OPINION AND AWARD
IN THE MATTER OF THE ARBITRATION BETWEEN

Ohio Department of Rehabilitation and Correctional Reception Center
-AND-
Ohio Civil Service Employees Association AFSCME Local 11

Appearing for Correctional Reception Center
Buffy Andrews Labor Relations Specialist
William D. Bryant, Correctional Officer
David Crowe, Witness
J. Michael Fisher, Correctional Captain
Jon C. Fausnaugh, Investigator
Kathy Merrill, Labor Relations Officer
Allison Vaughn, Labor Relations Officer
Venita S. White, Administrative Assistant III, Bureau of Labor Relations

Appearing for OCSEA
Brenda J. Battle, Grievant
Thomas B. Cochran, OCSEA Assistant General Counsel
Jamie Kuhner, OCSEA Staff Representative
Sherrie A. Patrick, President Local 6545/Correctional Officer
Henry L. Robinson, Chief Steward
Kimberly Ann Szyperski, Law Clerk, OCSEA

CASE-SPECIFIC DATA
Grievance No.
No.27-05-20070807-1546-01-03

Hearing(s) Held
March 12, 2008

Closing Arguments E-mailed
Final Brief Emailed 4/21/08; Received 6/1/08

Case Decided
August 5, 2008

Subject
Transporting/Using Cell Phone Inside Agency

The Award
Grievance Denied

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

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I. The Facts

This is a disciplinary dispute involving the Ohio Correction Reception Center ("Agency," "CRC," or "Facility") a branch of the Ohio Department of Rehabilitation and Correction ("ODRC") and the Ohio Civil Service Employees Association AFSCME Local 11 (" Union or "OCSEA"),[1] representing Ms. Brenda Battle ("Grievant"). CRC is a multiple security portal and conduit for new inmates en route to parent correctional institutions. The Agency hired the Grievant as a Correction Officer on May 16, 1994[2] and removed her on July 31, 2007 for violating several work rules governing the use and possession of cell phones on the Agency's premises.[3] The Agency classifies cell phones as contraband and bans them from its premises. The events that precipitated the Grievant's termination are set forth below.

A. February 14, 2007–Cell Phone Found

The Grievant's problems began on February 14, 2007 when Correction Officer William D. Bryant found the Grievant's cell phone[4] lying on the Agency's premises between the Control Center and the front doors of Building No. 3, an area of relatively heavy pedestrian traffic.[5] Officer Bryant submitted the phone to Captain V. Michael Officer and asked Captain Fisher not to involve him in the matter. Captain Fisher honored that request, claimed he had found the phone, and submitted it to his superior.

The Agency launched an administrative investigation with Mr. Jon C. Fausnaugh ("Investigator Fausnaugh") as the investigator. Upon examining the memory of the Grievant's cell phone, Investigator Fausnaugh found photographs taken within the Agency of the following individuals in uniform: the Grievant, Officer William Underwood, and Sergeant Michael Ackison.[6] Investigator Fausnaugh also reviewed the

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[1] Hereinafter collectively referred to as the ("Parties").

[2] Joint Exhibit G.

[3] Joint Exhibit H.

[4] During their interview on February 15, 2007, Sergeant Ackison told Interviewer Fausnaugh that he had sold one of his cell phones to the Grievant approximately 2 months earlier. (Joint Exhibit I, at 2). In other words, Sergeant Ackison sold a cell phone to the Grievant in December 2006.

[5] Union's Post-hearing Brief, at 13.

[6] Joint Exhibit I, at 24-25; Joint Exhibit I, at 1.

internal phone book ("call Log") within the Grievant's cell phone and found several phone numbers.[7]

B. Interviews on February 15, 2007

These discoveries prompted Investigator Fausnaugh to interview several correction officers on February 15, 2007, including the Grievant. During her interview, the Grievant flatly denied bringing the cell phone into the Agency on February 14, insisting that she left the phone on the front seat of her car and did not lock the doors because February 14 was a frigid day, and she feared the door locks would freeze. She further claimed that upon returning to her car, the cell phone was missing. While searching for the phone, the Grievant enlisted assistance from Officer Tyler who dialed the cell phones number (614-579-6578)[8] with the hope that either he or the Grievant would hear the ring and locate the phone. Although the Grievant admitted using her cell phone inside the Agency to photograph Sergeant Ackison and Officer Underwood, she insisted that the photos were taken approximately one week earlier (February 8, 2007) when she mistakenly brought the phone into the Agency. Finally, the Grievant claimed that was the *one and only time* she brought a cell phone into the Facility. Investigator Fausnaugh asked the Grievant to let him review her cell phone records on the web. Her carrier, Verizon, made that data available on the web. The Grievant initially agreed but changed her mind, saying that Verizon Wireless Telephone Company ("Verizon") mailed hard copies of her cell phone records.

On February 15, 2007, Investigator Fausnaugh also interviewed Officer Underwood and Sergeant Ackison. During his interview, Officer Underwood denied any knowledge that a cell phone was in the Agency or that someone used a cell phone to photograph inside the Agency.[9] In contrast, Sergeant Michael Ackison admitted, during his interview, that "sometime within the last month" the Grievant had ***mistakenly*** brought the phone into the Agency. They used the camera to take photographs; Neither officer bothered to

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[7] Joint Exhibit I, at 1.

[8] *Id.*

[9] Joint Exhibit I, at 2.

report the cell phone to a superior officer.[10]

C. Grievant's Cell Phone Records

Although the Grievant said she had brought the phone into the Agency **only once**, the cell phone call log indicated that three calls were made from the phone during her shift.[11] This discrepancy prompted Investigator Fausnaugh to subpoena the cell phone records.[12] On February 27, 2007, ODRC subpoenaed the cell phone records from Verizon,[13] which supplied them on March 26, 2007. Upon examining those records, Investigator Fausnaugh discovered the following:

1. From January 1, 2006 through February 14, 2007 (182 days), the Grievant's cell phone made/received approximately 870 telephone calls during her shift, many of which were to her home phone number and the numbers of other correction officers. Also, many calls were made during the Agency's mid-day count.[14]
2. Inmates had used the institutional phone allotted to them to call approximately 40 of the 870 numbers in the cell phone records.[15] Four of those forty numbers were also called from the Grievant's cell phone during her shift and on dates when the inmates were housed in her unit (A-4). [16] Seventeen of the forty numbers were called from her cell phone to her home but were not called by inmates in Unit A-4 when the calls were made.[17] Nineteen of the forty numbers were called from the Grievant's cell phone when she was not on her shift.[18]
3. The cell phone had been used on May 18, 2006 to call Inmate Howard's girlfriend, Ms. Melissa Jones, and on October 18, 2006 to call Inmate David Crowe's wife, Ms. Lynn Crowe. Both calls were made during the Grievant's shift. When the calls occurred, both inmates were housed in the Grievant's assigned unit, and both calls occurred during the Grievant's shift.[19]

Remarkably, on May 18, 2006 and October 18, 2006, Inmates Howard and Crowe, respectively, were being transferred to other institutions. Furthermore, Mses. Jones and Crowe were scheduled to visit Inmates Howard and Crowe on May 18 and October 18, respectively. Customarily, inmates learned of their transfers

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[10] *Id.* (emphasis added).
[11] Joint Exhibit I, at 28-29.
[12] *Id.*, at 11.
[13] *Id.*, at 3.
[14] *Id.*, at 11.
[15] *Id.*, at 7.
[16] *Id.*
[17] *Id.*
[18] *Id.*
[19] *Id.*

shortly before they were moved. The Agency avoided pre-announcing either times or destinations of transfers because such knowledge could facilitate plans to escape. In any event, after learning of his transfer, Inmate Crowe asked the Grievant if he could use the inmates' institutional phone to tell his wife not to visit him on October 18, 2006, since he was being transferred that day. The Grievant declined his request to use the institutional phone but agreed to take care of it.

D. Interviews on April 6, 12, 13, & 16, 2007

Investigator Fausnaugh also conducted interviews on the foregoing dates. On April 6, he interviewed Ms. Crowe who admitted that she had planned to visit Inmate Crowe on October 18, 200. En route to the Agency, she received an anonymous call from a female who said: "I know I'm not suppose to do this, but Crowe wanted me to tell Officer Underwood he rode out this morning."[\20] The caller then advised Ms. Crowe not to visit the Agency because Inmate Crowe was being transferred that day.[\21]

On April 6, 2007, Investigator Fausnaugh interviewed Inmate Crowe, who admitted that he had asked the Grievant for permission to call his wife as set forth above and that the Grievant had assured him that she would contact his wife. He gave the Grievant his wife's home phone number. Although Inmate Crowe said he was uncertain that the Grievant actually telephoned his wife. However, that statement is strongly contradicted by a recording of a telephone conversation between Inmate Crowe and his wife on October 19, 2006. During that conversation, Ms. Crowe mentioned that, on October 18 2006, someone notified her not to visit him that day. Inmate Crowe immediately assumed it was the Grievant, specifically mentioned her name, and complimented her.[\22]

[\20] Joint Exhibit I, at 8,transcript of call between Inmate and Ms. Crowe, who makes the statement.

[\21] *Id.*

[\22] Witness the following exchange between Mr. and Ms. Crowe:

Inmate Crowe	-	Hello
Ms. Crowe	-	Good God!
Inmate Crowe	-	Did you drive all the way down there?
Ms. Crowe		No.
Inmate Crowe		***Ms. Battle called?***
Ms. Crowe		Yes.

On April 12, 2007, Investigator Fausnaugh interviewed Ms. Jones who stated that, on May 18, 2006, she received an anonymous call from a female who advised her not to visit Inmate Howard that day because he was being transferred. Ms. Jones believed the caller was one of the Agency's staff.[23] Also, Ms. Jones's cell phone number (937-626-6225) appeared on the Grievant's cell phone as an outgoing call made on May 18, 2006. On April 13, 2007, Investigator Fausnaugh interviewed Inmate Howard who categorically denied any recollection of a staff member telephoning Ms. Jones on the day of his transfer.[24]

Investigator Fausnaugh interviewed the Grievant for a second time, on April 16, 2007. This time, however, he had the Grievant's cell phone records in hand. When asked about the 870 calls from her cell phone within 182 days and specifically about the forty-seven numbers that inmates also had called, the Grievant said she shared the cell phone with her son who knew many individuals, including some inmates.[25] Investigator Fausnaugh then confronted the Grievant with the following evidence:

1. Inmate Crowe said that the Grievant had agreed to notify his wife not to visit him on October 18, 2006 because he was being transferred that very day.
2. On October 18, 2006, an anonymous female caller told Ms. Crowe not to visit Inmate Crowe because he was being transferred.
3. The Grievant's cell phone had been used to call Ms. Crowe's home phone number on October 18, 2006 and Ms. Jones on May 18, 2006.

The Grievant's response to this evidence was not a definitive denial. Instead, she said she did not recall telephoning either Ms. Crowe or Ms. Jones.

The foregoing evidence and discrepancies prompted the Agency to charge the Grievant with violating the following four Standards of Employee Conduct ("SOEC"):

Inmate Crowe	Thank you.
* * * *	
Ms. Crowe	No, she was like, I know I'm not supposed to do this, but Crowe wanted me to tell you that he rode out this morning.
Inmate Crowe	She's excellent.

Joint Exhibit I, at 5-9 (emphasis added).

[23] *Id.*, at 6.

[24] *Id.*

[25] *Id.*, at 7.

1. Rule 24, Interfering with, failing to cooperate in, or lying in an official investigation or inquiry.
2. Rule 30, while on duty or on state owned or leased property C. Unauthorized conveyance, distribution, misuse, or possession of other contraband.
3. Rule 38, Any act or commission not otherwise set forth herein 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.
4. Rule 46(A), Unauthorized Relationships A. 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.[26]

On June 20, 2007, the Agency held a pre-disciplinary hearing for the Grievant to assess the validity of these charges.[27] The Pre-disciplinary Hearing Officer found just cause for discipline,[28] and the Agency removed the Grievant on July 31, 2007.[29] The Union filed Grievance No. 27-05-20070807-1546-01-03 ("Grievance"), on August 7, 2007, arguing that the Grievant was removed for other than just cause and that she should be reinstated and made whole.[30]

The Parties could not resolve the matter and ultimately secured the Undersigned to hear the matter on March 12, 2008. During that arbitral hearing, the Parties presented their evidence and arguments before the Undersigned. No procedural issues implicated the Undersigned's jurisdictional to hear the substance of the dispute.[31] During the arbitral hearing, both Union and Management advocates made opening statements and introduced documentary and testimonial evidence to support their positions in this dispute. All documentary evidence was available for proper and relevant challenges; all witnesses were duly sworn and subjected to both direct and cross-examination. The Grievant was present throughout the proceedings.

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[26] Joint Exhibit E, at 1. Because these Rules are cited here, they shall not be cited in Section III below.

[27] Joint Exhibit F, at 1.

[28] *Id*, at 3.

[29] Joint Exhibit E, at 1.

[30] Joint Exhibit D.

[31] During the arbitral hearing, the Union alleged that the Agency refused to disclose all evidence within its possession that addressed issues in this dispute. The Agency denied this charge, and the Union's Post-hearing Brief did not pursue it. Without further discussion to develop this allegation and denial, the Arbitrator lacks an analytical foundation.

At the close of the hearing, the Parties elected to submit written closings (Post-hearing Briefs) that would be emailed to the Undersigned on or about April 14, 2008. For whatever reason, the Undersigned did not receive the Agency's emailed brief until June 1, 2008, although it was apparently emailed on April 21, 2008.

II. Stipulated Issue

Was the Grievant removed for just cause? If not, what should the remedy be?[32]

III. Relevant Contractual Provisions

A. Contractual Provisions

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 written reprimand(s) (with appropriate notion 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. Agencies shall forward a copy of any fine issued to employees, to OCB. Should a grievance be filed over the issuance of a fine and the grievance is settled prior to Step 4, the Agency shall forward a copy of the settlement to OCB. OCB shall maintain a database involving fines and share this information with the Union no less than quarterly.
e. One or more day(s) suspension(s);
f. Reduction of one (1) step; This shall not interfere with the employee's normal step anniversary. Solely at the Employer's discretion, this action shall only be used as an alternative to termination.
g. Termination.

Disciplinary action shall be initiated as soon as reasonably possible consistent with the requirement of the other provisions of this Article. An arbitrator deciding a discipline grievance must consider the timeliness of the Employer's decision to begin the disciplinary process.

The deduction of fines from an employee's wages shall not require the employee's authorization for withholding of fines.

If a bargaining unit employee receives discipline which includes lost wages or fines, the Employer may offer the following forms of corrective action:

1. Actually having the employee serve the designated number of days suspended without pay; or pay the designated fine or;
2. Having the employee deplete his/her accrued personal leave, vacation, or compensatory leave banks of hours, or a combination any of these banks under such terms as may be mutually agreed to between the Employer, employee, and the

[32] Joint Exhibit A.

Union.

24.06- Imposition of Discipline

The Agency Head or designated Deputy Director or equivalent shall make a final decision on the recommended disciplinary action as soon as reasonably possible but no more than forty-five (45) days after the conclusion of the pre-discipline meeting. . . . The employee and/or Union representative may submit a written presentation to the Agency Head or Acting Agency Head.

If a final decision is made to impose any discipline, the employee and Union shall be notified in writing. The old OSCEA Chapter President shall notify the Agency Head in writing of the name and address of the Union representative to receive such notice. Once the employee has received written notification of the final decision to impose discipline, the disciplinary action shall not be increased. Disciplinary measures imposed shall be reasonable and commensurate with the offense and shall not be used solely for punishment.

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ARTICLE 25-GRIEVANCE PROCEDURE
25.09—Relevant Witnesses and Information

The Union may request specific documents, books, papers or witnesses reasonably available from the Employer and relevant to the grievance under consideration. Such request shall not be unreasonably denied. . . .

This section applies to all steps of the grievance procedure: The Employer shall provide copies of documents, books, and papers relevant to the grievance without charge to the Union, unless the request requires more than ninety (90) minutes of employee time to produce and/or copy, at which time the Union will be charged $0.10 per page.

IV. Summaries of the Parties' Arguments

A. Summary of Agency's Arguments

1. This dispute does not implicate the Fourth Amendment, which, according to the U.S. Supreme Court, neither addresses nor limits the use of information that a third party conveys to the government.[33] Furthermore, for several reasons, it was reasonable for ODRC to subpoena a copy of the Grievant's cell phone records for one year. First, the presence of the cell phone on the Agency's premises created a security breach. Second, the Grievant's cell phone contained outgoing calls that appeared to have been made during her duty hours. Third, the Grievant admitted that she had bought her cell phone on the Agency's premises before February 15, 2007, but she could only estimate that it was approximately one week before February 15. However, Sergeant Ackison who was photographed on the Agency's premises with the Grievant's cell phone stated that the phone was on the Agency's premises from two to four weeks prior to February 15, 2007.
2. The Grievant violated Rule 30 by bringing her cell phone into the Agency at least three separate times: When she telephoned Ms. Jones on May 18, 2006;[34] When she telephoned Ms. Crowe on

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[33] Agency's Post-hearing Brief, at 6, Citing, United States v. Miller, 96 S.Ct. 1619, 1624 (1976) (citations omitted) The Court reaffirmed its position in Securities and Exchange Commission, et al., v. Jerry T. O'Brian, Inc. et al., 104 S.Ct. 2720 (1984).

[34] Joint Exhibit I, at 180, line 801; Interview with Ms. Jones.

October 18, 2006;[35] And when she photographed Officers Ackison and Underwood in January or February 2007.[36] In addition, circumstantial evidence indicates that the Grievant made or received 870 calls on her cell phone over 182 days from within the Agency.[37]

3. The Grievant violated Rule 46 by contacting Ms. Crowe and Ms. Jones, notifying them not to visit Inmates Crowe and Howard, respectively. Furthermore, when Ms. Crowe answered the Grievant's call on May 18, 2006, the Grievant said,"I know I'm not supposed to do this." That statement shows the Grievant knew that she was acting improperly.[38]
4. The Grievant violated Rule 38 by either making or receiving approximately 870 calls during her working hours. Circumstantial evidence contradicts the Grievant's denial that she either made or received these calls during her shift. For example, her cell phone records indicate that after her initial interview, on February 15, 2007, she received no more calls during her shift. Also, if, as the Grievant claims, her son was using the cell phone during her shift, why would he suddenly stop after the Grievant's February 15 interview? Also, why would her son call the Grievant at home when he knew or should have known that she was working?
5. It is irrelevant how the phone got inside the Agency on February 14, 2007. What is relevant to the Grievant's discipline is that her cell phone was inside the Agency on at least three other occasions and that the Grievant used the phone to contact inmates' family and friends, during which time she revealed sensitive information.
6. Removal is the proper measure of discipline in this case
   a. Although the SOEC contemplate measures of discipline ranging from a two-day suspension or fine to removal, the Grievant's offense(s) warrant removal for the first infraction. The SOEC specifically define cell phones as unlawful contraband.[39] A two-day fine or suspension would be applicable where, for example, the Grievant had inadvertently brought the cell phone into the Agency's premises on one occasion, made no calls, and immediately reported it. In this case, she brought the cell phone into the Agency at least three time, took photos, and failed to report the phone. Moreover, she telephoned Ms. Jones on May 18, 2006[40] and Ms. Crowe on October 18, 2006.[41] Finally, substantial, credible, circumstantial evidence supports an inference that she routinely transported a cell phone into the Agency.[42]
   b. Without more, the two intentional telephone calls to Ms. Crowe and Ms. Jones warrant removal. The Grievant fully understood the impropriety of her action as reflected by her comment to Ms. Crowe: "I know I'm not supposed to do this. . . ." [43] and her attempt to conceal

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[35] Joint Exhibit I, at 257, line 3472; Interview with Mrs. Crowe.

[36] *Id.*, at 1.

[37] *Id.*, at 62, 63 (summary of inmates, calls & telephone numbers, pp. 106-158, punch records detailing when Grievant was on duty, pp. 159-309, Grievant's cellular telephone records).

[38] *Id.*, recording of telephone call between Inmate Crowe and Ms. Crowe, as well as the Grievant's efforts to conceal her cellular telephone number by using *67. *See also Joint Exhibit* I, at 52 (Verizon Codes, p. 180, line 801, p. 257, line 3472)

[39] Joint Exhibit B, at 4.

[40] Joint Exhibit I, at 180, line 801. *See* also Ms. Jones' interview.

[41] *Id,* at 257, line 3472. *See* also Mrs. Crowe's interview.

[42] *Id.*, at 62, 63 (summary of inmates, calls & telephone numbers, pp. 106-158, punch records detailing when Grievant was on duty, pp. 159-309 Grievant's cellular telephone records).

[43] *Id.*, at 52 (recording of telephone call between Inmate Crowe and Ms. Crowe) .

her phone though the *67 code.[44]

c. The Grievant was less than forthright during and interfered with the administrative investigation.

B. Summary of Union's Arguments

1. Based on arbitral interpretation of the Collective-bargaining Agreement, the Agency must establish its case against the Grievant by clear and convincing evidence.
2. The Fourth Amendment of the United States Constitution, made applicable to the states through the Fourteenth Amendment, prohibits the Agency from using any of the Grievant's cell phone records beyond those for February 2007 because the Agency lacked probable cause to search the Grievant's cell phone records beyond that month. Consequently, the search of the Grievant's phone records beyond February 2007 was fatal for over breadth.
   a. Evidence indicates that the Grievant might have used the phone during her duty hours on February 9, 12, and 13, 2007. But the Agency lacks justification to review the Grievant's phone records prior to February 2007.
   b. Two other considerations cast further doubt upon the need for the pre-February 2007 search:
      (1) The Agency never interviewed all available witnesses, and those who were interviewed–Sergeant Ackison, Officer Underwood, Inmates Crowe and Howard–apparently did not say they saw the Grievant with a phone in her possession on the Agency's premises.
      (2) The photos of Sergeant Ackison and Underwood in the phone were taken on the same day in February 2007, which suggests that the Grievant only brought her phone into the Agency on that day. Thus, the Arbitrator should exclude phone records from January 2006 through January 2007.
3. Even if the Arbitrator admits the pre-February 2007 phone records, they merely raise a suspicion that the Grievant carried the cell phone inside the Agency prior to February 2007 or that she made all calls attributed to her. Several other considerations tend to undermine the proposition that the Grievant made those calls.[45]
4. It is unlikely that the Grievant's cell phone was discovered where the Agency alleges given the number of pedestrians in the area when the phone was lost.
5. In addition to those reasons, the Grievant's claim that her son made the calls in question essentially neutralizes the Agency's evidence. Thus, the Grievant may be disciplined for just cause only for one episode of misconduct, which hardly justifies removal given her record with the Agency and the principles of progressive discipline.
6. The Agency failed to establish that the Grievant was the exclusive user of the cell phone or that she used the phone inside the Agency to contact Ms. Crowe and Ms. Jones.
   a. The Agency's charge that the Grievant contacted Ms. Crowe and Ms. Jones fails for several reasons.
      (1) First, the phone records on which the Agency relied to sustain that charge were obtained in violation of the Grievant's Fourth Amendment rights as set forth above.
      (2) Second, even if the phone records are admitted into evidence, they show only that Ms. Jones's number was on the cell phone. However, one must balance this evidence against Inmate Howard's staunch denial that someone telephoned his girlfriend from the Agency and the Grievant's denial that she called Ms. Jones.

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[44] Joint Exhibit I, at 52 (Verizon Codes, p. 180, line 801, p. 257, line 3472).

[45] Union's Post-hearing Brief, at 28.

(3) Third, assuming, arguendo, that the Grievant contacted these individuals, neither Rule 38 nor Rule 46(A) was thereby violated because neither Rule explicitly prohibits staff from advising inmates' relatives not to visit inmates on certain days.

(4) Nor did the alleged misconduct implicate the Agency's security as required in Rule 38 because there is no proof that the Grievant actually conveyed information about the inmates' relocations.

(a) Both the transcript and Ms. Crowe's testimony establish that the caller merely informed her not to come to the Agency on the date in question. Absent more specific information, there is no violation of Rule 38.

(5) Nor is there an established violation of Rule 46(A), which addresses relationships between inmates and the Agency's staff, since there is no evidence that the Grievant had a relationship with either Ms. Crowe, Ms. Jones, Inmate Crowe, or Inmate Howard. Finally, even if the Grievant's calls violated the spirit of Rule 46(A), removal was not thereby warranted.

V. Preliminary Considerations

A. Evidentiary Preliminaries

Because this dispute involves discipline, the Agency has the burden of proof or persuasion regarding its charges against the Grievant. To establish those charges, the Agency must adduce ***preponderant*** evidence in the arbitral record as a whole, showing *more likely than not* that the Grievant engaged in the alleged misconduct. Doubts regarding the existence of any alleged misconduct shall be resolved against the Agency. Unless the Agency thus establishes the purported misconduct, it cannot prevail, *irrespective* of the strength or weakness of the Union's defenses. Similarly, the Union has the burden of persuasion (preponderant evidence) as to its allegations and affirmative defenses, doubts about which shall be resolved against the Union.

B. Proper Measure of Persuasion

The Union argues that the proper measure of persuasion in this dispute is the clear and convincing standard rather than the preponderant standard. In support of this position, the Union notes that the Grievant was charged with conduct sufficiently serious to cause her removal and that the Grievant had a blemish-free disciplinary record when she was terminated. In addition, the Union notes that other arbitrators have interpreted the Parties' Collective-bargaining Agreement to require the clear and convincing standard in

disciplinary disputes. In contrast, the Agency takes no position on this issue.

Preponderance of evidence is the proper measure of persuasion in this case. First, as is the case in civil litigation, with certain notable exceptions, the preponderant standard is undoubtedly the "workhorse" in arbitral disciplinary disputes. In grievance arbitration, the clear and convincing standard is usually applied where the charges against an employee are particularly stigmatizing and, therefore, could make it inordinately difficult for the employee to obtain future employment. Before saddling the employee such additional hardships, one should be "*clearly convinced*" that the employee is guilty as charged. Conversely, the preponderant standard only requires a showing that *more likely than not* the employee is guilty as charged. Examples of stigmatizing misconduct that warrant the clear and convincing standard include sexual harassment, theft, and drug abuse.

Second, the Union has not alleged that the alleged misconduct in this case is inordinately stigmatizing. Instead, the Union merely contends that the charges against the Grievant are sufficiently "serious" to cause the Agency to fire her and references the Grievant's lack of active discipline.[\46] However, neither an employee's disciplinary history nor the measure of discipline associated with a given charge informs the selection of a measure of persuasion. Finally, while citing how other arbitrators have interpreted the Parties' Collective-bargaining Agreement to require clear and convincing evidence, the Union points to no specific contractual provision that either explicitly or implicitly mandates, or even suggests, the clear and convincing standard. Based on the foregoing analysis, the Arbitrator holds that the preponderant rather than the clear and convincing standard is proper in the instant dispute.

VI. Substantive Analysis and Discussion

A. Presence of Cell Phone Inside Agency on February 14, 2007

Before discussing the substantive issues in this dispute, another prefatory observation is indicated. Although discovery of the Grievant's cell phone inside the Agency on February 14, 2007 was catalytic in

[\46] Union's Post-hearing Brief, at 23-24 (citations omitted).

this dispute, none of the charges against her flowed from that discovery. Instead, data in the cell phone call log together with the Grievant's conflicting responses precipitated an investigation that triggered charges, which led to her removal. Therefore, further discussion of the cell phone presence inside the Agency is not indicated.

B. Permissible Scope of Subpoena

The issue here is whether the Agency had probable cause to search thirteen months of the Grievant's cell phone records, or was that search fatally overbroad? In this respect, the Union contends that the Agency lacked probable cause to search the Grievant's records beyond February 2007 and cites *U.S. v. Nagalingam* ("*Nagalingam*")[47] to support this proposition. The Union interprets *Nagalingam* as holding that searches must contain time limits consistent with evidence of when alleged offenses likely occurred.[48] In the instant case, the Union claims that the Agency lacked credible evidence that the Grievant brought the cell phone into the Agency earlier than in February 2007. To support this position, the Union stresses that the Grievant credibly stated that her son often used her cell phone while she was working. This position suggests that the Union accepts that Mr. Fausnaugh observed three calls in the cell phone call log that occurred on three different dates during the Grievant's duty hours.

The Agency disagrees with the Union's interpretation of *Nagalingam* and with the foregoing factual pattern.[49] The Agency essentially argues that confusion regarding the timing and frequency with which the Grievant brought her cell phone into the Facility justified the thirteen-month search of the cell phone records. Specifically, the Agency notes that the Grievant's cell phone contained calls that appeared to have

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[47] 166 F. 3rd 1266 (6th Cir. 1998).

[48] Union's Post-hearing Brief, at 25.

[49] The Agency makes several non-responsive arguments to the Union's probable cause objection. Although the arguments are listed below, further discussion of them is not indicated. Specifically, the Agency argues that the Fourth Amendment does not limit the use of information that a third party submits to the government. Applied to the instant case, this argument posits that Verizon, a third party to the instant dispute, may submit the Grievant's phone records to the Agency without offending the Fourth Amendment. Be that as it may, the argument misses the thrust of the Union's Fourth Amendment objection, which addresses probable cause to subpoena thirteen months of the Grievant's cell phone records.

been made during her duty hours on three different dates, even though she claimed to have brought the phone into the Facility once. Also, the Grievant admitted that she had bought her cell phone into the Agency approximately one week before her February 15 interview. Finally, the Agency notes that in contrast to the Grievant's statements, Sergeant Ackison, who was photographed inside the Agency with the Grievant's cell phone, stated that the phone was on the Agency's premises between two and four weeks before February 15. These conflicting statements and facts constituted probable cause to reasonably extend the scope of its search of the Grievant's cell phone records to cover all likely dates that the phone was inside the Agency.

C. Essence of *Nagalingam*

Since the Agency cites no competing judicial precedent on this point, the Arbitrator views *Nagalingam* as controlling this issue and turns now to an interpretation and application of that decision to the issue of over breadth. Nagalingam provides in relevant part:

> The Fourth Amendment requires warrants to particularly describ[e] the ... things to be seized. But the degree of specificity depends on the crime alleged and the items sought. A general description will suffice when a more specific description is *unavailable*. Similarly, the absence of a time limitation does not make a warrant overbroad if the magistrate judge is unable to determine an appropriate time frame. But *when there is information available to place a time frame on a search of records, a warrant is overbroad if it lacks such limits.*[\50]

The pith of the Parties' contentions here is whether the Agency had probable cause to subpoena thirteen months (January 1, 2006 through February 2007) of the Grievant's cell phone records. Absent probable cause, the subpoena was overbroad, and subpoenaed evidence that falls without the realm of probable cause is inadmissible into the arbitral record. The basis for such an evidentiary exclusion would be the Grievant's status as a public employee who enjoys the full panoply of protection from unreasonable searches and seizures under the Fourth Amendment of the United Sates Constitution made applicable to the states through

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[\50] *Id*., at 1218 (emphasis added) .

the Fourteenth Amendment.

The Arbitrator holds that although the nature of the Grievant's misconduct did not render the Agency "unable" to set a specific time limit on a search of the Grievant's cell phone records, a thirteen-month search was reasonable and for probable cause. First, the Agency was justifiably unsure about the number of prior violations. Had the cell phone been inside the Agency one, two, three, or four weeks before the February 15 interviews? Instead, the Agency was left with the Grievant's violations and her assertion that the phone was last inside the Agency one week before February 15, an assertion that Sergeant Ackison flatly contradicted.

Second, by its nature the misconduct could (and very well might) have been continual before February 2007, since the misconduct required only a capability to defeat the Agency's security and a willingness to ignore the Agency's rules. Third, the Grievant had plainly demonstrated both capacities, the latter occurring where she elected to photograph her coworkers–with the phone she claimed to have accidentally brought into the Agency–rather than to report the phone to Management.[\51] Finally, and perhaps most important, if the Grievant had indeed brought a cell phone into the Agency on other prior occasions, such prior misconduct very well could pose ominous ***present consequences*** for the Agency if, for example, inmates had either directly or indirectly accessed the phone. Confronted with known serious violations that were easily repeated and could have serious present consequences, the Agency clearly had probable cause to search the Grievant's prior cell phone records.[\52] The only remaining issue is the scope of that probable cause search. In other words, how far back into the cell phone records was the Agency entitled to search?

Based on the foregoing discussion, the Arbitrator holds that whatever the maximum scope of the Agency's probable cause search, it clearly had probable cause to search thirteen months of the Grievant's cell phone

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[\51] Clearly the Grievant has demonstrated both of these capacities in this case by bringing the phone into the Agency and cavalierly using that "contraband" to photograph Officers Ackison and Underwood.

[\52] The prospect of serious present consequences from prior, easily perpetrated violations founds the probable cause in this case.

records in this case.[53]

D. 870 Calls From Inside Agency In 182 Days

The issue here is whether the Grievant brought her telephone into the Facility 182 days and either made or received 870 calls inside the Agency during that time. This was one of the findings in Investigator Fausnaugh's investigative report,[54] and one of the charges on which the Agency relied when it elected to remove the Grievant.[55]

The Agency argues that the Grievant made the 870 calls. In support of that claim, the Agency relies solely upon the subpoenaed records of the cell phone between January 1, 2006 and February 27, 2007 ("Records") which indicate that, within that period, the Grievant's cell phone was used to make and/or receive 870 calls during her shift, which was from 5:50 a.m. to 2:00 p.m.[56] Furthermore, the records show that the calls were commonly made between 10:30 and 11:30 a.m., which, according to the Agency, coincides with the Mid-day count.[57] This is the extent of the Agency's evidence, all of which is entirely circumstantial; No one claimed to have seen the Grievant making or receiving cell phone calls from within the Facility. Nevertheless, the Agency contends that this circumstantial evidence supports a reasonable inference that more likely than not the Grievant made 870 calls within 182 days while on duty within the Agency.

The Union disagrees and offers several arguments to bolster its general contention that the foregoing evidence does not show that the Grievant made the 870 cell phone calls. First, the Union notes that the Grievant has many friends who are incarcerated and that her son frequently used her cell phone.[58] In this

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[53] Arguably, the maximum scope of the Agency's search was broader, perhaps substantially so. Given the nature of the threat, the Agency's search could have legitimately enveloped not only the present misconduct, but also prior misconduct that carried the threat of serious present or future consequences. In short, the Agency's search could cover the entire threat to its operations rather than only the present manifestations of the threat. The scope of a search may be extended to cover the true dimensions of a threat that can inflict serious present or future concequences.

[54] Joint Exhibit I, at 11.

[55] Joint Exhibit E, at 1.

[56] *Id.*, at 1; Joint Exhibit I, at 8.

[57] *Id.*

[58] Union's Post-hearing Brief, at 10.

respect, the Union notes that Investigator Fausnaugh failed to interview the Grievant's son.[59] Also, the Union stresses that Investigator Fausnaugh did not interview witnesses who likely would have seen the phone laying where it was allegedly found on February 14, 2007 and that, given the traffic in that area (approximately 450 employees excluding visitors[60]), someone should have quickly found the phone.[61] Second, the Union notes that Investigator Fausnaugh, himself, was not convinced that the Grievant made the 870 calls. Instead, he had a mere "belief" that she made the 870 cell phone calls from within the Facility.[62]

Third, the Union offers three arguments, some of which seem to raise procedural issues suggesting that Investigator Fausnaugh failed to conduct a thorough investigation[63] and others that apparently attack Investigator Fausnaugh's analysis of the situations confronting him during the investigation. First, the Union alleges that Investigator Fausnaugh failed to consider how difficult it would have been for the Grievant to have made 870 cell phone calls without someone observing her making at least some of those calls. In this respect, the Union first contends that correction officers on the Grievant's shift were in plain view of their coworkers and inmates, and that both groups were motivated to report misconduct. Duty motivated her coworkers, while the prospect of gaining leverage motivated inmates. Furthermore, the Union notes that Investigator Fausnaugh failed to ask correction officers stationed in the Grievant's assigned area whether they saw her using the phone. Next, the Union observes that the Agency failed to test the signal strength of the Grievant's phone to assure that it could make and receive calls from within the Facility.[64] Also, the Union asserts that given the traffic in the area where the phone was found, it was highly unlikely

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[59] Union's Post-hearing Brief, at 15.

[60] Direct testimony of Correction Officer Patrick.

[61] Union's Post-hearing Brief, at 14-15. These arguments seem to address whether the cell phone was in fact found where Officer Bryant said he found it. The Union does not develop this argument, and the nature of its inference or conclusion is unclear.

[62] *Id.*

[63] However, the Union did not couch its arguments in that specific language.

[64] Union's Post-hearing Brief, at 12.

that it lay there unnoticed for sixteen hours.[65] Finally, the Union argues that Investigator Fausnaugh never considered how difficult it would have been to bring a cell phone into the Facility 182 days without detection.

The Arbitrator concludes that more likely than not the Grievant transported a cell phone into the Agency within the 182-day period in question. Because evidence in the record is purely circumstantial, its probative value is at best coextensive with the strength of the reasonable inference(s) to be drawn from that evidence. On its face, the record clearly establishes that for 182 days between January 1, 2006 and February 27, 2007, 870 calls were either made or received from the Grievant's cell phone during her shift. The first question is whether on its face that evidence supports inferences that: (1) The calls were made/received from within the Agency, and (2) The Grievant made/received those calls.[66] Absent a persuasive explanation, one can reasonably infer that more likely than not, the owner of a cell phone made and received the calls charged to that phone.

Therefore, the issue now becomes whether the Union's responsive arguments and evidence rebut this inference. First, the Union challenges the inference that the Grievant had physical possession of the phone during her shift by arguing that, during that period, her son had the cell phone, knew several inmates, and likely made/received the calls. Second, the Union suggests that the Agency had a duty to investigate this allegation by interviewing the Grievant's son.

These arguments are unpersuasive. First, the Grievant's claim is actually an affirmative defense to the inference that she had possession of her cell phone during all times relevant to this dispute. Therefore, the Union and not the Agency had the burden of persuasion to establish its affirmative defense by preponderant

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[65] Union's Post-hearing Brief, at 13.

[66] The Union does not dispute the number of calls made, the period within which they were made, or the time of day in which they were made.

evidence in the arbitral record as a whole.[67] In short, the Union needed to produce either testimonial or documentary evidence[68] from the Grievant's son stating when and how he and the Grievant shared the phone. Absent such evidence from the Grievant's son, the foregoing inference from the record that the Grievant had the phone remains unrebutted.[69] Accordingly, the Arbitrator holds that preponderant evidence in the arbitral record as a whole establishes that more likely than not the Grievant had possession of her phone during the time in question and made/received the foregoing 870 calls from her cell phone.

The next issue is whether those calls were made from within the Facility. Here, the Agency reasons or infers that the Grievant made the calls from within the Facility because the calls were made during her shift, most likely during mid-day count since most calls were made between 10:30 and 11:30 a.m.[70] The Union offers several arguments in rebuttal, stressing: (1) Circumstances that contraindicate the Grievant's making 870 cell phone calls from within the Facility; and (2) Investigator Fausnaugh's investigative and analytical lapses. These arguments are discussed in turn below.

1. Circumstantial Hurdles

First, the Union argues that circumstances in Unit A-4, where the Grievant was assigned, would have precluded her from making 870 unobserved and unreported calls, especially where some lasted more than fifty minutes. Specifically, the Union notes the following considerations: (1) The Grievant was constantly

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[67] The Agency's duty to conduct a thorough investigation does not oblige it to pursue every allegation that the Grievant makes. Instead, the Agency must gather all relevant, probative evidence needed to substantiate its charges against the Grievant. Once the Agency adduces preponderant evidence of the element(s) of its charge(s) against the Grievant, the Union may directly attack the probative value of that evidence through cross-examination, objections, etc. In addition, the Union may indirectly attack that evidence through affirmative defenses which, the Union has the burden of raising and establishing. Affirmative defenses may not be established by merely *articulating* them; the burden is one of persuasion and not of production. Instead, the Union must establish (prove) its affirmative defenses by adducing preponderant evidence in the arbitral record as a whole. Therefore the Union's reliance on the Grievant's mere articulation that her son had the cell phone during the time in question is misplaced.

[68] Of course any written statement from the son could encounter probative challenges in the form of hearsay.

[69] For example, had the son testified at the arbitral hearing, perhaps he could have explained why he called the Grievant at home on several occasions when he either knew or should have known she was at work. In light of this observation alone, the claim that the son had the phone and made the calls offends reason.

[70] Joint Exhibit I, at 11.

within plain view of her coworkers who are duty-bound to report such misconduct; and (2) Inmates are highly vigilant and eager to report staff misconduct, using it as a quid pro quo for extra privileges and/or leverage.

Again, these arguments fall short of the mark. First, evidence in the arbitral record suggests that not all correction officers honor their duty to report coworker misconduct. For example, neither Sergeant Ackison nor Officer Underwood reported that the Grievant had a cell phone within the Facility. Indeed, rather than report it as duty required, they apparently posed as she photographed them with her contraband (cell phone). The regrettable point here is that the mere existence of a duty hardly guarantees performance thereof. In response to the Union's concern about the absence of inmates' reports that the Grievant was using a cell phone on Unit A-4, the Agency raises several credible, explanatory scenarios. First, the Agency argues that when she was on Unit A-4, the Grievant was not constantly within eyeshot of inmates. Such is the case, for example, when inmates are in "lock down." Also, the Agency stressed that rather than actually report a staff' member's misconduct, inmates often remain silent and attempt to blackmail the staff member. The foregoing observations, arguments, and evidence fend off the contention that circumstances on Unit A-4 necessarily would have triggered reports of the Grievant's using a cell phone there.[\71]

The Union's second major argument here is the alleged improbability that the Grievant could have successfully secreted her cell phone past security frequently enough to make 870 calls. However, Correction Officer Sherrie A. Patrick (President of Local 6545) testified that after removing the Grievant, the Agency tightened its security at the Facility's entrances. Therefore, gaps in security must have existed, gaps that perhaps allowed the Grievant to get her phone into the Facility.[\72] Finally, as discussed below, the

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[\71] Also, absent clarification, frequent use of the cell phone to call the Grievant's home phone number when she was clearly working strengthens the inference that the the Grievant used the phone from within the Facility to call her home. Assuming, arguendo, that her son had the phone during the times in question, who would he have been calling at the Grievant's home when she was at work?

[\72] This conclusion does not violate the tort-based rule that correcting an injury-causing defect after the fact does not constitute evidence of guilt by the party who effected the corrections. The distinction is that, in this case, the fact that security gaps existed and were closed does not redound to the Agency's detriment.

Grievant clearly got her phone through security on at least three occasions, which suggests that she very well might have found a gap in the Agency's security. These considerations persuade the Arbitrator that the Union may not rely on the global efficacy of the Agency's security to rebut the inference that the Grievant used her phone within the Agency numerous times during the 182 days in question.

2. De Facto Allegations of Procedural Error

Here, the Union first alleges that Investigator Fausnaugh failed to interview all relevant witnesses. On its face, this argument suggests a procedural error–Investigator Fausnaugh did not conduct a thorough investigation. That the cell phone calls coincided with the Grievant's working hours is indisputable. Therefore, the question becomes, if not the Grievant, then who made the calls? The only other person of interest is the Grievant's son, who neither testified nor offered a written statement detailing how and when he shared the Grievant's cell phone. Beyond the Grievant's son, the Union offers no one else who might have used the Grievant's phone during the 182 days in question.

Second, the Union stresses that the Agency never tested the signal strength of the Grievant's phone and, even worse, disallowed the Union to do so. To this objection, the Agency merely asserts that the Union raised this issue at Step 5 of the negotiated Grievance procedure,[\73] without either citing a contractual provision that prohibits Step-5 challenges or otherwise explaining its cryptic response. Nothing in the arbitral record supports the Agency's rejection of the Union's request to check the signal strength of the Grievant's cell phone within the Facility.

Unlike the Union's arguments thus far in this opinion, this one poses a problem for the Agency, though they happen not to be fatal under the circumstances of the instant case. First, absent unambiguous contractual or statutory language to the contrary, the Union has a manifest *right* to crosscheck and expand upon the Agency's investigation. This right saddles the Agency with a corresponding *duty* to cooperate with

[\73] Agency's Post-hearing Brief, at 5.

the Union's reasonable efforts to conduct its own investigation. In the instant case, the Union's effort to check the signal strength of the Grievant's cell phone is a legitimate, logical consideration that, under different circumstances, could have become an effective affirmative defense. Nevertheless, in the instant dispute, this procedural error is not fatal to the Agency's cause. Independent evidence establishes that the Grievant used her cell phone to make calls from within the Facility on at least two occasions when she telephoned Ms. Crowe and Ms. Jones. Although, these two events do not establish that the Grievant's cell phone never encountered problems with signal strength from within the Agency, those successful calls demonstrate that signal strength was not a perpetual problem. Moreover, this evidence suggests that signal strength might not have posed any problem, depending on the location of the phone when the calls were made/received.[74] Based on this analysis, the Arbitrator holds that the Agency's unexplained (unjustified) denial of the Union's request to test the cell phone signal strength constitutes *serious* procedural error that, but for independent facts in this case, would have been *reversible* procedural error.[75] Nevertheless, for the reasons set forth above, the Arbitrator holds that more likely than not the Agency's procedural error, in this case, did not substantively harm either the Union or the Grievant.

Finally, the Union notes that Investigator Fausnaugh merely *believed* but was not *convinced* or persuaded that the Grievant made the 870 calls.[76] The Agency disagrees with Investigator Fausnaugh and essentially adopts the hearing officer's position.[77] Whatever distinction there is between a belief and a conviction, evidence in the record presents an inculpatory finger towards the Grievant, establishing that during the 182 days in question, she made/received the calls charged to her cell phone during her shift and from within the

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[74] Barring a total loss of signal strength throughout the Grievant's entire work area, a signal-strength test could very well prove inconclusive as to whether the Grievant used her cell phone within the Agency, since there is likely to be lingering disagreement about where she might have used it.

[75] In the Arbitrator's view, the Agency should carefully review its procedures and receptiveness to the Union's efforts to conduct its own investigations in future disputes. Continued recalcitrance such as that displayed here could very well redound to the Agency's detriment.

[76] Here the Union notes that, in contrast, Investigator Fausnaugh found that "the evidence conclusively substantiates" that the Grievant had her cell phone inside the Facility at least four times.

[77] Joint Exhibit F, at 3.

Facility, and the Arbitrator so holds.

E. Violation of Rule 30

1. 870 Phone Calls

The issue here is whether the Grievant violated Rule 30 bringing the cell phone into the Facility and making/receiving cell phone calls therein. Rule 30 provides: "While on duty or on state owned or leased property the: C. Unauthorized *conveyance*, distribution, *misuse*, or *possession* of other contraband."[\78] There is no dispute but that cell phones constitute "contraband" under Rule 30 and that the Grievant lacked authorization to bring her cell phone into the Facility.[\79] Resolution of the issue here requires one to assess the credibility and probative value of the records in light of the Union's contradictory arguments and evidence as set forth below.

2. Conveyance of Cell Phone and Photographs

The issue here is whether the Grievant violated Rule 30 by bringing her phone into the Agency and using it to photograph Sergeant Ackison and Officer Underwood early in February 2007. Because the photographs were taken inside the Agency and were in the memory of the Grievant's cell phone, there is no doubt but that she had the cell phone inside the Facility and used it to photograph Sergeant Ackison and Officer Underwood. Nor does the Union contest these facts. These facts alone establish the following violations of Rule 30: "unauthorized conveyance" because she brought the phone into the Agency; "misuse" because she used it within the Agency to photograph her fellow officers, and "possession" because she had the phone on her person within the Facility.[\80]

[\78] Emphasis added.

[\79] Since the Parties have not specifically addressed whether Rule 30 distinguishes between intentional and unintentional conveyance of contraband into the Facility, the Arbitrator assumes that Rule 30 makes no such distinction. Consequently, to establish a violation of Rule 30, the Agency needs to demonstrate only that the Grievant transported a cell phone into the Facility. This is not to say, however, that a lack of intent would not impact the remedial dimensions of a dispute, i.e., the severity of discipline imposed under Rule 30.

[\80] The Grievant's claim that she inadvertently brought the cell phone into the Facility is not an issue as to whether she *violated* Rule 30 because in the first instance, as discussed above, intent apparently is not an element of the rules governing contraband inside the Agency.

Finally, once the Grievant was inside the Agency and discovered the phone on her person, reason suggests and duty required that she should have reported it to her supervisor. Instead, she used the phone camera to photograph her fellow officers. However, since the Agency did not specifically charge the Grievant with failing to report the cell phone, that conduct warrants no further consideration in this opinion. The extent of the Grievant's misconduct, therefore, is violating Rule 30 by bringing the cell phone into the Agency and using it to photograph her fellow officers, and the Arbitrator so holds.

3. Contacting Ms. Crowe

The final issue under Rule 30 is whether the Grievant used her cell phone within the Facility to contact Ms. Jones and Ms. Crowe. The Agency maintains that the Grievant committed these offenses and proffers the following evidence and arguments in support of that position. Inmate Crowe asked the Grievant if he could use the inmate's phone to notify his wife to cancel her scheduled visit on October 18, 2006 because he was being transferred to an institution in Toledo, Ohio on that day. The Grievant denied the request to use the phone but agreed to assist Inmate Crowe, who then gave the Grievant Ms. Crowe's home phone number. On October 18, 2006, an anonymous female telephoned Ms. Crowe on her cell phone and said: "I know I'm not supposed to do this, but Crowe wanted me to tell Officer Underwood he rode out this morning."[\81] Ms. Crowe aborted her visit to the Agency on October 18.[\82] Inmate Crowe used the inmate's phone system to telephone Ms. Crowe from the Toledo institution, and the Agency recorded their conversation. Immediately upon hearing that Ms. Crowe did not visit the Agency on October 18, Inmate Crowe specifically asked if the Grievant had called, and Ms. Crowe said yes. Inmate Crowe then praised the Grievant. In addition to the foregoing evidence, the Grievant's cell phone called Ms. Crowe's home telephone number on October 18, 2006 during the Grievant's shift. The Agency argues that the foregoing

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\81 Joint Exhibit I, at 8,transcript of call between Inmate and Ms. Crowe, who makes the statement.

\82 Because Ms. Crowe was en route to visit Inmate Crowe and had forwarded calls from her home phone to her cell phone, the Grievant's call to Ms. Crowe's home phone went to her cell phone. After she received the anonymous call, Ms. Crowe aborted her trip to the Agency.

facts demonstrate a violation of Rule 30, but the Union denies the existence of those facts contending that they were not established under either the clear and convincing or the preponderant standard.

The Agency's position is more persuasive on this issue. First, as discussed above, the proper measure of persuasion or quantum of proof for this dispute is preponderance of the evidence rather than clear and convincing evidence. Second, the Union insists that the Grievant's allegation that her son had her telephone most of the time has also been dismissed because the son neither testified at the arbitral hearing nor submitted a statement explaining when and how he shared the phone with the Grievant. Third, reasonable inferences from the foregoing circumstantial evidence point inexorably toward the Grievant and satisfy the preponderant standard as to whether the Grievant used her cell phone while inside the Agency to telephone Ms. Crowe on October 18, 2006 for the express purpose of advising Ms. Crowe not to visit Inmate Crowe that day. That the caller remained anonymous is a consideration, but not a pivotal one, given the other circumstantial factors that line up almost perfectly to inculpate the Grievant. Although the proper measure of persuasion is preponderance of the evidence, the Arbitrator holds that the strength of the inferences exceeds what the preponderance standard requires by screening out all other reasonable suspects, leaving only the Grievant in its an incriminatory beam.[\83]

4. Contacting Ms. Jones

The issue here is whether the Grievant was the anonymous caller who advised Ms. Jones not to visit Inmate Howard on May 18, 2006. The Agency argues that circumstantial evidence on this point also supports a reasonable inference that the Grievant was the anonymous caller. First, the Agency stresses that Ms. Jones' cell phone number was on the records of the Grievant's cell phone,[\84] and the call was made on May 18, 2006 when Inmate Howard was to be transferred. The anonymous caller notified Ms. Jones not

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[\83] Inmate Crowe testified that he did ask a male Correction Officer to contact Ms. Crowe. However, it was an anonymous *female* caller who alerted Ms. Crowe.

[\84] The Agency cites Joint Exhibit I, at 180, ln 801.

to visit Inmate Howard on that day as he was being transferred.

The Union disagrees for three reasons. First, the caller was anonymous. Second, Ms. Jones never identified the caller as being the Grievant. Third, Inmate Howard specifically denied any knowledge of any staff member telephoning Ms. Jones and notifying her not to show up at the Agency on May 18, 2006.

The Arbitrator holds that preponderant evidence in the arbitral record as a whole demonstrates that, more likely than not, on May 18, 2006, the Grievant telephone Ms. Jones and told her not to visit the Agency. Although the evidence linking the Grievant to the May 18 call is slightly weaker than that linking her to the October 18 call to Ms. Crowe, the May 18 evidence certainly supports a reasonable inference that *more likely that not* the Grievant was the anonymous caller. How else could one explain a call from the Grievant's cell phone to Ms. Jones cell phone on May 18, 2006 and just in time to prevent Ms. Jones from visiting Inmate Howard? The presence of Ms. Jones' cell phone number in the Grievant's cell phone records on May 18, 2006 together with the timing of the call, and the nature of the message essentially precludes happenstance as a plausible explanation here. Finally, contrary to the Union's contention, Inmate Howard did not vehemently claim that no staff called Ms. Jones. Instead, he claimed to have *lacked any knowledge* of such an event. That response substantially differs from a categorical denial, which would have suggested affirmative knowledge that the event never happened. A lack of knowledge is simply a claim of ignorance, which means the event could or could not have happened. For the foregoing reasons, the Arbitrator holds that the Grievant notified Ms. Jones not to visit Inmate Howard on May 18, 2006.

F. Violation of Rules 38, 46(A)

Having held that the Grievant improperly notified Ms. Jones and Ms. Crowe in violation of Rule 30, the Arbitrator now considers whether the foregoing conduct runs afoul of the captioned Rules.

1. Violation of Rule 38

Rule 38 generally prohibits: "Any act or commission *not otherwise set* forth herein 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."[85] The Agency offers the following arguments in support of its contention that the Grievant's conduct violated all three Rules, including Rule 38. By transporting the cell phone (contraband)[86] into the Facility and using it to alert Inmate Crowe's and Ms. Jones respectively, the Grievant "compromised the security of the institution."[87]

Conversely, the Union maintains that Rule 38 does not explicitly cover telephoning inmates' friends and relatives, and even if the Grievant's conduct violates the intent of Rule 38, that conduct hardly warrants termination. Furthermore, the Union asserts that there is no evidence that the Grievant's calls to Ms. Crowe and Ms. Jones "actually conveyed information that threatened somebody's safety." In this respect, the Union contends that the Grievant did not divulge the exact time or destination of the transfer, without which there can be no threat to the Agency.[88]

The Agency prevails here. On its face, Rule 38 is intended to be a "catchall," as evidenced by the phrase "not *otherwise* set forth herein."[89] In the nature of things, "Catchall" rules paint in broad strokes. In addition, although Rule 38 explicitly prohibits *threats* to the Agency's security, that does not mean that the Rule ignores *potential threats or conduct that poses a potential threat*. It is a well-settled principle in labor/management relations that an employer need not withhold its disciplinary hand until a threat to its legitimate interest is either imminent or actualized.

The Union stresses that the Grievant did not violate Rule 38 because she did not impart *specific*

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[85] Emphasis added.

[86] Because the Arbitrator has held that transporting a cell phone into the Agency violated Rule 30, there is no need to address that portion of Rule 38 that covers the unauthorized conveyance of contraband into the Agency. Even though the language of these Rules differ, they overlap regarding the element of conveyance.

[87] Agency's Post-hearing Brief, at 7.

[88] Union's Post-hearing Brief, at 33. The Union focuses on Ms. Crowe, but since the Grievant has been held to have also contacted Ms. Jones, the Arbitrator assumes that the Union intended for this argument to cover the communication to Ms. Jones.

[89] Emphasis added.

information about time and destination, but that type of specificity is not necessary for reasonably intelligent, motivated individuals to fill in the gaps and effect their disruptive plans.[90] Furthermore, the degree of specificity and the magnitude of threat are positively related, but the specificity of information need not attain crystal clarity to be actionable under Rule 38. Also, the Union's interpretation of Rule 38 would place the Agency in the untenable position of trying to parse speech or verbiage to determine exactly what was said, implied, suggested, etc., thereby encouraging a semantic game, with the Agency's security at risk. The more reasonable interpretation is that Rule 38 prohibits correction officers from communicating with inmates' friends and family *about transfers*, since such communications are indelibly imprinted with security risks and are practically impervious to effective, efficient policing or regulation. As a catchall, Rule 38 intended to screen out unspecified conduct that threatens the Agency's security, and one should broadly interpret it to achieve its intended legitimate purpose. Finally, although Administrative Code (OAC) Rule 5120-9-21(D) ("Statute") prohibits notifying inmates of "the *exact date or time* the transfer is scheduled,"[91] that Statute clearly was not intended to embrace communications that lay the groundwork for individuals to deduce facts intended to be kept secret. In other words, if one cannot directly or explicitly reveal exact times and dates, then reason reveals that one cannot circumvent the intent of the Statute through a back-door approach that either indirectly or implicitly imparts such information. Based on the foregoing discussion, the Arbitrator holds that the Grievant violated Rule 38 by transporting the cell phone into the Agency and by using it to telephone Ms. Crowe and Ms. Jones.

2. Violation of Rule 46(A)

The issue here is whether the Grievant violated Rule 46(A) by alerting Ms. Crowe and Ms. Jones not to

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[90] In this case, for example, assuming, arguendo, that the Grievant revealed no exact date of transfer, an astute individual could have deduced that information by being told not to show up on a given date. Why should the Agency indulge that game of how much information is enough and how much is too much. Under these circumstances, it seems perfectly sensible and legitimate to prohibit all communications about inmates transfers.

[91] *See,* Union Exhibit 3.

visit Inmate Crowe and Inmate Howard. Rule 46(A), addresses "Unauthorized Relationships" and explicitly prohibits: "The *exchange* of . . . *phone calls, or information* with any individual currently under the supervision of the . . . [ODRC] or *friends or family* of same, without express authorization of . . . [ODRC].[92] Also Administrative Code (OAC) Rule 5120-9-21(D) prohibits notifying inmates of "the exact date or time the transfer is scheduled."[93] First, the Agency argues that the Statute together with Rule 46(A) prohibited the Grievant's communications with Ms. Crowe and Ms. Jones. Next, the Agency insists that even without regulatory prohibition, commonsense contraindicates informing inmates' families and/or friends about transferring inmates because such information could imperil the public, transportation officers, and fellow inmates.

The Union argues that the Grievant did not violate Rule 46(A) for several reasons. First, the Union observes that Rule 46(A) does not *specifically* address telephoning as a means of communication or otherwise conveying innocuous information to inmates' families. Second, the Union contends that the Grievant formed no *relationship* with either Ms. Crowe or Ms. Jones and did not *exchange* anything with them or with Inmates Howard or Crowe. Finally, the Union maintains that even if the Grievant's calls violated the spirit of Rule 46(A), removal is not thereby warranted.

The Arbitrator agrees with the Union. First, Rule 46(A) focuses on "relationships" and pours content into that broad term by explicitly prohibiting relationships that involve, "the [unauthorized] *exchange* of . . . phone calls, or information. . . ."[94] Using this definition of "relationship," one must strain to find any wrongdoing between the Grievant and either Ms. Crowe or Ms. Jones. There was no "exchange" of anything, since that term suggests some type of reciprocity, involving a giving and receiving. In this case, the Grievant imparted information but received nothing in return. Nor does the Agency offer a persuasive,

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[92] Joint Exhibit B, at 16 (emphasis added).

[93] *See,* Union Exhibit 3.

[94] Emphasis added.

contrary argument.

The next question is whether the Grievant had any "relationship" (as defined in Rule 46(A)) with either Inmate Crowe or Inmate Howard because nothing was exchanged between the Grievant and the inmates. Instead, she did them a favor. And while one may generally view favors as evidence of some type of a relationship, there is no "exchange" as defined under Rule 46(A). Since Rule 46(A) narrowly defines "relationship," one is justified in applying that restricted definition according to the language of that Rule. Accordingly, the Arbitrator holds that the Grievant did not violate Rule 46(A).

G. Violation of Rule 24–Interfering with Official Investigation

Rule 24 prohibits employees from: "Interfering with, failing to cooperate in, or lying in an official investigation or inquiry." The issue here is whether the Grievant's conveying a cell phone into the Agency and using it to call Ms. Crowe and Ms. Jones violated Rule 24. The Agency claims the Grievant violated Rule 24 on several occasions during the administrative investigation. First, the Agency claims that the Grievant failed to cooperate with Investigator Fausnaugh when he requested access to her cell phone records on the web. Second, the Grievant insisted that she brought a cell phone into the Agency only once when she photographed Sergeant Ackison and Officer Underwood, when she clearly misrepresented that fact. The Grievant could not recall telephoning either Ms. Crowe or Ms. Jones. The Grievant denied making the 870 calls that showed up on her cell phone records, claiming, instead, that her son made the calls. The Union's Post-hearing Brief does not specifically challenge the Rule 24 charge. Instead, the brief merely mentions the charge.

The Arbitrator is not persuaded that the Grievant's resistance to Investigator Fausnaugh rises to the level of interference with the investigation. Rule 24 prohibits "Interfering with, failing to cooperate in, or lying in an official investigation or inquiry." The difficulty is that when the Agency interprets Rule 24, it must walk a fine line between protecting the integrity of its administrative investigations, on the one hand, and

preserving the Grievant's right to develop her case and defenses, on the other. In this case, the Agency's interpretation of Rule 24 impermissibly infringes upon the Grievant's right to develop her defenses and to assert her constitutional rights. First, the Grievant had no duty to assist the Agency in developing its case against her; nor did she have a right to affirmatively undermine or sabotage the Agency's ability to conduct a fair, impartial, and thorough investigation. She may not, for example, offer patently false statements that are wholly devoid of any foundation in truth or reason. Nor may she tamper with evidence or witnesses, or embrace any other conduct that, as a general proposition hinders the Agency's investigations.

Negotiating these interests, however, occasionally, is often akin to threading the proverbial needle. The "rub" or grey area occurs when evidence sought by the Agency is, for example, inextricably intertwined with constitutional protections or other rights necessary for the Grievant to fashion the best possible answer to the charges against her. In the interest of so developing her own defenses, the Grievant certainly may offer scenarios that contradict the Agency's. The Grievant has a right to offer her version of a given issue or circumstance, even though circumstantial evidence and the Agency's interpretation thereof differ markedly from the Grievant's interpretation.[\95] For example, she may claim that her son often made "many" of the calls in question from her cell phone, even if he made "relatively few" of those calls. In the nature of things, the Agency need only point out that the Grievant made the claim and, therefore, must prove it if she can, and leave it there. The Grievant either proves her allegation, or not. Nor is she obliged to surrender her constitutional protections for fear of "interfering" or being "uncooperative." If granted in this case, the Agency's interpretation of Rule 24 would effectively convert the shield for preserving its right to conduct interference-free investigations to a sword for piercing the Grievant's armor, which she needs to develop her defenses and case, and she would be effectively conscripted into the Agency's prosecutorial team. If that is the case, then why have a Union? An equitable balance must be struck on a case-by-case

[\95] Recall that circumstantial is always open to more than one interpretation. The issue there is whether a given conclusion (inference) is *reasonable* as distinguished from *right*.

basis. Based on the foregoing discussion, the Arbitrator holds that under the facts of this case, the Grievant did not violate Rule 24.

VII. Penalty Decision

Because the Agency established that the Grievant violated Rules 30 and 38, some measure of discipline is indicated. Assessment of the proper quantum of discipline requires an evaluation of the mitigative and aggravative factors leading to an ultimate determination of whether removal is unreasonable, arbitrary, capricious, or an abuse of discretion under the circumstances of this case.

A. Aggravative Factors

The aggravative factors are the Grievant's repeated use of a cell phone on the Agency's premises to make and receive calls during her working hours. In addition, on one occasion when she had a phone inside the Agency, the Grievant, in open defiance of the rule banning contraband, proceeded to take photographs with the phone. This specific conduct suggests a degree of contempt for the Agency's rules governing contraband on its premises. Also, the Grievant used a cell phone to contact Ms. Crowe and Ms. Jones, advising them not to visit Inmate Crowe and Inmate Howard respectively because the inmates were being transferred. Finally, between January 1, 2006 and February 27, 2007, the Grievant used a cell phone to make and receive numerous calls from within the Agency.

B. Mitigative Factors

The strongest mitigative factor is that the Agency established only two of the four charges lodged against the Grievant. A second mitigative factor is the Grievant's almost thirteen years of service. Also of considerable note are her record of satisfactory job performance and the absence of active discipline when she was removed on July 31, 2007.

C. Propriety of Removal

This balance of mitigative and aggravative factors indicates that the Grievant deserves a heavy dose of

discipline. As the Arbitrator has held in previous cases, correction officers are charged with overseeing inmates and frequently interact with them and, for better or worse, become de facto role models for those inmates. The Agency, therefore, may hold correction officers to a higher standard of conduct relative to ordinary employees. In this case, the Grievant's misconduct profoundly implicates her trustworthiness and respect for the Agency's rules, and commitment to the Agency's mission. Correction officers are the primary, if not the only, line of defense against contraband and must remain wholly trustworthy. The Agency must fully trust its correction officers, remaining ever confident that, as members of its security team, correction officer are part of the solution, rather than the reverse. Unfortunately, in this case, the Grievant manifestly was not a part of the solution. Indeed, given the 870 phone calls and notification of Ms. Crowe and Ms. Jones, the Grievant has proved to be a recalcitrant, continual part of the problem. Finally, for the first violation of either Rule 30 or Rule 38, the Agency's penalty table calls for either a two-day fine, suspension, working suspension, ***or*** removal.[\96] In this particular case, just cause is not offended by removal for a first violation of Rules 30 and 38.

VIII. The Award

For all the foregoing reasons, the Grievance is hereby **Denied in its entirety**.

Respectfully,

Robert Brookins

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

[\96] Joint Exhibit B, at 8, 14, 15.

I. The Facts

This is a disciplinary dispute involving the Ohio Correction Reception Center ("Agency," "CRC," or "Facility") a branch of the Ohio Department of Rehabilitation and Correction ("ODRC") and the Ohio Civil Service Employees Association AFSCME Local 11 (" Union or "OCSEA"),[1] representing Ms. Brenda Battle ("Grievant"). CRC is a multiple security portal and conduit for new inmates en route to parent correctional institutions. The Agency hired the Grievant as a Correction Officer on May 16, 1994[2] and removed her on July 31, 2007 for violating several work rules governing the use and possession of cell phones on the Agency's premises.[3] The Agency classifies cell phones as contraband and bans them from its premises. The events that precipitated the Grievant's termination are set forth below.

A. February 14, 2007–Cell Phone Found

The Grievant's problems began on February 14, 2007 when Correction Officer William D. Bryant found the Grievant's cell phone[4] lying on the Agency's premises between the Control Center and the front doors of Building No. 3, an area of relatively heavy pedestrian traffic.[5] Officer Bryant submitted the phone to Captain V. Michael Officer and asked Captain Fisher not to involve him in the matter. Captain Fisher honored that request, claimed he had found the phone, and submitted it to his superior.

The Agency launched an administrative investigation with Mr. Jon C. Fausnaugh ("Investigator Fausnaugh") as the investigator. Upon examining the memory of the Grievant's cell phone, Investigator Fausnaugh found photographs taken within the Agency of the following individuals in uniform: the Grievant, Officer William Underwood, and Sergeant Michael Ackison.[6] Investigator Fausnaugh also reviewed the

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[1] Hereinafter collectively referred to as the ("Parties").

[2] Joint Exhibit G.

[3] Joint Exhibit H.

[4] During their interview on February 15, 2007, Sergeant Ackison told Interviewer Fausnaugh that he had sold one of his cell phones to the Grievant approximately 2 months earlier. (Joint Exhibit I, at 2). In other words, Sergeant Ackison sold a cell phone to the Grievant in December 2006.

[5] Union's Post-hearing Brief, at 13.

[6] Joint Exhibit I, at 24-25; Joint Exhibit I, at 1.

internal phone book ("call Log") within the Grievant's cell phone and found several phone numbers.[7]

B. Interviews on February 15, 2007

These discoveries prompted Investigator Fausnaugh to interview several correction officers on February 15, 2007, including the Grievant. During her interview, the Grievant flatly denied bringing the cell phone into the Agency on February 14, insisting that she left the phone on the front seat of her car and did not lock the doors because February 14 was a frigid day, and she feared the door locks would freeze. She further claimed that upon returning to her car, the cell phone was missing. While searching for the phone, the Grievant enlisted assistance from Officer Tyler who dialed the cell phones number (614-579-6578)[8] with the hope that either he or the Grievant would hear the ring and locate the phone. Although the Grievant admitted using her cell phone inside the Agency to photograph Sergeant Ackison and Officer Underwood, she insisted that the photos were taken approximately one week earlier (February 8, 2007) when she mistakenly brought the phone into the Agency. Finally, the Grievant claimed that was the *one and only time* she brought a cell phone into the Facility. Investigator Fausnaugh asked the Grievant to let him review her cell phone records on the web. Her carrier, Verizon, made that data available on the web. The Grievant initially agreed but changed her mind, saying that Verizon Wireless Telephone Company ("Verizon") mailed hard copies of her cell phone records.

On February 15, 2007, Investigator Fausnaugh also interviewed Officer Underwood and Sergeant Ackison. During his interview, Officer Underwood denied any knowledge that a cell phone was in the Agency or that someone used a cell phone to photograph inside the Agency.[9] In contrast, Sergeant Michael Ackison admitted, during his interview, that "sometime within the last month" the Grievant had ***mistakenly*** brought the phone into the Agency. They used the camera to take photographs; Neither officer bothered to

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[7] Joint Exhibit I, at 1.

[8] *Id.*

[9] Joint Exhibit I, at 2.

report the cell phone to a superior officer.[10]

C. Grievant's Cell Phone Records

Although the Grievant said she had brought the phone into the Agency **only once**, the cell phone call log indicated that three calls were made from the phone during her shift.[11] This discrepancy prompted Investigator Fausnaugh to subpoena the cell phone records.[12] On February 27, 2007, ODRC subpoenaed the cell phone records from Verizon,[13] which supplied them on March 26, 2007. Upon examining those records, Investigator Fausnaugh discovered the following:

1. From January 1, 2006 through February 14, 2007 (182 days), the Grievant's cell phone made/received approximately 870 telephone calls during her shift, many of which were to her home phone number and the numbers of other correction officers. Also, many calls were made during the Agency's mid-day count.[14]
2. Inmates had used the institutional phone allotted to them to call approximately 40 of the 870 numbers in the cell phone records.[15] Four of those forty numbers were also called from the Grievant's cell phone during her shift and on dates when the inmates were housed in her unit (A-4). [16] Seventeen of the forty numbers were called from her cell phone to her home but were not called by inmates in Unit A-4 when the calls were made.[17] Nineteen of the forty numbers were called from the Grievant's cell phone when she was not on her shift.[18]
3. The cell phone had been used on May 18, 2006 to call Inmate Howard's girlfriend, Ms. Melissa Jones, and on October 18, 2006 to call Inmate David Crowe's wife, Ms. Lynn Crowe. Both calls were made during the Grievant's shift. When the calls occurred, both inmates were housed in the Grievant's assigned unit, and both calls occurred during the Grievant's shift.[19]

Remarkably, on May 18, 2006 and October 18, 2006, Inmates Howard and Crowe, respectively, were being transferred to other institutions. Furthermore, Mses. Jones and Crowe were scheduled to visit Inmates Howard and Crowe on May 18 and October 18, respectively. Customarily, inmates learned of their transfers

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[10] *Id.* (emphasis added).
[11] Joint Exhibit I, at 28-29.
[12] *Id.*, at 11.
[13] *Id.*, at 3.
[14] *Id.*, at 11.
[15] *Id.*, at 7.
[16] *Id.*
[17] *Id.*
[18] *Id.*
[19] *Id.*

shortly before they were moved. The Agency avoided pre-announcing either times or destinations of transfers because such knowledge could facilitate plans to escape. In any event, after learning of his transfer, Inmate Crowe asked the Grievant if he could use the inmates' institutional phone to tell his wife not to visit him on October 18, 2006, since he was being transferred that day. The Grievant declined his request to use the institutional phone but agreed to take care of it.

D. Interviews on April 6, 12, 13, & 16, 2007

Investigator Fausnaugh also conducted interviews on the foregoing dates. On April 6, he interviewed Ms. Crowe who admitted that she had planned to visit Inmate Crowe on October 18, 200. En route to the Agency, she received an anonymous call from a female who said: "I know I'm not suppose to do this, but Crowe wanted me to tell Officer Underwood he rode out this morning."[\20] The caller then advised Ms. Crowe not to visit the Agency because Inmate Crowe was being transferred that day.[\21]

On April 6, 2007, Investigator Fausnaugh interviewed Inmate Crowe, who admitted that he had asked the Grievant for permission to call his wife as set forth above and that the Grievant had assured him that she would contact his wife. He gave the Grievant his wife's home phone number. Although Inmate Crowe said he was uncertain that the Grievant actually telephoned his wife. However, that statement is strongly contradicted by a recording of a telephone conversation between Inmate Crowe and his wife on October 19, 2006. During that conversation, Ms. Crowe mentioned that, on October 18 2006, someone notified her not to visit him that day. Inmate Crowe immediately assumed it was the Grievant, specifically mentioned her name, and complimented her.[\22]

[\20] Joint Exhibit I, at 8,transcript of call between Inmate and Ms. Crowe, who makes the statement.

[\21] *Id.*

[\22] Witness the following exchange between Mr. and Ms. Crowe:

Inmate Crowe	-	Hello
Ms. Crowe	-	Good God!
Inmate Crowe	-	Did you drive all the way down there?
Ms. Crowe		No.
Inmate Crowe		***Ms. Battle called?***
Ms. Crowe		Yes.

On April 12, 2007, Investigator Fausnaugh interviewed Ms. Jones who stated that, on May 18, 2006, she received an anonymous call from a female who advised her not to visit Inmate Howard that day because he was being transferred. Ms. Jones believed the caller was one of the Agency's staff.[23] Also, Ms. Jones's cell phone number (937-626-6225) appeared on the Grievant's cell phone as an outgoing call made on May 18, 2006. On April 13, 2007, Investigator Fausnaugh interviewed Inmate Howard who categorically denied any recollection of a staff member telephoning Ms. Jones on the day of his transfer.[24]

Investigator Fausnaugh interviewed the Grievant for a second time, on April 16, 2007. This time, however, he had the Grievant's cell phone records in hand. When asked about the 870 calls from her cell phone within 182 days and specifically about the forty-seven numbers that inmates also had called, the Grievant said she shared the cell phone with her son who knew many individuals, including some inmates.[25] Investigator Fausnaugh then confronted the Grievant with the following evidence:

1. Inmate Crowe said that the Grievant had agreed to notify his wife not to visit him on October 18, 2006 because he was being transferred that very day.
2. On October 18, 2006, an anonymous female caller told Ms. Crowe not to visit Inmate Crowe because he was being transferred.
3. The Grievant's cell phone had been used to call Ms. Crowe's home phone number on October 18, 2006 and Ms. Jones on May 18, 2006.

The Grievant's response to this evidence was not a definitive denial. Instead, she said she did not recall telephoning either Ms. Crowe or Ms. Jones.

The foregoing evidence and discrepancies prompted the Agency to charge the Grievant with violating the following four Standards of Employee Conduct ("SOEC"):

Inmate Crowe	Thank you.
* * * *	
Ms. Crowe	No, she was like, I know I'm not supposed to do this, but Crowe wanted me to tell you that he rode out this morning.
Inmate Crowe	She's excellent.

Joint Exhibit I, at 5-9 (emphasis added).

[23] *Id.*, at 6.

[24] *Id.*

[25] *Id.*, at 7.

1. Rule 24, Interfering with, failing to cooperate in, or lying in an official investigation or inquiry.
2. Rule 30, while on duty or on state owned or leased property C. Unauthorized conveyance, distribution, misuse, or possession of other contraband.
3. Rule 38, Any act or commission not otherwise set forth herein 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.
4. Rule 46(A), Unauthorized Relationships A. 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.[26]

On June 20, 2007, the Agency held a pre-disciplinary hearing for the Grievant to assess the validity of these charges.[27] The Pre-disciplinary Hearing Officer found just cause for discipline,[28] and the Agency removed the Grievant on July 31, 2007.[29] The Union filed Grievance No. 27-05-20070807-1546-01-03 ("Grievance"), on August 7, 2007, arguing that the Grievant was removed for other than just cause and that she should be reinstated and made whole.[30]

The Parties could not resolve the matter and ultimately secured the Undersigned to hear the matter on March 12, 2008. During that arbitral hearing, the Parties presented their evidence and arguments before the Undersigned. No procedural issues implicated the Undersigned's jurisdictional to hear the substance of the dispute.[31] During the arbitral hearing, both Union and Management advocates made opening statements and introduced documentary and testimonial evidence to support their positions in this dispute. All documentary evidence was available for proper and relevant challenges; all witnesses were duly sworn and subjected to both direct and cross-examination. The Grievant was present throughout the proceedings.

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[26] Joint Exhibit E, at 1. Because these Rules are cited here, they shall not be cited in Section III below.

[27] Joint Exhibit F, at 1.

[28] *Id*, at 3.

[29] Joint Exhibit E, at 1.

[30] Joint Exhibit D.

[31] During the arbitral hearing, the Union alleged that the Agency refused to disclose all evidence within its possession that addressed issues in this dispute. The Agency denied this charge, and the Union's Post-hearing Brief did not pursue it. Without further discussion to develop this allegation and denial, the Arbitrator lacks an analytical foundation.

At the close of the hearing, the Parties elected to submit written closings (Post-hearing Briefs) that would be emailed to the Undersigned on or about April 14, 2008. For whatever reason, the Undersigned did not receive the Agency's emailed brief until June 1, 2008, although it was apparently emailed on April 21, 2008.

II. Stipulated Issue

Was the Grievant removed for just cause? If not, what should the remedy be?[32]

III. Relevant Contractual Provisions

A. Contractual Provisions

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 written reprimand(s) (with appropriate notion 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. Agencies shall forward a copy of any fine issued to employees, to OCB. Should a grievance be filed over the issuance of a fine and the grievance is settled prior to Step 4, the Agency shall forward a copy of the settlement to OCB. OCB shall maintain a database involving fines and share this information with the Union no less than quarterly.
e. One or more day(s) suspension(s);
f. Reduction of one (1) step; This shall not interfere with the employee's normal step anniversary. Solely at the Employer's discretion, this action shall only be used as an alternative to termination.
g. Termination.

Disciplinary action shall be initiated as soon as reasonably possible consistent with the requirement of the other provisions of this Article. An arbitrator deciding a discipline grievance must consider the timeliness of the Employer's decision to begin the disciplinary process.

The deduction of fines from an employee's wages shall not require the employee's authorization for withholding of fines.

If a bargaining unit employee receives discipline which includes lost wages or fines, the Employer may offer the following forms of corrective action:

1. Actually having the employee serve the designated number of days suspended without pay; or pay the designated fine or;
2. Having the employee deplete his/her accrued personal leave, vacation, or compensatory leave banks of hours, or a combination any of these banks under such terms as may be mutually agreed to between the Employer, employee, and the

[32] Joint Exhibit A.

Union.

24.06- Imposition of Discipline

The Agency Head or designated Deputy Director or equivalent shall make a final decision on the recommended disciplinary action as soon as reasonably possible but no more than forty-five (45) days after the conclusion of the pre-discipline meeting. . . . The employee and/or Union representative may submit a written presentation to the Agency Head or Acting Agency Head.

If a final decision is made to impose any discipline, the employee and Union shall be notified in writing. The old OSCEA Chapter President shall notify the Agency Head in writing of the name and address of the Union representative to receive such notice. Once the employee has received written notification of the final decision to impose discipline, the disciplinary action shall not be increased. Disciplinary measures imposed shall be reasonable and commensurate with the offense and shall not be used solely for punishment.

* * * * *

ARTICLE 25-GRIEVANCE PROCEDURE
25.09—Relevant Witnesses and Information

The Union may request specific documents, books, papers or witnesses reasonably available from the Employer and relevant to the grievance under consideration. Such request shall not be unreasonably denied. . . .

This section applies to all steps of the grievance procedure: The Employer shall provide copies of documents, books, and papers relevant to the grievance without charge to the Union, unless the request requires more than ninety (90) minutes of employee time to produce and/or copy, at which time the Union will be charged $0.10 per page.

IV. Summaries of the Parties' Arguments

A. Summary of Agency's Arguments

1. This dispute does not implicate the Fourth Amendment, which, according to the U.S. Supreme Court, neither addresses nor limits the use of information that a third party conveys to the government.[33] Furthermore, for several reasons, it was reasonable for ODRC to subpoena a copy of the Grievant's cell phone records for one year. First, the presence of the cell phone on the Agency's premises created a security breach. Second, the Grievant's cell phone contained outgoing calls that appeared to have been made during her duty hours. Third, the Grievant admitted that she had bought her cell phone on the Agency's premises before February 15, 2007, but she could only estimate that it was approximately one week before February 15. However, Sergeant Ackison who was photographed on the Agency's premises with the Grievant's cell phone stated that the phone was on the Agency's premises from two to four weeks prior to February 15, 2007.
2. The Grievant violated Rule 30 by bringing her cell phone into the Agency at least three separate times: When she telephoned Ms. Jones on May 18, 2006;[34] When she telephoned Ms. Crowe on

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[33] Agency's Post-hearing Brief, at 6, Citing, United States v. Miller, 96 S.Ct. 1619, 1624 (1976) (citations omitted) The Court reaffirmed its position in Securities and Exchange Commission, et al., v. Jerry T. O'Brian, Inc. et al., 104 S.Ct. 2720 (1984).

[34] Joint Exhibit I, at 180, line 801; Interview with Ms. Jones.

October 18, 2006;[35] And when she photographed Officers Ackison and Underwood in January or February 2007.[36] In addition, circumstantial evidence indicates that the Grievant made or received 870 calls on her cell phone over 182 days from within the Agency.[37]

3. The Grievant violated Rule 46 by contacting Ms. Crowe and Ms. Jones, notifying them not to visit Inmates Crowe and Howard, respectively. Furthermore, when Ms. Crowe answered the Grievant's call on May 18, 2006, the Grievant said,"I know I'm not supposed to do this." That statement shows the Grievant knew that she was acting improperly.[38]
4. The Grievant violated Rule 38 by either making or receiving approximately 870 calls during her working hours. Circumstantial evidence contradicts the Grievant's denial that she either made or received these calls during her shift. For example, her cell phone records indicate that after her initial interview, on February 15, 2007, she received no more calls during her shift. Also, if, as the Grievant claims, her son was using the cell phone during her shift, why would he suddenly stop after the Grievant's February 15 interview? Also, why would her son call the Grievant at home when he knew or should have known that she was working?
5. It is irrelevant how the phone got inside the Agency on February 14, 2007. What is relevant to the Grievant's discipline is that her cell phone was inside the Agency on at least three other occasions and that the Grievant used the phone to contact inmates' family and friends, during which time she revealed sensitive information.
6. Removal is the proper measure of discipline in this case
   a. Although the SOEC contemplate measures of discipline ranging from a two-day suspension or fine to removal, the Grievant's offense(s) warrant removal for the first infraction. The SOEC specifically define cell phones as unlawful contraband.[39] A two-day fine or suspension would be applicable where, for example, the Grievant had inadvertently brought the cell phone into the Agency's premises on one occasion, made no calls, and immediately reported it. In this case, she brought the cell phone into the Agency at least three time, took photos, and failed to report the phone. Moreover, she telephoned Ms. Jones on May 18, 2006[40] and Ms. Crowe on October 18, 2006.[41] Finally, substantial, credible, circumstantial evidence supports an inference that she routinely transported a cell phone into the Agency.[42]
   b. Without more, the two intentional telephone calls to Ms. Crowe and Ms. Jones warrant removal. The Grievant fully understood the impropriety of her action as reflected by her comment to Ms. Crowe: "I know I'm not supposed to do this. . . ." [43] and her attempt to conceal

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[35] Joint Exhibit I, at 257, line 3472; Interview with Mrs. Crowe.

[36] *Id.*, at 1.

[37] *Id.*, at 62, 63 (summary of inmates, calls & telephone numbers, pp. 106-158, punch records detailing when Grievant was on duty, pp. 159-309, Grievant's cellular telephone records).

[38] *Id.*, recording of telephone call between Inmate Crowe and Ms. Crowe, as well as the Grievant's efforts to conceal her cellular telephone number by using *67. *See also Joint Exhibit* I, at 52 (Verizon Codes, p. 180, line 801, p. 257, line 3472)

[39] Joint Exhibit B, at 4.

[40] Joint Exhibit I, at 180, line 801. *See* also Ms. Jones' interview.

[41] *Id,* at 257, line 3472. *See* also Mrs. Crowe's interview.

[42] *Id.*, at 62, 63 (summary of inmates, calls & telephone numbers, pp. 106-158, punch records detailing when Grievant was on duty, pp. 159-309 Grievant's cellular telephone records).

[43] *Id.*, at 52 (recording of telephone call between Inmate Crowe and Ms. Crowe) .

her phone though the *67 code.[44]

c. The Grievant was less than forthright during and interfered with the administrative investigation.

B. Summary of Union's Arguments

1. Based on arbitral interpretation of the Collective-bargaining Agreement, the Agency must establish its case against the Grievant by clear and convincing evidence.
2. The Fourth Amendment of the United States Constitution, made applicable to the states through the Fourteenth Amendment, prohibits the Agency from using any of the Grievant's cell phone records beyond those for February 2007 because the Agency lacked probable cause to search the Grievant's cell phone records beyond that month. Consequently, the search of the Grievant's phone records beyond February 2007 was fatal for over breadth.
   a. Evidence indicates that the Grievant might have used the phone during her duty hours on February 9, 12, and 13, 2007. But the Agency lacks justification to review the Grievant's phone records prior to February 2007.
   b. Two other considerations cast further doubt upon the need for the pre-February 2007 search:
      (1) The Agency never interviewed all available witnesses, and those who were interviewed–Sergeant Ackison, Officer Underwood, Inmates Crowe and Howard–apparently did not say they saw the Grievant with a phone in her possession on the Agency's premises.
      (2) The photos of Sergeant Ackison and Underwood in the phone were taken on the same day in February 2007, which suggests that the Grievant only brought her phone into the Agency on that day. Thus, the Arbitrator should exclude phone records from January 2006 through January 2007.
3. Even if the Arbitrator admits the pre-February 2007 phone records, they merely raise a suspicion that the Grievant carried the cell phone inside the Agency prior to February 2007 or that she made all calls attributed to her. Several other considerations tend to undermine the proposition that the Grievant made those calls.[45]
4. It is unlikely that the Grievant's cell phone was discovered where the Agency alleges given the number of pedestrians in the area when the phone was lost.
5. In addition to those reasons, the Grievant's claim that her son made the calls in question essentially neutralizes the Agency's evidence. Thus, the Grievant may be disciplined for just cause only for one episode of misconduct, which hardly justifies removal given her record with the Agency and the principles of progressive discipline.
6. The Agency failed to establish that the Grievant was the exclusive user of the cell phone or that she used the phone inside the Agency to contact Ms. Crowe and Ms. Jones.
   a. The Agency's charge that the Grievant contacted Ms. Crowe and Ms. Jones fails for several reasons.
      (1) First, the phone records on which the Agency relied to sustain that charge were obtained in violation of the Grievant's Fourth Amendment rights as set forth above.
      (2) Second, even if the phone records are admitted into evidence, they show only that Ms. Jones's number was on the cell phone. However, one must balance this evidence against Inmate Howard's staunch denial that someone telephoned his girlfriend from the Agency and the Grievant's denial that she called Ms. Jones.

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[44] Joint Exhibit I, at 52 (Verizon Codes, p. 180, line 801, p. 257, line 3472).

[45] Union's Post-hearing Brief, at 28.

(3) Third, assuming, arguendo, that the Grievant contacted these individuals, neither Rule 38 nor Rule 46(A) was thereby violated because neither Rule explicitly prohibits staff from advising inmates' relatives not to visit inmates on certain days.

(4) Nor did the alleged misconduct implicate the Agency's security as required in Rule 38 because there is no proof that the Grievant actually conveyed information about the inmates' relocations.

(a) Both the transcript and Ms. Crowe's testimony establish that the caller merely informed her not to come to the Agency on the date in question. Absent more specific information, there is no violation of Rule 38.

(5) Nor is there an established violation of Rule 46(A), which addresses relationships between inmates and the Agency's staff, since there is no evidence that the Grievant had a relationship with either Ms. Crowe, Ms. Jones, Inmate Crowe, or Inmate Howard. Finally, even if the Grievant's calls violated the spirit of Rule 46(A), removal was not thereby warranted.

V. Preliminary Considerations

A. Evidentiary Preliminaries

Because this dispute involves discipline, the Agency has the burden of proof or persuasion regarding its charges against the Grievant. To establish those charges, the Agency must adduce ***preponderant*** evidence in the arbitral record as a whole, showing *more likely than not* that the Grievant engaged in the alleged misconduct. Doubts regarding the existence of any alleged misconduct shall be resolved against the Agency. Unless the Agency thus establishes the purported misconduct, it cannot prevail, *irrespective* of the strength or weakness of the Union's defenses. Similarly, the Union has the burden of persuasion (preponderant evidence) as to its allegations and affirmative defenses, doubts about which shall be resolved against the Union.

B. Proper Measure of Persuasion

The Union argues that the proper measure of persuasion in this dispute is the clear and convincing standard rather than the preponderant standard. In support of this position, the Union notes that the Grievant was charged with conduct sufficiently serious to cause her removal and that the Grievant had a blemish-free disciplinary record when she was terminated. In addition, the Union notes that other arbitrators have interpreted the Parties' Collective-bargaining Agreement to require the clear and convincing standard in

disciplinary disputes. In contrast, the Agency takes no position on this issue.

Preponderance of evidence is the proper measure of persuasion in this case. First, as is the case in civil litigation, with certain notable exceptions, the preponderant standard is undoubtedly the "workhorse" in arbitral disciplinary disputes. In grievance arbitration, the clear and convincing standard is usually applied where the charges against an employee are particularly stigmatizing and, therefore, could make it inordinately difficult for the employee to obtain future employment. Before saddling the employee such additional hardships, one should be "*clearly convinced*" that the employee is guilty as charged. Conversely, the preponderant standard only requires a showing that *more likely than not* the employee is guilty as charged. Examples of stigmatizing misconduct that warrant the clear and convincing standard include sexual harassment, theft, and drug abuse.

Second, the Union has not alleged that the alleged misconduct in this case is inordinately stigmatizing. Instead, the Union merely contends that the charges against the Grievant are sufficiently "serious" to cause the Agency to fire her and references the Grievant's lack of active discipline.[\46] However, neither an employee's disciplinary history nor the measure of discipline associated with a given charge informs the selection of a measure of persuasion. Finally, while citing how other arbitrators have interpreted the Parties' Collective-bargaining Agreement to require clear and convincing evidence, the Union points to no specific contractual provision that either explicitly or implicitly mandates, or even suggests, the clear and convincing standard. Based on the foregoing analysis, the Arbitrator holds that the preponderant rather than the clear and convincing standard is proper in the instant dispute.

VI. Substantive Analysis and Discussion

A. Presence of Cell Phone Inside Agency on February 14, 2007

Before discussing the substantive issues in this dispute, another prefatory observation is indicated. Although discovery of the Grievant's cell phone inside the Agency on February 14, 2007 was catalytic in

[\46] Union's Post-hearing Brief, at 23-24 (citations omitted).

this dispute, none of the charges against her flowed from that discovery. Instead, data in the cell phone call log together with the Grievant's conflicting responses precipitated an investigation that triggered charges, which led to her removal. Therefore, further discussion of the cell phone presence inside the Agency is not indicated.

B. Permissible Scope of Subpoena

The issue here is whether the Agency had probable cause to search thirteen months of the Grievant's cell phone records, or was that search fatally overbroad? In this respect, the Union contends that the Agency lacked probable cause to search the Grievant's records beyond February 2007 and cites *U.S. v. Nagalingam* ("*Nagalingam*")[47] to support this proposition. The Union interprets *Nagalingam* as holding that searches must contain time limits consistent with evidence of when alleged offenses likely occurred.[48] In the instant case, the Union claims that the Agency lacked credible evidence that the Grievant brought the cell phone into the Agency earlier than in February 2007. To support this position, the Union stresses that the Grievant credibly stated that her son often used her cell phone while she was working. This position suggests that the Union accepts that Mr. Fausnaugh observed three calls in the cell phone call log that occurred on three different dates during the Grievant's duty hours.

The Agency disagrees with the Union's interpretation of *Nagalingam* and with the foregoing factual pattern.[49] The Agency essentially argues that confusion regarding the timing and frequency with which the Grievant brought her cell phone into the Facility justified the thirteen-month search of the cell phone records. Specifically, the Agency notes that the Grievant's cell phone contained calls that appeared to have

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[47] 166 F. 3rd 1266 (6th Cir. 1998).

[48] Union's Post-hearing Brief, at 25.

[49] The Agency makes several non-responsive arguments to the Union's probable cause objection. Although the arguments are listed below, further discussion of them is not indicated. Specifically, the Agency argues that the Fourth Amendment does not limit the use of information that a third party submits to the government. Applied to the instant case, this argument posits that Verizon, a third party to the instant dispute, may submit the Grievant's phone records to the Agency without offending the Fourth Amendment. Be that as it may, the argument misses the thrust of the Union's Fourth Amendment objection, which addresses probable cause to subpoena thirteen months of the Grievant's cell phone records.

been made during her duty hours on three different dates, even though she claimed to have brought the phone into the Facility once. Also, the Grievant admitted that she had bought her cell phone into the Agency approximately one week before her February 15 interview. Finally, the Agency notes that in contrast to the Grievant's statements, Sergeant Ackison, who was photographed inside the Agency with the Grievant's cell phone, stated that the phone was on the Agency's premises between two and four weeks before February 15. These conflicting statements and facts constituted probable cause to reasonably extend the scope of its search of the Grievant's cell phone records to cover all likely dates that the phone was inside the Agency.

C. Essence of *Nagalingam*

Since the Agency cites no competing judicial precedent on this point, the Arbitrator views *Nagalingam* as controlling this issue and turns now to an interpretation and application of that decision to the issue of over breadth. Nagalingam provides in relevant part:

> The Fourth Amendment requires warrants to particularly describ[e] the ... things to be seized. But the degree of specificity depends on the crime alleged and the items sought. A general description will suffice when a more specific description is *unavailable*. Similarly, the absence of a time limitation does not make a warrant overbroad if the magistrate judge is unable to determine an appropriate time frame. But *when there is information available to place a time frame on a search of records, a warrant is overbroad if it lacks such limits.*[\50]

The pith of the Parties' contentions here is whether the Agency had probable cause to subpoena thirteen months (January 1, 2006 through February 2007) of the Grievant's cell phone records. Absent probable cause, the subpoena was overbroad, and subpoenaed evidence that falls without the realm of probable cause is inadmissible into the arbitral record. The basis for such an evidentiary exclusion would be the Grievant's status as a public employee who enjoys the full panoply of protection from unreasonable searches and seizures under the Fourth Amendment of the United Sates Constitution made applicable to the states through

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[\50] *Id*., at 1218 (emphasis added) .

the Fourteenth Amendment.

The Arbitrator holds that although the nature of the Grievant's misconduct did not render the Agency "unable" to set a specific time limit on a search of the Grievant's cell phone records, a thirteen-month search was reasonable and for probable cause. First, the Agency was justifiably unsure about the number of prior violations. Had the cell phone been inside the Agency one, two, three, or four weeks before the February 15 interviews? Instead, the Agency was left with the Grievant's violations and her assertion that the phone was last inside the Agency one week before February 15, an assertion that Sergeant Ackison flatly contradicted.

Second, by its nature the misconduct could (and very well might) have been continual before February 2007, since the misconduct required only a capability to defeat the Agency's security and a willingness to ignore the Agency's rules. Third, the Grievant had plainly demonstrated both capacities, the latter occurring where she elected to photograph her coworkers–with the phone she claimed to have accidentally brought into the Agency–rather than to report the phone to Management.[\51] Finally, and perhaps most important, if the Grievant had indeed brought a cell phone into the Agency on other prior occasions, such prior misconduct very well could pose ominous ***present consequences*** for the Agency if, for example, inmates had either directly or indirectly accessed the phone. Confronted with known serious violations that were easily repeated and could have serious present consequences, the Agency clearly had probable cause to search the Grievant's prior cell phone records.[\52] The only remaining issue is the scope of that probable cause search. In other words, how far back into the cell phone records was the Agency entitled to search?

Based on the foregoing discussion, the Arbitrator holds that whatever the maximum scope of the Agency's probable cause search, it clearly had probable cause to search thirteen months of the Grievant's cell phone

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[\51] Clearly the Grievant has demonstrated both of these capacities in this case by bringing the phone into the Agency and cavalierly using that "contraband" to photograph Officers Ackison and Underwood.

[\52] The prospect of serious present consequences from prior, easily perpetrated violations founds the probable cause in this case.

records in this case.[53]

D. 870 Calls From Inside Agency In 182 Days

The issue here is whether the Grievant brought her telephone into the Facility 182 days and either made or received 870 calls inside the Agency during that time. This was one of the findings in Investigator Fausnaugh's investigative report,[54] and one of the charges on which the Agency relied when it elected to remove the Grievant.[55]

The Agency argues that the Grievant made the 870 calls. In support of that claim, the Agency relies solely upon the subpoenaed records of the cell phone between January 1, 2006 and February 27, 2007 ("Records") which indicate that, within that period, the Grievant's cell phone was used to make and/or receive 870 calls during her shift, which was from 5:50 a.m. to 2:00 p.m.[56] Furthermore, the records show that the calls were commonly made between 10:30 and 11:30 a.m., which, according to the Agency, coincides with the Mid-day count.[57] This is the extent of the Agency's evidence, all of which is entirely circumstantial; No one claimed to have seen the Grievant making or receiving cell phone calls from within the Facility. Nevertheless, the Agency contends that this circumstantial evidence supports a reasonable inference that more likely than not the Grievant made 870 calls within 182 days while on duty within the Agency.

The Union disagrees and offers several arguments to bolster its general contention that the foregoing evidence does not show that the Grievant made the 870 cell phone calls. First, the Union notes that the Grievant has many friends who are incarcerated and that her son frequently used her cell phone.[58] In this

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[53] Arguably, the maximum scope of the Agency's search was broader, perhaps substantially so. Given the nature of the threat, the Agency's search could have legitimately enveloped not only the present misconduct, but also prior misconduct that carried the threat of serious present or future consequences. In short, the Agency's search could cover the entire threat to its operations rather than only the present manifestations of the threat. The scope of a search may be extended to cover the true dimensions of a threat that can inflict serious present or future concequences.

[54] Joint Exhibit I, at 11.

[55] Joint Exhibit E, at 1.

[56] *Id.*, at 1; Joint Exhibit I, at 8.

[57] *Id.*

[58] Union's Post-hearing Brief, at 10.

respect, the Union notes that Investigator Fausnaugh failed to interview the Grievant's son.[59] Also, the Union stresses that Investigator Fausnaugh did not interview witnesses who likely would have seen the phone laying where it was allegedly found on February 14, 2007 and that, given the traffic in that area (approximately 450 employees excluding visitors[60]), someone should have quickly found the phone.[61] Second, the Union notes that Investigator Fausnaugh, himself, was not convinced that the Grievant made the 870 calls. Instead, he had a mere "belief" that she made the 870 cell phone calls from within the Facility.[62]

Third, the Union offers three arguments, some of which seem to raise procedural issues suggesting that Investigator Fausnaugh failed to conduct a thorough investigation[63] and others that apparently attack Investigator Fausnaugh's analysis of the situations confronting him during the investigation. First, the Union alleges that Investigator Fausnaugh failed to consider how difficult it would have been for the Grievant to have made 870 cell phone calls without someone observing her making at least some of those calls. In this respect, the Union first contends that correction officers on the Grievant's shift were in plain view of their coworkers and inmates, and that both groups were motivated to report misconduct. Duty motivated her coworkers, while the prospect of gaining leverage motivated inmates. Furthermore, the Union notes that Investigator Fausnaugh failed to ask correction officers stationed in the Grievant's assigned area whether they saw her using the phone. Next, the Union observes that the Agency failed to test the signal strength of the Grievant's phone to assure that it could make and receive calls from within the Facility.[64] Also, the Union asserts that given the traffic in the area where the phone was found, it was highly unlikely

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[59] Union's Post-hearing Brief, at 15.

[60] Direct testimony of Correction Officer Patrick.

[61] Union's Post-hearing Brief, at 14-15. These arguments seem to address whether the cell phone was in fact found where Officer Bryant said he found it. The Union does not develop this argument, and the nature of its inference or conclusion is unclear.

[62] *Id.*

[63] However, the Union did not couch its arguments in that specific language.

[64] Union's Post-hearing Brief, at 12.

that it lay there unnoticed for sixteen hours.[65] Finally, the Union argues that Investigator Fausnaugh never considered how difficult it would have been to bring a cell phone into the Facility 182 days without detection.

The Arbitrator concludes that more likely than not the Grievant transported a cell phone into the Agency within the 182-day period in question. Because evidence in the record is purely circumstantial, its probative value is at best coextensive with the strength of the reasonable inference(s) to be drawn from that evidence. On its face, the record clearly establishes that for 182 days between January 1, 2006 and February 27, 2007, 870 calls were either made or received from the Grievant's cell phone during her shift. The first question is whether on its face that evidence supports inferences that: (1) The calls were made/received from within the Agency, and (2) The Grievant made/received those calls.[66] Absent a persuasive explanation, one can reasonably infer that more likely than not, the owner of a cell phone made and received the calls charged to that phone.

Therefore, the issue now becomes whether the Union's responsive arguments and evidence rebut this inference. First, the Union challenges the inference that the Grievant had physical possession of the phone during her shift by arguing that, during that period, her son had the cell phone, knew several inmates, and likely made/received the calls. Second, the Union suggests that the Agency had a duty to investigate this allegation by interviewing the Grievant's son.

These arguments are unpersuasive. First, the Grievant's claim is actually an affirmative defense to the inference that she had possession of her cell phone during all times relevant to this dispute. Therefore, the Union and not the Agency had the burden of persuasion to establish its affirmative defense by preponderant

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[65] Union's Post-hearing Brief, at 13.

[66] The Union does not dispute the number of calls made, the period within which they were made, or the time of day in which they were made.

evidence in the arbitral record as a whole.[67] In short, the Union needed to produce either testimonial or documentary evidence[68] from the Grievant's son stating when and how he and the Grievant shared the phone. Absent such evidence from the Grievant's son, the foregoing inference from the record that the Grievant had the phone remains unrebutted.[69] Accordingly, the Arbitrator holds that preponderant evidence in the arbitral record as a whole establishes that more likely than not the Grievant had possession of her phone during the time in question and made/received the foregoing 870 calls from her cell phone.

The next issue is whether those calls were made from within the Facility. Here, the Agency reasons or infers that the Grievant made the calls from within the Facility because the calls were made during her shift, most likely during mid-day count since most calls were made between 10:30 and 11:30 a.m.[70] The Union offers several arguments in rebuttal, stressing: (1) Circumstances that contraindicate the Grievant's making 870 cell phone calls from within the Facility; and (2) Investigator Fausnaugh's investigative and analytical lapses. These arguments are discussed in turn below.

1. Circumstantial Hurdles

First, the Union argues that circumstances in Unit A-4, where the Grievant was assigned, would have precluded her from making 870 unobserved and unreported calls, especially where some lasted more than fifty minutes. Specifically, the Union notes the following considerations: (1) The Grievant was constantly

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[67] The Agency's duty to conduct a thorough investigation does not oblige it to pursue every allegation that the Grievant makes. Instead, the Agency must gather all relevant, probative evidence needed to substantiate its charges against the Grievant. Once the Agency adduces preponderant evidence of the element(s) of its charge(s) against the Grievant, the Union may directly attack the probative value of that evidence through cross-examination, objections, etc. In addition, the Union may indirectly attack that evidence through affirmative defenses which, the Union has the burden of raising and establishing. Affirmative defenses may not be established by merely *articulating* them; the burden is one of persuasion and not of production. Instead, the Union must establish (prove) its affirmative defenses by adducing preponderant evidence in the arbitral record as a whole. Therefore the Union's reliance on the Grievant's mere articulation that her son had the cell phone during the time in question is misplaced.

[68] Of course any written statement from the son could encounter probative challenges in the form of hearsay.

[69] For example, had the son testified at the arbitral hearing, perhaps he could have explained why he called the Grievant at home on several occasions when he either knew or should have known she was at work. In light of this observation alone, the claim that the son had the phone and made the calls offends reason.

[70] Joint Exhibit I, at 11.

within plain view of her coworkers who are duty-bound to report such misconduct; and (2) Inmates are highly vigilant and eager to report staff misconduct, using it as a quid pro quo for extra privileges and/or leverage.

Again, these arguments fall short of the mark. First, evidence in the arbitral record suggests that not all correction officers honor their duty to report coworker misconduct. For example, neither Sergeant Ackison nor Officer Underwood reported that the Grievant had a cell phone within the Facility. Indeed, rather than report it as duty required, they apparently posed as she photographed them with her contraband (cell phone). The regrettable point here is that the mere existence of a duty hardly guarantees performance thereof. In response to the Union's concern about the absence of inmates' reports that the Grievant was using a cell phone on Unit A-4, the Agency raises several credible, explanatory scenarios. First, the Agency argues that when she was on Unit A-4, the Grievant was not constantly within eyeshot of inmates. Such is the case, for example, when inmates are in "lock down." Also, the Agency stressed that rather than actually report a staff' member's misconduct, inmates often remain silent and attempt to blackmail the staff member. The foregoing observations, arguments, and evidence fend off the contention that circumstances on Unit A-4 necessarily would have triggered reports of the Grievant's using a cell phone there.[\71]

The Union's second major argument here is the alleged improbability that the Grievant could have successfully secreted her cell phone past security frequently enough to make 870 calls. However, Correction Officer Sherrie A. Patrick (President of Local 6545) testified that after removing the Grievant, the Agency tightened its security at the Facility's entrances. Therefore, gaps in security must have existed, gaps that perhaps allowed the Grievant to get her phone into the Facility.[\72] Finally, as discussed below, the

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[\71] Also, absent clarification, frequent use of the cell phone to call the Grievant's home phone number when she was clearly working strengthens the inference that the the Grievant used the phone from within the Facility to call her home. Assuming, arguendo, that her son had the phone during the times in question, who would he have been calling at the Grievant's home when she was at work?

[\72] This conclusion does not violate the tort-based rule that correcting an injury-causing defect after the fact does not constitute evidence of guilt by the party who effected the corrections. The distinction is that, in this case, the fact that security gaps existed and were closed does not redound to the Agency's detriment.

Grievant clearly got her phone through security on at least three occasions, which suggests that she very well might have found a gap in the Agency's security. These considerations persuade the Arbitrator that the Union may not rely on the global efficacy of the Agency's security to rebut the inference that the Grievant used her phone within the Agency numerous times during the 182 days in question.

2. De Facto Allegations of Procedural Error

Here, the Union first alleges that Investigator Fausnaugh failed to interview all relevant witnesses. On its face, this argument suggests a procedural error–Investigator Fausnaugh did not conduct a thorough investigation. That the cell phone calls coincided with the Grievant's working hours is indisputable. Therefore, the question becomes, if not the Grievant, then who made the calls? The only other person of interest is the Grievant's son, who neither testified nor offered a written statement detailing how and when he shared the Grievant's cell phone. Beyond the Grievant's son, the Union offers no one else who might have used the Grievant's phone during the 182 days in question.

Second, the Union stresses that the Agency never tested the signal strength of the Grievant's phone and, even worse, disallowed the Union to do so. To this objection, the Agency merely asserts that the Union raised this issue at Step 5 of the negotiated Grievance procedure,[\73] without either citing a contractual provision that prohibits Step-5 challenges or otherwise explaining its cryptic response. Nothing in the arbitral record supports the Agency's rejection of the Union's request to check the signal strength of the Grievant's cell phone within the Facility.

Unlike the Union's arguments thus far in this opinion, this one poses a problem for the Agency, though they happen not to be fatal under the circumstances of the instant case. First, absent unambiguous contractual or statutory language to the contrary, the Union has a manifest *right* to crosscheck and expand upon the Agency's investigation. This right saddles the Agency with a corresponding *duty* to cooperate with

[\73] Agency's Post-hearing Brief, at 5.

the Union's reasonable efforts to conduct its own investigation. In the instant case, the Union's effort to check the signal strength of the Grievant's cell phone is a legitimate, logical consideration that, under different circumstances, could have become an effective affirmative defense. Nevertheless, in the instant dispute, this procedural error is not fatal to the Agency's cause. Independent evidence establishes that the Grievant used her cell phone to make calls from within the Facility on at least two occasions when she telephoned Ms. Crowe and Ms. Jones. Although, these two events do not establish that the Grievant's cell phone never encountered problems with signal strength from within the Agency, those successful calls demonstrate that signal strength was not a perpetual problem. Moreover, this evidence suggests that signal strength might not have posed any problem, depending on the location of the phone when the calls were made/received.[74] Based on this analysis, the Arbitrator holds that the Agency's unexplained (unjustified) denial of the Union's request to test the cell phone signal strength constitutes *serious* procedural error that, but for independent facts in this case, would have been *reversible* procedural error.[75] Nevertheless, for the reasons set forth above, the Arbitrator holds that more likely than not the Agency's procedural error, in this case, did not substantively harm either the Union or the Grievant.

Finally, the Union notes that Investigator Fausnaugh merely *believed* but was not *convinced* or persuaded that the Grievant made the 870 calls.[76] The Agency disagrees with Investigator Fausnaugh and essentially adopts the hearing officer's position.[77] Whatever distinction there is between a belief and a conviction, evidence in the record presents an inculpatory finger towards the Grievant, establishing that during the 182 days in question, she made/received the calls charged to her cell phone during her shift and from within the

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[74] Barring a total loss of signal strength throughout the Grievant's entire work area, a signal-strength test could very well prove inconclusive as to whether the Grievant used her cell phone within the Agency, since there is likely to be lingering disagreement about where she might have used it.

[75] In the Arbitrator's view, the Agency should carefully review its procedures and receptiveness to the Union's efforts to conduct its own investigations in future disputes. Continued recalcitrance such as that displayed here could very well redound to the Agency's detriment.

[76] Here the Union notes that, in contrast, Investigator Fausnaugh found that "the evidence conclusively substantiates" that the Grievant had her cell phone inside the Facility at least four times.

[77] Joint Exhibit F, at 3.

Facility, and the Arbitrator so holds.

E. Violation of Rule 30

1. 870 Phone Calls

The issue here is whether the Grievant violated Rule 30 bringing the cell phone into the Facility and making/receiving cell phone calls therein. Rule 30 provides: "While on duty or on state owned or leased property the: C. Unauthorized *conveyance*, distribution, *misuse*, or *possession* of other contraband."[\78] There is no dispute but that cell phones constitute "contraband" under Rule 30 and that the Grievant lacked authorization to bring her cell phone into the Facility.[\79] Resolution of the issue here requires one to assess the credibility and probative value of the records in light of the Union's contradictory arguments and evidence as set forth below.

2. Conveyance of Cell Phone and Photographs

The issue here is whether the Grievant violated Rule 30 by bringing her phone into the Agency and using it to photograph Sergeant Ackison and Officer Underwood early in February 2007. Because the photographs were taken inside the Agency and were in the memory of the Grievant's cell phone, there is no doubt but that she had the cell phone inside the Facility and used it to photograph Sergeant Ackison and Officer Underwood. Nor does the Union contest these facts. These facts alone establish the following violations of Rule 30: "unauthorized conveyance" because she brought the phone into the Agency; "misuse" because she used it within the Agency to photograph her fellow officers, and "possession" because she had the phone on her person within the Facility.[\80]

[\78] Emphasis added.

[\79] Since the Parties have not specifically addressed whether Rule 30 distinguishes between intentional and unintentional conveyance of contraband into the Facility, the Arbitrator assumes that Rule 30 makes no such distinction. Consequently, to establish a violation of Rule 30, the Agency needs to demonstrate only that the Grievant transported a cell phone into the Facility. This is not to say, however, that a lack of intent would not impact the remedial dimensions of a dispute, i.e., the severity of discipline imposed under Rule 30.

[\80] The Grievant's claim that she inadvertently brought the cell phone into the Facility is not an issue as to whether she *violated* Rule 30 because in the first instance, as discussed above, intent apparently is not an element of the rules governing contraband inside the Agency.

Finally, once the Grievant was inside the Agency and discovered the phone on her person, reason suggests and duty required that she should have reported it to her supervisor. Instead, she used the phone camera to photograph her fellow officers. However, since the Agency did not specifically charge the Grievant with failing to report the cell phone, that conduct warrants no further consideration in this opinion. The extent of the Grievant's misconduct, therefore, is violating Rule 30 by bringing the cell phone into the Agency and using it to photograph her fellow officers, and the Arbitrator so holds.

3. Contacting Ms. Crowe

The final issue under Rule 30 is whether the Grievant used her cell phone within the Facility to contact Ms. Jones and Ms. Crowe. The Agency maintains that the Grievant committed these offenses and proffers the following evidence and arguments in support of that position. Inmate Crowe asked the Grievant if he could use the inmate's phone to notify his wife to cancel her scheduled visit on October 18, 2006 because he was being transferred to an institution in Toledo, Ohio on that day. The Grievant denied the request to use the phone but agreed to assist Inmate Crowe, who then gave the Grievant Ms. Crowe's home phone number. On October 18, 2006, an anonymous female telephoned Ms. Crowe on her cell phone and said: "I know I'm not supposed to do this, but Crowe wanted me to tell Officer Underwood he rode out this morning."[\81] Ms. Crowe aborted her visit to the Agency on October 18.[\82] Inmate Crowe used the inmate's phone system to telephone Ms. Crowe from the Toledo institution, and the Agency recorded their conversation. Immediately upon hearing that Ms. Crowe did not visit the Agency on October 18, Inmate Crowe specifically asked if the Grievant had called, and Ms. Crowe said yes. Inmate Crowe then praised the Grievant. In addition to the foregoing evidence, the Grievant's cell phone called Ms. Crowe's home telephone number on October 18, 2006 during the Grievant's shift. The Agency argues that the foregoing

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\81 Joint Exhibit I, at 8,transcript of call between Inmate and Ms. Crowe, who makes the statement.

\82 Because Ms. Crowe was en route to visit Inmate Crowe and had forwarded calls from her home phone to her cell phone, the Grievant's call to Ms. Crowe's home phone went to her cell phone. After she received the anonymous call, Ms. Crowe aborted her trip to the Agency.

facts demonstrate a violation of Rule 30, but the Union denies the existence of those facts contending that they were not established under either the clear and convincing or the preponderant standard.

The Agency's position is more persuasive on this issue. First, as discussed above, the proper measure of persuasion or quantum of proof for this dispute is preponderance of the evidence rather than clear and convincing evidence. Second, the Union insists that the Grievant's allegation that her son had her telephone most of the time has also been dismissed because the son neither testified at the arbitral hearing nor submitted a statement explaining when and how he shared the phone with the Grievant. Third, reasonable inferences from the foregoing circumstantial evidence point inexorably toward the Grievant and satisfy the preponderant standard as to whether the Grievant used her cell phone while inside the Agency to telephone Ms. Crowe on October 18, 2006 for the express purpose of advising Ms. Crowe not to visit Inmate Crowe that day. That the caller remained anonymous is a consideration, but not a pivotal one, given the other circumstantial factors that line up almost perfectly to inculpate the Grievant. Although the proper measure of persuasion is preponderance of the evidence, the Arbitrator holds that the strength of the inferences exceeds what the preponderance standard requires by screening out all other reasonable suspects, leaving only the Grievant in its an incriminatory beam.[\83]

4. Contacting Ms. Jones

The issue here is whether the Grievant was the anonymous caller who advised Ms. Jones not to visit Inmate Howard on May 18, 2006. The Agency argues that circumstantial evidence on this point also supports a reasonable inference that the Grievant was the anonymous caller. First, the Agency stresses that Ms. Jones' cell phone number was on the records of the Grievant's cell phone,[\84] and the call was made on May 18, 2006 when Inmate Howard was to be transferred. The anonymous caller notified Ms. Jones not

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[\83] Inmate Crowe testified that he did ask a male Correction Officer to contact Ms. Crowe. However, it was an anonymous *female* caller who alerted Ms. Crowe.

[\84] The Agency cites Joint Exhibit I, at 180, ln 801.

to visit Inmate Howard on that day as he was being transferred.

The Union disagrees for three reasons. First, the caller was anonymous. Second, Ms. Jones never identified the caller as being the Grievant. Third, Inmate Howard specifically denied any knowledge of any staff member telephoning Ms. Jones and notifying her not to show up at the Agency on May 18, 2006.

The Arbitrator holds that preponderant evidence in the arbitral record as a whole demonstrates that, more likely than not, on May 18, 2006, the Grievant telephone Ms. Jones and told her not to visit the Agency. Although the evidence linking the Grievant to the May 18 call is slightly weaker than that linking her to the October 18 call to Ms. Crowe, the May 18 evidence certainly supports a reasonable inference that *more likely that not* the Grievant was the anonymous caller. How else could one explain a call from the Grievant's cell phone to Ms. Jones cell phone on May 18, 2006 and just in time to prevent Ms. Jones from visiting Inmate Howard? The presence of Ms. Jones' cell phone number in the Grievant's cell phone records on May 18, 2006 together with the timing of the call, and the nature of the message essentially precludes happenstance as a plausible explanation here. Finally, contrary to the Union's contention, Inmate Howard did not vehemently claim that no staff called Ms. Jones. Instead, he claimed to have *lacked any knowledge* of such an event. That response substantially differs from a categorical denial, which would have suggested affirmative knowledge that the event never happened. A lack of knowledge is simply a claim of ignorance, which means the event could or could not have happened. For the foregoing reasons, the Arbitrator holds that the Grievant notified Ms. Jones not to visit Inmate Howard on May 18, 2006.

F. Violation of Rules 38, 46(A)

Having held that the Grievant improperly notified Ms. Jones and Ms. Crowe in violation of Rule 30, the Arbitrator now considers whether the foregoing conduct runs afoul of the captioned Rules.

1. Violation of Rule 38

Rule 38 generally prohibits: "Any act or commission *not otherwise set* forth herein 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."[85] The Agency offers the following arguments in support of its contention that the Grievant's conduct violated all three Rules, including Rule 38. By transporting the cell phone (contraband)[86] into the Facility and using it to alert Inmate Crowe's and Ms. Jones respectively, the Grievant "compromised the security of the institution."[87]

Conversely, the Union maintains that Rule 38 does not explicitly cover telephoning inmates' friends and relatives, and even if the Grievant's conduct violates the intent of Rule 38, that conduct hardly warrants termination. Furthermore, the Union asserts that there is no evidence that the Grievant's calls to Ms. Crowe and Ms. Jones "actually conveyed information that threatened somebody's safety." In this respect, the Union contends that the Grievant did not divulge the exact time or destination of the transfer, without which there can be no threat to the Agency.[88]

The Agency prevails here. On its face, Rule 38 is intended to be a "catchall," as evidenced by the phrase "not *otherwise* set forth herein."[89] In the nature of things, "Catchall" rules paint in broad strokes. In addition, although Rule 38 explicitly prohibits *threats* to the Agency's security, that does not mean that the Rule ignores *potential threats or conduct that poses a potential threat*. It is a well-settled principle in labor/management relations that an employer need not withhold its disciplinary hand until a threat to its legitimate interest is either imminent or actualized.

The Union stresses that the Grievant did not violate Rule 38 because she did not impart *specific*

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[85] Emphasis added.

[86] Because the Arbitrator has held that transporting a cell phone into the Agency violated Rule 30, there is no need to address that portion of Rule 38 that covers the unauthorized conveyance of contraband into the Agency. Even though the language of these Rules differ, they overlap regarding the element of conveyance.

[87] Agency's Post-hearing Brief, at 7.

[88] Union's Post-hearing Brief, at 33. The Union focuses on Ms. Crowe, but since the Grievant has been held to have also contacted Ms. Jones, the Arbitrator assumes that the Union intended for this argument to cover the communication to Ms. Jones.

[89] Emphasis added.

information about time and destination, but that type of specificity is not necessary for reasonably intelligent, motivated individuals to fill in the gaps and effect their disruptive plans.[90] Furthermore, the degree of specificity and the magnitude of threat are positively related, but the specificity of information need not attain crystal clarity to be actionable under Rule 38. Also, the Union's interpretation of Rule 38 would place the Agency in the untenable position of trying to parse speech or verbiage to determine exactly what was said, implied, suggested, etc., thereby encouraging a semantic game, with the Agency's security at risk. The more reasonable interpretation is that Rule 38 prohibits correction officers from communicating with inmates' friends and family *about transfers*, since such communications are indelibly imprinted with security risks and are practically impervious to effective, efficient policing or regulation. As a catchall, Rule 38 intended to screen out unspecified conduct that threatens the Agency's security, and one should broadly interpret it to achieve its intended legitimate purpose. Finally, although Administrative Code (OAC) Rule 5120-9-21(D) ("Statute") prohibits notifying inmates of "the *exact date or time* the transfer is scheduled,"[91] that Statute clearly was not intended to embrace communications that lay the groundwork for individuals to deduce facts intended to be kept secret. In other words, if one cannot directly or explicitly reveal exact times and dates, then reason reveals that one cannot circumvent the intent of the Statute through a back-door approach that either indirectly or implicitly imparts such information. Based on the foregoing discussion, the Arbitrator holds that the Grievant violated Rule 38 by transporting the cell phone into the Agency and by using it to telephone Ms. Crowe and Ms. Jones.

2. Violation of Rule 46(A)

The issue here is whether the Grievant violated Rule 46(A) by alerting Ms. Crowe and Ms. Jones not to

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[90] In this case, for example, assuming, arguendo, that the Grievant revealed no exact date of transfer, an astute individual could have deduced that information by being told not to show up on a given date. Why should the Agency indulge that game of how much information is enough and how much is too much. Under these circumstances, it seems perfectly sensible and legitimate to prohibit all communications about inmates transfers.

[91] *See,* Union Exhibit 3.

visit Inmate Crowe and Inmate Howard. Rule 46(A), addresses "Unauthorized Relationships" and explicitly prohibits: "The *exchange* of . . . *phone calls, or information* with any individual currently under the supervision of the . . . [ODRC] or *friends or family* of same, without express authorization of . . . [ODRC].[92] Also Administrative Code (OAC) Rule 5120-9-21(D) prohibits notifying inmates of "the exact date or time the transfer is scheduled."[93] First, the Agency argues that the Statute together with Rule 46(A) prohibited the Grievant's communications with Ms. Crowe and Ms. Jones. Next, the Agency insists that even without regulatory prohibition, commonsense contraindicates informing inmates' families and/or friends about transferring inmates because such information could imperil the public, transportation officers, and fellow inmates.

The Union argues that the Grievant did not violate Rule 46(A) for several reasons. First, the Union observes that Rule 46(A) does not *specifically* address telephoning as a means of communication or otherwise conveying innocuous information to inmates' families. Second, the Union contends that the Grievant formed no *relationship* with either Ms. Crowe or Ms. Jones and did not *exchange* anything with them or with Inmates Howard or Crowe. Finally, the Union maintains that even if the Grievant's calls violated the spirit of Rule 46(A), removal is not thereby warranted.

The Arbitrator agrees with the Union. First, Rule 46(A) focuses on "relationships" and pours content into that broad term by explicitly prohibiting relationships that involve, "the [unauthorized] *exchange* of . . . phone calls, or information. . . ."[94] Using this definition of "relationship," one must strain to find any wrongdoing between the Grievant and either Ms. Crowe or Ms. Jones. There was no "exchange" of anything, since that term suggests some type of reciprocity, involving a giving and receiving. In this case, the Grievant imparted information but received nothing in return. Nor does the Agency offer a persuasive,

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[92] Joint Exhibit B, at 16 (emphasis added).

[93] *See,* Union Exhibit 3.

[94] Emphasis added.

contrary argument.

The next question is whether the Grievant had any "relationship" (as defined in Rule 46(A)) with either Inmate Crowe or Inmate Howard because nothing was exchanged between the Grievant and the inmates. Instead, she did them a favor. And while one may generally view favors as evidence of some type of a relationship, there is no "exchange" as defined under Rule 46(A). Since Rule 46(A) narrowly defines "relationship," one is justified in applying that restricted definition according to the language of that Rule. Accordingly, the Arbitrator holds that the Grievant did not violate Rule 46(A).

G. Violation of Rule 24–Interfering with Official Investigation

Rule 24 prohibits employees from: "Interfering with, failing to cooperate in, or lying in an official investigation or inquiry." The issue here is whether the Grievant's conveying a cell phone into the Agency and using it to call Ms. Crowe and Ms. Jones violated Rule 24. The Agency claims the Grievant violated Rule 24 on several occasions during the administrative investigation. First, the Agency claims that the Grievant failed to cooperate with Investigator Fausnaugh when he requested access to her cell phone records on the web. Second, the Grievant insisted that she brought a cell phone into the Agency only once when she photographed Sergeant Ackison and Officer Underwood, when she clearly misrepresented that fact. The Grievant could not recall telephoning either Ms. Crowe or Ms. Jones. The Grievant denied making the 870 calls that showed up on her cell phone records, claiming, instead, that her son made the calls. The Union's Post-hearing Brief does not specifically challenge the Rule 24 charge. Instead, the brief merely mentions the charge.

The Arbitrator is not persuaded that the Grievant's resistance to Investigator Fausnaugh rises to the level of interference with the investigation. Rule 24 prohibits "Interfering with, failing to cooperate in, or lying in an official investigation or inquiry." The difficulty is that when the Agency interprets Rule 24, it must walk a fine line between protecting the integrity of its administrative investigations, on the one hand, and

preserving the Grievant's right to develop her case and defenses, on the other. In this case, the Agency's interpretation of Rule 24 impermissibly infringes upon the Grievant's right to develop her defenses and to assert her constitutional rights. First, the Grievant had no duty to assist the Agency in developing its case against her; nor did she have a right to affirmatively undermine or sabotage the Agency's ability to conduct a fair, impartial, and thorough investigation. She may not, for example, offer patently false statements that are wholly devoid of any foundation in truth or reason. Nor may she tamper with evidence or witnesses, or embrace any other conduct that, as a general proposition hinders the Agency's investigations.

Negotiating these interests, however, occasionally, is often akin to threading the proverbial needle. The "rub" or grey area occurs when evidence sought by the Agency is, for example, inextricably intertwined with constitutional protections or other rights necessary for the Grievant to fashion the best possible answer to the charges against her. In the interest of so developing her own defenses, the Grievant certainly may offer scenarios that contradict the Agency's. The Grievant has a right to offer her version of a given issue or circumstance, even though circumstantial evidence and the Agency's interpretation thereof differ markedly from the Grievant's interpretation.[\95] For example, she may claim that her son often made "many" of the calls in question from her cell phone, even if he made "relatively few" of those calls. In the nature of things, the Agency need only point out that the Grievant made the claim and, therefore, must prove it if she can, and leave it there. The Grievant either proves her allegation, or not. Nor is she obliged to surrender her constitutional protections for fear of "interfering" or being "uncooperative." If granted in this case, the Agency's interpretation of Rule 24 would effectively convert the shield for preserving its right to conduct interference-free investigations to a sword for piercing the Grievant's armor, which she needs to develop her defenses and case, and she would be effectively conscripted into the Agency's prosecutorial team. If that is the case, then why have a Union? An equitable balance must be struck on a case-by-case

[\95] Recall that circumstantial is always open to more than one interpretation. The issue there is whether a given conclusion (inference) is *reasonable* as distinguished from *right*.

basis. Based on the foregoing discussion, the Arbitrator holds that under the facts of this case, the Grievant did not violate Rule 24.

VII. Penalty Decision

Because the Agency established that the Grievant violated Rules 30 and 38, some measure of discipline is indicated. Assessment of the proper quantum of discipline requires an evaluation of the mitigative and aggravative factors leading to an ultimate determination of whether removal is unreasonable, arbitrary, capricious, or an abuse of discretion under the circumstances of this case.

A. Aggravative Factors

The aggravative factors are the Grievant's repeated use of a cell phone on the Agency's premises to make and receive calls during her working hours. In addition, on one occasion when she had a phone inside the Agency, the Grievant, in open defiance of the rule banning contraband, proceeded to take photographs with the phone. This specific conduct suggests a degree of contempt for the Agency's rules governing contraband on its premises. Also, the Grievant used a cell phone to contact Ms. Crowe and Ms. Jones, advising them not to visit Inmate Crowe and Inmate Howard respectively because the inmates were being transferred. Finally, between January 1, 2006 and February 27, 2007, the Grievant used a cell phone to make and receive numerous calls from within the Agency.

B. Mitigative Factors

The strongest mitigative factor is that the Agency established only two of the four charges lodged against the Grievant. A second mitigative factor is the Grievant's almost thirteen years of service. Also of considerable note are her record of satisfactory job performance and the absence of active discipline when she was removed on July 31, 2007.

C. Propriety of Removal

This balance of mitigative and aggravative factors indicates that the Grievant deserves a heavy dose of

discipline. As the Arbitrator has held in previous cases, correction officers are charged with overseeing inmates and frequently interact with them and, for better or worse, become de facto role models for those inmates. The Agency, therefore, may hold correction officers to a higher standard of conduct relative to ordinary employees. In this case, the Grievant's misconduct profoundly implicates her trustworthiness and respect for the Agency's rules, and commitment to the Agency's mission. Correction officers are the primary, if not the only, line of defense against contraband and must remain wholly trustworthy. The Agency must fully trust its correction officers, remaining ever confident that, as members of its security team, correction officer are part of the solution, rather than the reverse. Unfortunately, in this case, the Grievant manifestly was not a part of the solution. Indeed, given the 870 phone calls and notification of Ms. Crowe and Ms. Jones, the Grievant has proved to be a recalcitrant, continual part of the problem. Finally, for the first violation of either Rule 30 or Rule 38, the Agency's penalty table calls for either a two-day fine, suspension, working suspension, ***or*** removal.[\96] In this particular case, just cause is not offended by removal for a first violation of Rules 30 and 38.

VIII. The Award

For all the foregoing reasons, the Grievance is hereby **Denied in its entirety**.

Respectfully,

Robert Brookins

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

[\96] Joint Exhibit B, at 8, 14, 15.