the Grievant's credibility in this dispute is severely compromised.

By actually eating some of the food, the Grievant manifestly *accepted* it. Moreover, since she purchased the food with the inmates' funds, the food was a "gift" to any person benefitted from the food, except the inmates whose monies bought the food. At the very least, then the food that the Grievant actually consumed became a "gift" to her. Similarly, the Grievant *accepted* the food by eating it.

In at least one sense, the Grievant also *accepted* the food as a "gift" when she intentionally distributed it to her relatives. Here, however, establishing that the Grievant

¹⁴⁶ See discussion *supra* p. 12-16.

¹⁴⁷ *Id.*

accepted the food as a "gift" is perhaps less obvious because the nexus between the Grievant herself and any benefit from the food is relatively indistinct. Nevertheless, one may presume that as because of her relationship to the recipients, the Grievant derived benefit from distributing the food to them. In other words, when the Grievant violated management's instructions by giving the food to her relatives, she converted the food to her own by exercising unauthorized dominion over it. And since the food was already a "gift," the Grievant's distribution of the food to her relatives constituted at least constructive *acceptance* of the food. In short, by giving the food to her relatives, the Grievant violated the *spirit or intent* of Section 302.01.

G. Realization of Personal Gain

Rule No. 16 of DRC's Standards of Employee Conduct prohibits employees from misusing official position for *personal gain*, to include *but not limited* to the accepting or soliciting of bribes in the course of carrying out assigned duties."⁴⁸ For the reasons enumerated and discussed immediately above, the Arbitrator holds that the Grievant realized "personal gain" from the food in question by consuming some herself and by distributing the remainder to her relatives.

H. Status of Funds Used to Purchase the Food

Also, SCI argues that the Grievant violated Rule 34 of DRC's Standards of Employee conduct, which penalizes, "intentional misuse of state or federal funds."⁴⁹ At some level, inmates' funds may belong to the state, but the record before this Arbitrator falls woefully short of establishing that as a fact. There are no specific arguments (let alone evidence showing) that inmates' funds somehow become state funds or are

⁴⁸ Joint Exhibit No. 2 at 5. (emphasis added).

⁴⁹ Joint Exhibit No. 2 at 7.

jointly owned by inmates and the state. Consequently, the Arbitrator holds that inmate rather than state funds were used to purchase the food in question.

I. Disparate Treatment

The Union argues that the severity of discipline imposed on the Grievant, in this case, is sufficiently disproportionate to that imposed upon another Corrections Officer, Mr. Rodney Smith, as to constitute disparate treatment. The Employer, of course, seeks to distinguish these two cases and thereby thwart the disparate-treatment claim.

To assess this issue, one must briefly review the facts of the comparative case. SCI decided to suspend Mr. Smith for five days for theft of the Employer's telephone service. Specifically, Mr. Smith used approximately \$145.00 (279 minutes) of SCI's funds for personal long distance telephone calls to Columbus, Ohio where his girlfriend was experiencing difficulties with her pregnancy.¹⁵⁰ Apparently, Mr. Smith knew that telephone calls from SCI to Columbus were long distance and that he was not paying for them. However, he did not know that calls from the particular telephone he used were traceable.¹⁵¹ However, when SCI approached Mr. Smith about his misconduct, he immediately admitted that he had made the calls. The Employer charged him with violation of Rule No. 14, "Theft," imposed a five-day fine, and required him to make restitution.¹⁵²

1. Whether the Grievant and Mr. Smith are Similarly Situated

When one compares the Grievant's case to Mr. Smith' In attempting to distinguish Mr. Smith's the similarities and differences in the record do not depict these employees as being similarly situated. The similarities are as follows:

¹⁵⁰ Union Exhibit No. 4 at 1.

¹⁵¹ Mr. Walter Dillard's redirect testimony.

¹⁵² Union Exhibit No. 4 at 3-6.

Several relevant similarities tend to link the cases. For example, the Grievant and Mr. Smith were intentionally dishonest. Mr. Dillard testified that even though Mr. Smith knew that telephone calls from SCI to Columbus were long distance Mr. Smith persisted in making those calls on a telephone line that belonged to SCI and that Mr. Smith though was untraceable. Thus, Mr. Smith intentionally sought to steal from SCI. Similarly, the Grievant intended to give at least two food baskets to her family members for their consumption, instead of giving the baskets to needy families that were not related to her. Both employees misappropriated the funds of others. The Grievant misappropriated inmate funds; Mr. Smith misappropriated or stole state funds. Both employees were correctional officers. As corrections officers, they had the same duty to serve as role models for inmates. Finally, both employees *initially* sought to conceal their misconduct

On the other hand, several differences tend to distinguish the cases. Because some of these differences are linked to SCI's Standards of Employee conduct, the relevant rules are set forth below for referential purposes.

Partial Penalty Table

Text of Rule	1 st offense	2 nd offense	3 rd offense	4 th offense
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1.	Any violation of ORC 124.34-. . . and for incompetency, inefficiency, dishonesty, drunkenness, immoral conduct, insubordination, discourteous treatment of the public, neglect of duty, violation of such sections or the rules of the director of administrative services or the commission, or any other <i>failure of</i> <i>good behavior</i> , or any other acts of misfeasance, malfeasance, or nonfeasance in office.	OR/R	WR-3/R	5-10/R	R
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14	Theft	WR/R	5-10/R	R
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16	Misusing official position for personal gain, to include but not limited to the accepting or soliciting of bribes in the course of carrying out assigned duties .	5-10/R	R	
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funds.

A review of the table and of the nature of the Grievant's and Mr. Smith's misconduct reveals several important facts. The Employer argues that Mr. Smith incurred fewer charges than the Grievant, suggesting that the number of charges somehow justifies the difference in disciplinary severity. First, that conclusion does not necessarily follow, since one must assess the number of substantiated charges against the Grievant as well as the number of charges that *reasonably could have been* asserted against Mr. Smith. as pointed out earlier, SCI did not prove that the Grievant misused state funds. Thus, the Rule-34 violation is not a factor in penalty assessment. Second, SCI could have reasonably charged Mr. Smith with a violation of rule No. 1, insofar as his conduct fell within the global scope of "failure of good behavior." Recall that Mr. Smith intentionally misused SCI's telephone service. Second, Mr. Smith realized at least as much "personal gain" from his telephone calls to his pregnant girlfriend. Thus, Mr. Smith and the Grievant experienced psychological or emotional benefit. Consequently, Mr. Smith could have been charged with a Rule-16 violation. Of course the Grievant also presumably experienced some physiological benefit from eating the food. Third, the Grievant and Mr. Smith engaged in some form of "theft." Ultimately, then, both the Grievant and Mr. Smith could reasonably have been charged with violations of Rule Nos. 1, 14, and 16. But only Mr. Smith reasonably could have been charged with violating Rule No. 34. Consequently, the differences in the number of charges does not, as SCI's argues, clearly justify the substantial difference in disciplinary measures imposed on the Grievant and Mr. Smith.

Furthermore, some differences between the cases tend to exacerbate Mr. Smith's case relative to the Grievant's, thereby contraindicating a harsher measure of

discipline for the Grievant. For example, Mr. Smith's conduct, relative to the Grievant's, constitutes a clearer case of intentional misuse of "state" funds, under Rule No. 34. Therefore, one additional charge reasonably could have been lodged against the Mr. Smith, though it is unclear whether that extra charge if sustained would have justified firing Mr. Smith. Moreover, Mr. Smith's active disciplinary history was a clear aggravative factor that arguably contraindicated imposing a lesser measure discipline upon Mr. Smith.

Similarly, there are differences that tend to aggravate the Grievant's case. SCI seeks to distinguish the cases by arguing that the Grievant's reinstatement would unduly burden the Employer because of the extra effort needed to protect the Grievant the Grievant from inmates who recognize her deception and who might seek revenge against her. The Union contends that the Employer's argument is little more than speculation. After some deliberation, the must Arbitrator. The difficulty with the Employer's argument is the utter lack of evidence to support it. Of course in the nature of things no rational inmate is going announce an intent to retaliate against a corrections officer or any other employee. Therefore, the Employer's contention is premised on logic. Nevertheless, if that logic is to serve the Employer, there must be at least proof that the inmates are *aware* of the Grievant's conduct and *disapprove* of it. Still, nothing in the arbitral record establishes even those facts, not to mention that inmates intend to victimize the Grievant because of her misconduct in this case.

The difference that is ultimately fatal to the claim of disparate treatment is that in addition to being a corrections officer, the Grievant was also the Jaycees Advisor and directly responsible for properly distributing the food baskets. As Jaycees Advisor, she had a second job or duty that brought her in direct contact with inmates and their finances in a program that was designed to provide inmates with some sense of philanthropic, moral, and ethical sensitivity. As a result, the Grievant's misconduct is

likely to be more conspicuous to inmates than Mr. Smith's. It is not unreasonable to conclude that these facts would make it more difficult for the Grievant to perform her job as corrections officer. Second, when confronted with his wrong doing, Mr. Smith readily admitted it.¹⁵³ The Grievant still denies her misconduct. When initially confronted with her misdeeds, the Grievant admitted giving the food baskets to her family, but changed her story when the Highway Patrol entered the investigation, seeking justify and explain her conduct. Consequently, one might reasonably argue that the Grievant's moral turpitude is unmitigated relative to Mr. Smith's, thereby rendering the Grievant less susceptible to rehabilitation. The foregoing reasons persuade the Arbitrator that the Grievant was not similarly situated with Mr. Smith.¹⁵⁴

VII. Penalty Assessment

Because SCI has established two of the three charges it level against the Grievant, some measure of discipline is necessary. To determine the appropriate measure of discipline in this case, the Arbitrator looks to the aggravative and mitigative circumstances that surround this dispute, bearing in mind that the Employer's disciplinary decision should be modified only if the Employer abused its discretion by imposing a measure of discipline that is arbitrary, capricious, or unreasonable.

A. Aggravative Circumstances

As discussed above, the Grievant embraced thinly veiled dishonesty and deceit. She distributed at least two food baskets to her relatives with the intent that they

¹⁵³ Note, however, that Mr. Smith may have been obliged to admit his misdeed, given the "smoking gun" circumstantial evidence of telephone records.. Those records would have revealed that the telephone calls were made from SCI to Mr. Smith's fiancé's telephone number. Under those circumstances, one has there is little "wiggle room."

¹⁵⁴ Although the Arbitrator did not offer a detailed discussion of similarities and differences between the Grievant's case and Mr. Hyme's, the same factors that precluded a finding of similarity between the Grievant and Mr. Smith preclude a finding of similarity between the Grievant and Mr. Hyme.

consume the food therein. The Grievant, her relatives, and Mr. Hyme consumed the food. The Grievant knew or should have known that she was violating Section 302.01 as well as the instructions of Mr. Wolf and Major Nichols. The Grievant sought to "cover her tracks" by changing her version of the facts. Indeed, the Arbitrator is persuaded that the Grievant deliberately attempted to escape accountability in this matter by changing her "story."

Also, the Grievant occupied two positions of responsibility—corrections officer and Jaycees Advisor. Together these positions preclude her from serving as any kind of role model and, hence, as a corrections officer in SCI. The pivotal problem here is that the Grievant's misconduct as Jaycees Advisor is or is very likely to be very conspicuous to inmates.

B. Mitigative Factors

The sole mitigative factor in the record is the Grievant's discipline-free record with SCI. Without more, that factor does not render SCI's decision to remove the Grievant unreasonable, arbitrary, capricious, or an abuse of discretion.

VIII. The Award

For all the foregoing reasons, the grievance is **DENIED** in its entirety.

Notary Certificate

State of Indiana)
)SS:
County of _____

Before me the undersigned, Notary Public for _____ County, State of Indiana, personally appeared _____, who swears under oath and under penalty of perjury that the contents of this document are true and accurate and were prepared solely by Robert Brookins who hereby acknowledges the execution of this instrument this _____ day of _____, 2001.

Signature of Notary Public: _____

Printed Name of Notary Public: _____

My commission expires: _____

County of Residency: _____

Robert Brookins