OPINION AND AWARD
IN THE MATTER OF THE ARBITRATION BETWEEN

Ohio Department of Rehabilitation and Corrections (Northeast Pre-release Center)
-AND-
Ohio Civil Service Employees Association AFSCME Local 11

Appearing for Mansfield Correctional Institution
Jessie R. Keyes, OCB-LRS
Beth A. Lewis, Assistant Chief Labor Relations
Stephen M. Reynolds, Captain
Laura M. Solnick, Investigator Representative
Joe Trejo, OCB-LRS
James E. Williams, Lieutenant
Ted Williams, LRO

Appearing for OCSEA
Sean K. Bannerman, Correction Officer
Donna M. Jackson, Chapter President
James McElvain, Staff Representative
James Reynolds, Correction Officer
Nicole A. Smith, Correction Officer
Rodney Spivey, Grievant

CASE-SPECIFIC DATA
Grievance No.
Grievance No. 27-17-6-16-04-1441-01-03

Hearing Held
February 2, 2005

Closing Arguments Received
February 15, 2005

Case Decided
March 17, 2005

Subject
Inappropriate Conduct/Inmate

The Award
Grievance **Denied in Part and Sustained in Part**.

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

Table of Contents

I. The Facts

The parties to this disciplinary dispute are the Ohio Northeast Pre-release Center ("NEPRC" "Agency"), a Division of Ohio Department of Rehabilitation ("DR&C") and OCSEA, AFSCME Local 11 ("Union"), representing Mr. Rodney Spivey ("Grievant"). When he was removed, the Grievant was thirty-eight years old, a ten-year employee with the Department of Rehabilitation & Corrections ("DR&C"), and had no active discipline on his record. The Grievant began his ten-year employment with the State of Ohio in the Food Service Department at the Orient Correctional Facility on August 22, 1994. On February 19, 1995, he moved to the Grafton Correctional Facility where he remained in the Food Service Department. Although he remained in Food Service, the Grievant moved to the NEPRC on March 17, 1996. On March 16, 1997, he received a lateral transfer to a Correctional Officer.

The Grievant was a respected member of NEPRC, and an in-service instructor. Also, as a respected member of his community, the Grievant was a nine-year active duty service man, a member of the military reserves, an active member in the mentor's program for his church, and coach of its basketball team. Finally, the Grievant is a father who shares custody of his six-year old daughter.

Circumstances leading to the Grievant's troubles with the Agency began on March 25, 2004, while he worked overtime in Unit G, which was not his regularly assigned Unit. Unit post orders require correctional officers to take a formal headcount ("Count") at 9:00 PM. After he had completed his count in Unit G on March 25, 2004, the Grievant released Inmate Melissa Mason from her cell to do some laundry. Policy 310, Section VI, Procedures, A (7) ("Policy 310") prohibits "All [inmate] movement . . . during a formal count." Inmates may not move outside the building in which they are counted until the count is complete and accurate. . . ."[1] Post orders do not address inmate movements during counts. Although the arbitral record does not contain a specific date, sometime after March 25, 2004, during an exit interview, an inmate informed the Agency that on March 25, 2004, the Grievant had an inappropriate and sexual relationship with

[1] Management Exhibit 2, at 3.

an inmate.

The inmate's accusation triggered both administrative and criminal investigations by the Agency. Ms. Laura Solnick spearheaded the administrative investigation, which she initiated by retrieving a videotape of the hallway of Unit G on March 25, 2004. The laundry room was the first room on the left immediately upon entering the hallway through a door. The camera that produced the videotape was mounted above the doorway and aimed down the hallway of Unit G. The camera's timer and videotape captured the following events. The Grievant entered the laundry room at 9:03 PM, walked again out at 9:07.05 PM, and turned the lights off as he left. He then walked down the hallway and looked into some of inmates' cells. Meanwhile, Inmate Mason entered the laundry room at 9:07.15 PM, carrying what appeared to be a netted, see-through laundry bag. She immediately turned the lights on as she entered the laundry room but quickly turned them off again. The Grievant re-entered the laundry room at 9:08.58 PM. He and Inmate Mason then remained in the laundry room with the lights off until 9:20.43 PM, approximately eleven minutes. The Grievant then left the laundry room, walked down the hallway of Unit G, and returned to the unlit laundry room at 9:21.30 PM where he remained until 9:25.59 PM. The Grievant left the laundry room while making some type of hand gesture. At 9:26.24, Inmate Mason also left the unlit laundry room. At 9:27 PM, the Grievant called count and released the other inmates from their cells. Inmates then left their cells and some went into the laundry room, immediately turning on the lights as they entered.

Based on this videotape, the Agency subjected the Grievant to three interviews; (1) an administrative interview with Captain Reynolds on March 28, 2004;[2] (2) a second investigatory, "fact-finding" interview with Investigator Solnick on April 23, 2004;[3] and (3) a criminal investigatory interview on April 23, 2004.[4]

In light of interviews with the Grievant, interviews with Inmate Mason, as well as the videotape and the Grievant's admissions, the Agency charge the Grievant with misconduct on April 27, 2004.[5] Specifically,

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[2] Joint Exhibit 4, at 36.
[3] *Id* at 20-30.
[4] *Id.* at 33-34.
[5] Joint Exhibit 4, at 35.

the Agency alleged that on March 25, 2004, the Grievant violated two Standards of Employee Conduct: Rules 37 and 45(A). In a memorandum dated May 10, 2004, the Agency scheduled a pre-disciplinary hearing for May 13, 2004.[6] That hearing was held as scheduled, and on May 27, 2004, the Pre-disciplinary Officer found "just cause for discipline."[7] In a letter dated June 2, 2004, the Agency notified the Grievant that he was removed from his position for having violated Rules 37 and 45(A). The removal became effective on June 16, 2004.[8]

In Grievance No. 27-17-6-16-04-1441-01-03 ("Grievance"), the Union timely challenged the Grievant's removal as not for just cause.[9] On June 29, 2004, the Parties held a Step-3 meeting, and the Agency denied the Grievance on July 9, 2004.[10] On July 28, 2004, the Union notified the Agency that it was appealing the Grievance to Step 4.[11]

The Parties were unable to resolve the Grievance and selected the Undersigned to hear the matter. An arbitral hearing commenced at approximately 9:00 A.M. on February 2, 2005 at the NEPRC. At the beginning of the hearing, the Parties stipulated that there were no procedural objections and that the dispute was properly before the Undersigned. The Agency and the Union were represented by their respective advocates, each of whom had a full and fair opportunity to produce testimonial and documentary evidence in support of their case. All witnesses were duly sworn and fully available for cross-examination. Similarly, all documents introduced into the arbitral record were available for relevant objections. The Parties opted for Post-Hearing Briefs in lieu of closing arguments and agreed to e-mail the briefs to the Undersigned on or before February 15, 2005. The last brief was e-mailed on February 15, 2005, at which time the record was officially closed.

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[6] *Id.* at 9.
[7] *Id.* at 6.
[8] Management's Post-hearing Brief, at 1.
[9] Joint Exhibit 2, at 3.
[10] *Id.* at 2.
[11] *Id.* at 1.

II. The Issue

The Parties submitted to the following Issue: "Was the Grievant, Rodney Spivey, removed from his position of Correction Officer for Just Cause? If not, what shall the remedy be?"

III. Relevant Contractual and Regulatory Provisions

Article 24.01 Standard

Disciplinary action shall not be imposed upon an employee except for just cause. The Employer has the burden of proof to establish just cause.

Article 24.02 Progressive Discipline

The employer will follow the principles of Progressive discipline. Disciplinary action shall be commensurate with the offense.

Policy 310, Section VI, Procedures, A (7) General Conduct provides in relevant part:

"All movement will cease during a formal count. Inmates may not move outside the building in which they are counted until the count is complete and accurate. . . ."[12]

a. Post orders do not address inmate movement during counts.

B. Standards of Employee Conduct

1. Rule: 37 - Actions that could compromise or impair the ability of an employee to effectively carry out his/her duties as a public employee.
2. 45(A) Without express authorization, giving preferential treatment to any individual under the supervision of the Department, to include but not limited to: A. The offering, receiving, or giving of favor.

IV. Summaries of the Parties' Arguments

A. Summary of the Agency's Arguments

1. The Grievant violated Rule 45(A) of the Standards of Conduct, Policy 310, and standing supervisory orders by failing to obtain authorization before he released Inmate Mason from her cell during a formal count on March 25, 2004.
2. The Grievant violated Rule 37 of the Standards of Conduct by being in a dark room with Inmate Mason for approximately ten minutes. Under no circumstances should a Correction Officer place himself in such a position with a female inmate.
3. The Grievant's carefree attitude, suggesting the acceptability of his conduct, stating "he walks into so many dark rooms with inmates and doesn't think anything about it" further undermines his case and aggravates matters.

B. Summary of the Union's Arguments

The Agency lacked just cause to remove the Grievant because of the following factors.

1. There was a past practice of releasing inmates during counts, without supervisory authorization, where the inmates had soiled their sheets or had similar "accidents."
2. Correction Officer Nicole Smith and James Reynolds testified that in the past they have seen inmates

[12] Management Exhibit 2, at 3.

out during counts and that it was a common practice to release inmates from their rooms during counts.

3. The Grievant was unaware that he needed authorization to release inmates to wash their soiled sheet after they had "accidents."
4. The videotape exaggerated the darkness of the room. Light from the hallway and the courtyard illuminated the laundry room.
5. Because the video only shows the Grievant entering and leaving the laundry room twice, no rule was violated. And nothing untoward occurred between the Grievant and Inmate Mason.
6. It is an exaggeration to argue that the Grievant's presence in the laundry room with Inmate Mason somehow compromised his ability to perform his job.

V. Analysis and Discussion

A. Evidentiary Preliminaries

Because this is a disciplinary dispute, the Agency has the burden of proof or persuasion with respect to its charges against the Grievant. Thus, the Agency must adduce *preponderant* evidence in the arbitral record as a whole, showing *more likely than not* that: (1) The Grievant violated Rules 37 and 45(A). Doubts with respect to these charges shall be resolved against the Agency. Similarly, the Union has the burden of persuasion with respect to its allegations and affirmative defenses. Doubts with respect to those allegations or affirmative defenses shall be resolved against the Union.

B. Propriety of Releasing Inmate Mason

1. Post Orders and Policy 310

The threshold question here is whether either the post orders or Policy 310 notified the Grievant that, except under certain well-defined circumstances, correction officers should not release inmates during counts. The Agency claims that the Grievant violated post orders, policy, and standing supervisory orders, all of which prohibited correction officers from releasing inmates during counts, without explicit supervisory authorization. In contrast, the Union claims that the post orders do not mention releasing inmates during counts, Policy 310 was unavailable to the Grievant, and there was a past practice of releasing inmates during counts to wash their soiled linen following "accidents."

Clearly, the post orders are silent about releasing of inmates during counts and are thus irrelevant to this issue. The Agency must, therefore, look to Policy 310 and supervisory alerts to show that the Grievant was properly notified that inmates were not to be released without express supervisory authorization during

counts.

2. Grievant's Knowledge of and Access to Policy 310

Policy 310 specifically states that: "All movement will cease during a formal count. Inmates may not move outside the building in which they are counted until the count is complete and accurate. . . ."[13] The major issue with Policy 310 is whether the Grievant actually knew of it and/or had reasonable access to it. In other words, to subject the Grievant to the provisions of Policy 310, the Agency must have *properly and affirmatively* notified him of that Policy's strictures.

It did not. Evidence in the arbitral record establishes that the Grievant had neither actual nor constructive notice of Policy 310. Specifically, evidence does not demonstrate that the Agency made the Policy available to the Grievant during training or at any other time during his employment. First, the Grievant denied any knowledge of Policy 310. Second, under re-direct examination, Captain Stephen Reynolds testified that he was uncertain whether correction officers were given Policy 310 during their training. He testified further that correction officers may access Policy 310 in training offices, but Policy 310 is not posted. Third, Correction Officer James Reynolds offered testimony that corroborated that of Captain Reynolds, regarding the relative unavailability of Policy 310 to correction officers. Specifically, Officer Reynolds testified that the Agency keeps Policy 310 in a restricted security area in the Warden office or in Critical Incident Management. Moreover, according to Officer Reynolds, correction officers must obtain special permission to access the Policy.

On the other hand, Captain Reynolds testified that he regularly notified correction officers *not to* release inmates during counts, without supervisory authorization. Notably, Captain Reynolds did not claim and could not verify that the Grievant received such notice. Indeed, Captain Reynolds testified that he had no way of knowing whether his notification reached the Grievant. Finally, Captain Reynolds verified that Policy 310 was in effect on March 25, 2004. Finally, neither Correction Officer Nicole Smith nor Officer Reynolds

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[13] Management Exhibit 2, at 3.

could recall hearing Captain Reynolds notify correction officers, during roll call, that inmates may not be out of their cells during counts without proper authorization. Based on the foregoing testimonies, the Arbitrator holds that the Agency failed to show that it notified the Grievant that inmates were not to be released from their cells during counts.

3. Knowledge of Policy vs. Commonsense Understanding

As the Arbitrator has previously held, preponderant evidence in the record as a whole does not show that the Grievant either knew or had reason to know of an explicit, formal rule–such as Policy 310–that expressly prohibited releasing inmates from their cells during counts. Nevertheless, there remains sufficient reason to conclude that, as a Correction Officer, the Grievant implicitly *understood* that, as a general operational and commonsensical guideline, inmates should not be released for any and all reasons simply to roam around the facility during counts. The operational consequence of such a rule would render *accurate* counts, as well as related safety and operational procedures, all but illusory. From an operational perspective, then, there must be at least a rational understanding that, as a general guideline, subject to reasonable exceptions, inmates must remain in their cells during counts.

The Grievant's choice of affirmative defenses actually reveals his general understanding in this respect. He elected to rely heavily on "soiled sheets" as a justification for releasing Inmate Mason. The Grievant should have felt no need to rest his decision on soiled sheets if there were no *general understanding* that, except for unusual circumstances or operational needs such as buffing floors, inmates must remain in their cells during counts. Use of the "soiled sheets" exception implicitly recognizes such an understanding. Otherwise, the Grievant could have stated that he released Inmate Mason simply because she wanted to be released. Accordingly, the Arbitrator holds that the Grievant must have known that inmates are to be released from their cells only for *specific* reasons. That knowledge reflects the Grievant's implicit understanding that inmates must otherwise remain in their cells during counts. Therefore, the question now becomes whether the Grievant was justified in releasing Inmate Mason from her cell during the 9:00 PM

count on March 25, 2004.

4. Past Practice of Releasing Inmates

Inmate Mason's release was unjustified. To justify releasing Inmate Mason, the Grievant sought to establish a past practice of releasing inmates during counts to wash their soiled sheets, resulting from menstrual "accidents." Evidence in the record does not establish either the existence of the alleged past practice or that it would have exonerated the Grievant, even it did exist. Since the Grievant has the burden of persuasion on these issues, doubts are resolved against him. To establish a past practice, the Grievant must demonstrate that the unauthorized release of inmates to wash soiled sheets during counts is accepted by the Agency and the Union as a customary and accepted way of conducting business. Specifically, there was a *meeting of the minds* between the Parties about the proper response to menstrual "accidents" during counts. The record shows no such mutual understanding or agreement and, hence, the Grievant failed to establish the existence of the alleged past practice.

5. Why Grievant Released Inmate Mason

Even if the alleged past practice were established (and it is not), it would not help the Grievant. Evidence in the record does not establish that the Grievant released Inmate Mason to wash soiled sheets. The difficulty for the Grievant is the direct and material conflict between his statements during investigatory interviews and Inmate Mason's statements during her investigatory interview and testimony before the Rules Infraction Board. During her investigatory interview and before the Rules Infraction Board, Inmate Mason stated that the Grievant released her to wash coats and hoodies; The Grievant claimed he released her to wash soiled sheets from an "accident."[14] Thus Inmate Mason–the only other individual who could corroborate the Grievant's affirmative defense–directly contradicted him. Therefore, it remains unclear why the Grievant released Inmate Mason from her cell during a count. Accordingly, the Arbitrator resolves doubts against the Grievant and finds that the Grievant failed to demonstrate that he released Inmate Mason to wash soiled

[14] Joint Exhibit 4, at 18-19 and 31-32.

sheets. Thus, assuming, arguendo, the existence of such a practice, the Grievant has failed to show that his decision fell within the scope of that practice.

Ultimately, the Arbitrator holds for two reasons that the Grievant's release of Inmate Mason was a "favor" under Rule 45(A) for essentially two reasons. First, evidence in the record does not show that his decision to release Inmate Mason fell within the scope of his alleged past practice (soiled linen), even if he had successfully established the existence of such a practice, and he did not. Second, no one even claims that it is proper to release an inmate to wash coats and hoodies, which is the reason that Inmate Mason claims she was released. Thus, on March 25, 2004, Inmate Mason was released for an unauthorized reason, which reasonably constituted a "favor" under Rule 45(A) of the Standards of Employee conduct. The Grievant, therefore, violated Rule 45(A).

C. Rule 37: In Dark Room with Inmate Mason

The Union also claims that the Grievant's presence in the laundry room with Inmate Mason did not violate Rule 37 because no rule explicitly prohibits such conduct and nothing untoward occurred between the Grievant and Inmate Mason in the laundry room. Conversely, the Agency argues that it is always inappropriate for a male correction officer to be in a dark room with a female inmate. Furthermore, the Agency maintains that no work rule is needed to discipline a correction officer for such conduct.

For the following reasons, the Arbitrator holds that the Agency's position is more persuasive and, hence, that the Grievant's presence in the laundry room with a female inmate for an extended period of time constituted wholly intolerable misconduct in violation of Rule 37. Because the Grievant's misconduct was fraught with potential and real risks for the Agency, the Grievant, and the Inmate, the Agency did not need a rule explicitly prohibiting his conduct in order to discipline him for just cause.

An analogy should clarify. Few, If any, would seriously insist that an employee who launches an unprovoked physical attack on his supervisor may not be disciplined for just cause, unless a work rule explicitly prohibits such conduct. The reason for the virtually unanimity on this issue in labor-management

relations is that, if tolerated, such violent conduct would seriously undermine, if not totally destroy, the operational efficiency and effectiveness of any workplace. Similarly, in the instant case, no one with a specter of rationality would or could conclude that it is somehow proper for a correction officer to be alone for an extended time in a dark room with a female inmate. The very thought contravenes commonsense. With respect to the Agency's efficiency and effectiveness, the Grievant's presence in the laundry room with Inmate Mason poses no less of a risk than unprovoked violence against supervisors. Therefore, the two types of misconduct are equally unacceptable. No reasonable employee, least of all one with the responsibilities and presumed good judgement of a correction officer, needs a formal rule to notify them that such conduct is wholly unacceptable and, if detected, will draw severe disciplinary consequences. Specific rules are simply not required to notify employees to avoid such flagrant misconduct, given the magnitude and eminence of the inherent risks. This is a matter of reasonableness, rationality, commonsense, and judgement, all of which a correction officer should clearly possess. On that basis alone, the Grievant should have understood the highly problematic nature of his conduct, without the presence of an explicit rule or regulation.

1. Whether Laundry Room Was Dark

The Union argues that contrary to the videotape, the laundry room was not dark but was illuminated by the hallway and courtyard lighting. The Grievant and at least one witness for the Union stated that the laundry room was not dark. Relying entirely on the videotape, the Agency insists that the room was dark.

The Arbitrator holds that the laundry room was in fact dark but that even if the room were partially illuminated, the Grievant's presence in the room with Inmate Mason was inappropriate. The Union's position suffers from two difficulties. First, other credible facts and statements in the arbitral record strongly contradict the Union's position. For example, Inmate Mason turned the lights on when she first walked into the laundry room. That action supports a reasonable inference that the room was too dark for her to see what she was doing. Where then is the hallway and courtyard illumination? Also, other inmates entered the

laundry room after the count and immediately turned on the lights, again, presumably to see what they were doing. Finally, and most important, the videotape–the only purely objective evidence in the record–depicts the room as *totally* dark. In fact, no objective evidence in the record indicates that the laundry room was anything but dark. At this point, the Agency had produced sufficient evidence to support a reasonable inference that the Grievant was alone for an extended time in a *dark* room with Inmate Mason.

Confronted with this evidence, the Grievant had the unenviable task of demonstrating that things were not as they reasonably appeared. Balanced against the Agency's circumstantial and direct evidence is the Grievant's assertion that the room really was not completely dark because the hallway and courtyard lights poured some light into the room. That bald assertion does not and cannot prevail under the circumstances and evidence in this case. Nor did Inmate Mason state that the laundry room was illuminated. In fact, she expressed a decided preference for doing laundry in a "dark" room.[15]

Moreover, assuming, arguendo, that some residual hallway and courtyard light spilled into the laundry room, the Grievant is not thereby exonerated. For example, he and Inmate Mason could very well have stood in a dark corner of the room to engage in generic conversation. And it would be at least inappropriate for the Grievant, a Correction Officer, to idly stand around for an extended time in even a shadowy (not to mention a totally dark) room with a female inmate.

2. Past Practice of Male Correction Officers and Female Inmates in Dark Rooms

The Grievant argues that being in isolated or dark places with female inmates is acceptable as a common practice in the Agency, while the Agency adamantly denies any knowledge of such a practice. Again, the Grievant has the burden of establishing the existence of this alleged past practice, and he has failed to do so. As pointed out above, a past practice must show that both parties accept the conduct in question as the ordinary and accepted way of conducting business under the circumstances in question. Evidence in the record does not even come close to demonstrating such a practice. And given the inherently unacceptable

[15] Joint Exhibit 4, at 18.

nature of the Grievant's conduct, the Arbitrator requires clear proof that Management *knowingly* tolerates it. Instead, the Arbitrator finds that the Grievant's assertions are unsupported and incredible, if not astounding. This is not to say that staff members do not engage in such conduct with female inmates. Perhaps some do. But that proposition markedly differs from a conclusion that such conduct is a common practice, thereby suggesting that the Agency somehow "winks" at or implicitly accepts it. On its face, it seems both nonsensical and totally irresponsible for the Agency to behave in that manner, since the magnitude of potential and probable operational difficulties flowing from such conduct could threaten Management's position if not the existence of the institution itself. And from an evidentiary perspective, nothing in the record demonstrates that Management condones correction officers alone with female inmates in dark rooms as an accepted and normal routine in the Agency.

In light of the foregoing analysis, the Arbitrator holds that the Grievant's presence in a dark room with Inmate Mason for an extended period of time violated Rule 37. Specifically such conduct certainly "*could* compromise or impair . . . [the Grievant's] ability to effectively carry out his. . . duties as a . . . [Correction Officer]."

VI. Penalty Decision

Preponderant evidence in the arbitral record establishes that the Grievant violated Rule 45(A) and Rule 37. Consequently, some measure of discipline is indicated. To determine the proper quantum of discipline, the Arbitrator will assess both mitigating and aggravating factors. However, the Agency's penalty will not be disturbed unless the balance of aggravative and mitigative factors reveals the Grievant's removal to have been unreasonable, arbitrary, capricious, discriminatory, or an abuse of discretion.

A. Aggravative Factors

Of course violation of Rule 45(A) is also an aggravative factor. Yet, the major aggravative factor is the Grievant's presence in a dark room with Inmate Mason and the risks it poses to him, Inmate Mason, and the Agency's operational efficiency and effectiveness. Clearly, any male member of the Agency's staff,

especially a correction officer, faces two difficulties when alone in dark, shadowy, or isolated places with a female inmate. First, even if the staff member's behavior is totally innocent, there is an undeniable, salient, and unacceptable appearance of impropriety, which the Agency cannot possibly tolerate. Second, allowing male staff to occupy such positions with female inmates creates enormous opportunities and temptations for mischief, which, again, the Agency cannot possibly tolerate.

A separate aggravative factor is the Grievant's attitude. The Grievant's apparent cavalier attitude about such conduct tends to aggravate the situation. For example, he testified that he did not turn the lights on when he reentered the laundry room with Inmate Mason because, "He walks into so many dark rooms with inmates and doesn't think anything about it." The Arbitrator sincerely hopes that the discomfort associated with this dispute will be a sobering experience for the Grievant.

B. Mitigative Factors

There are several mitigative factors in this case. One is the Grievant's ten-year tenure with the Department of Rehabilitation and Corrections. In addition, he has maintained a blemish-free disciplinary record, and presumably satisfactory job performance. He has also maintained respectable status in his community. Another factor that may not be classically mitigative but still works for rather than against the Grievant is the range of disciplinary measures in the Agency's penalty table for Rules 37 and 45(A).[16] That breadth of penalties suggests that the Agency may not be unalterably wedded to removal for a first offense of those Rules. Also, Lieutenant Williams testified that a correction officer would be *reprimanded* for the unauthorized release of an inmate during count. "Reprimanded" obviously represents the low end of the disciplinary scale. If a reprimand satisfies the disciplinary requirement for a first violation of 45(A), then the question becomes whether being in a dark room with Inmate Mason, a Rule 37 violation, reasonably elevates a reprimand to a removal for a first offense.

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[16] A first violation of Rule 37 can draw discipline ranging from a written reprimand to removal. And a first violation of Rule 45(A) can result in discipline ranging from a two-day suspension to removal. Joint Exhibit 3, at 9.

Another major mitigating factor is that the Agency failed to afford the Grievant adequate notice of and access to Policy 310, which is the only Rule in the arbitral record that specifically addresses inmate movement during counts. But for this lack of adequate notice and accessibility the Grievant very well might have been better informed about the specific rules and exceptions governing inmate movement during counts. Armed with that knowledge, perhaps he might not have released Inmate Mason in the first instance. Certainly he deserves the benefit of the doubt in this respect, given the Agency's contributive fault. Even though the Grievant must have understood the *broad, commonsensical guidelines* about inmate movement during counts, it is unfair to hold him *fully* accountable for *specific* provisions in rules where the Agency has not shown that he either knew of the rules or had reasonable access to them. Based on this analysis, the Arbitrator concludes that the *Grievant and the Agency* must share some responsibility for the Grievant's violation of Rule 45(A). However, as pointed out elsewhere in this opinion, fault for the Rule 37 violation must rest squarely on the Grievant's shoulders, since notice was unnecessary to inform him of the impropriety of being in dark rooms with female inmates.

The foregoing balance of mitigative and aggravative factors together with the apportionment of fault does not warrant removal in this case. In short, the extreme penalty of removal is unreasonable, arbitrary, and capricious under the circumstances of this particular case. Still, a substantial penalty is indicated to rehabilitate the Grievant, especially in light of his relaxed attitude about associating or fraternizing with female inmates. Accordingly, the Arbitrator holds that the Grievant's removal shall be reduced to a sixty-day (60-day) suspension. He shall be reinstated with full backpay and with no loss of seniority. However, any backpay to which the Grievant is entitled shall be reduced by the interim income he could have earned with due diligence. In addition, any backpay to which the Grievant is entitled shall be reduced by any earnings he in fact earned between the date of his removal and the date of his reinstatement pursuant to this award.

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VII. The Award

For all the foregoing reasons, the Grievance is hereby **DENIED IN PART AND SUSTAINED IN PART**.