

**OPINION AND AWARD
IN THE MATTER OF THE ARBITRATION BETWEEN
Ohio Reformatory for Women**

-AND-

Ohio Civil Service Employees Association AFSCME Local 11

Appearing for ORW

Roland M. Alvarez, Labor Relations/ORW

Patricia Andrews, Warden

Megan Ary, Witness

Roberta L. Bennett, Witness

Ashley Hughes, Legal Intern, OCB

Jennifer Marshall, Lieutenant

Christopher Lambert, LRO 3

Francisco Pineda, Deputy Warden Special Services

Kathy Putt, Lieutenant

Anik M. Rogers, State Trooper

Kami L. Rotelleni, Witness

Teya Sheldon, Witness

Richard Shutek, Labor Relations Officer 2

Kristy Webb, Witness

Michael Winks, Lieutenant

Laurie Worcester, Labor Relations, Specialist-2nd Chair

Appearing for OCSEA

James M. Adkins, Plumber 2

Lynn Belcher, OCSEA Staff Representative

Robert Edmonds, Grievant

Joseph Hawk Chapter 8010 Vice-president

Michael Hill, OCSEA Staff Representative

James McElvain, OCSEA Staff Representative

Timothy W. Roberts, Correction Officer, President Chapter 8010

Carolyn A. Wilkins, Program Aid

CASE-SPECIFIC DATA

Grievance No.

27-19-20041213-3816-01-03

Hearing(s) Held

August 4, 2005; August 29, 2005

Closing Arguments E-mailed

September 16, 2005

Case Decided

October 31, 2005

Subject

Sexual Misconduct, Interfering With Official Investigation

The Award

Grievance **Denied**

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

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1 **I. The Facts**

2 This is a disciplinary dispute involving the Ohio Reformatory for Women (“Agency” or “ORW”), and
3 the Ohio Civil Service Employees Association AFSCME Local 11 (“Union”),¹ representing Mr. Robert
4 Edmonds (“Grievant”). The Agency fired the Grievant on December 13, 2004 for violating Work Rules 24,
5 46E, and 46F.² When he was terminated, the Grievant was a Correction Officer with eleven years tenure,
6 having been hired on January 31, 1994.³ He was assigned to Hale Cottage and had an active written
7 reprimand for violating Rule 8 of the Disciplinary Grid, Performance Track. Hale Cottage houses new
8 inmates who are going through boot camp. The Grievant had a reputation among the inmates as being a
9 strict, no-nonsense Correction Officer. Each morning, he assembled a group of approximately fifteen inmate
10 volunteers to clean the showers in Hale Cottage.

11 The Grievant employed the same cleaning procedure each time. First, the walls and floors of the showers
12 were scrubbed down. Then the Grievant would have the volunteers to fill buckets with water from faucets
13 in the shower area. The inmates would bring the filled buckets to the Grievant as he stood in or near the
14 showers and pass them off to him. Because the buckets had not handles, the inmates had to hold them close
15 to their bodies as they passed them to the Grievant, a situation that he exploited.

16 Inmates Teya Sheldon, Kristy Webb, Kami Rotelleni, and Roberta L. Bennett testified at the arbitral
17 hearing before the Undersigned and credibly described the Grievant’s modus operandi. As the inmates
18 handed the Grievant the buckets of water, he made sexual contact with them. Specifically, when receiving
19 the buckets of water from the inmates, the Grievant placed one hand beneath the buckets and one on the side.
20 Then, he would pull the bucket to himself and deliberately graze or brush against the inmates’ breasts and/or
21 crotches usually with the hand beneath the bucket.⁴ Occasionally, he would touch an inmate’s crotch and

¹ Hereinafter collectively referred to as the (“Parties”).
² Joint Exhibit 1, at 1.
³ Management Exhibit 1, at 7.
⁴ See also ORW’s Investigatory Report, Joint Exhibit a, at 11-21.

1 brush all the way up her body, grazing over her breasts. Some inmates sought to avoid his touch. For
2 example, some inmates tried to stand further away while passing the bucket of water, but the Grievant would
3 usually extend the hand further beneath the bucket to contact the inmates' breasts or crotches. At least one
4 inmate requested a bucket with a handle but did not get it.

5 Not all of the inmates viewed the Grievant's touch to be unwelcome. Ms. Roberta L. Bennett, a former
6 inmate, desired the Grievant's physical attention because she had not been with a man for approximately four
7 months when the Grievant began touching her. The Grievant would regularly assigned Ms. Bennett to
8 inventory items in the broom closet and assigned various tasks to other inmates to keep them busy and out
9 of the way. Then he would join Ms. Bennett in the broom closet and rub her vaginal area and breasts.
10 Occasionally, he actually penetrated her vagina with his fingers while rubbing her breasts. On at least one
11 occasion, Inmate Bennett rubbed the Grievant's crotch through his pants.

12 On April 14, 2004, four inmates informed Correction Officer Howard Smith that an unnamed staff
13 member had sexually assaulted two inmates.⁵ C/O Smith passed the information to his superiors.⁶ And on
14 April 18, 2004, during an interview with Warden Patricia Andrews, the Grievant, who had union
15 representation, stated that he "may have, on accident, touched the breasts of an inmate . . . [because] it is a
16 very close area in the inmate bathroom cleaning area."⁷ Labor Relations Officer, Roland M. Alvarez,
17 testified that the Grievant said "he may have accidentally touched the breast of an inmate near the bathroom
18 of Hale Cottage." That same day, the Warden placed the Grievant on administrative leave with pay while
19 ORW investigated the matter. On April 21, 2004, Inmate Russell told C/O Smith that Inmate Teya Sheldon
20 had accused the Grievant of misconduct because he was "mean and an asshole."⁸ C/O Smith reported these
21 accusations to his superiors.

⁵ Joint Exhibit 1, at 31.

⁶ *Id.*

⁷ Joint Exhibit 1, at 12.

⁸ Union Exhibit 1.

1 On July 28, 2004, the Agency interviewed the Grievant as part of its administrative investigation into
2 his alleged misconduct with inmates in Hale Cottage.⁹ Before initiating that interview, the Agency advised
3 the Grievant of his Garrity Rights.¹⁰ During the interview, the Grievant flatly denied saying that he may have
4 intentionally or unintentionally touched an inmate's breasts while accepting buckets of water in Hale Cottage
5 shower area.¹¹ This categorical denial prompted the Agency to accuse the Grievant of interfering with an
6 official investigation.

7 The Agency published its investigatory report on October 6, 2004 and quickly initiated disciplinary
8 action against the Grievant.¹² On October 13, 2004, the Agency scheduled a pre-disciplinary hearing for
9 October 21, 2004.¹³ The Pre-disciplinary Hearing Officer held, on October 26, 2004, that there was just
10 cause to discipline the Grievant.¹⁴ On November 24, 2004, Warden Andrews elected to remove the Grievant
11 effective December 13, 2004.¹⁵ That same day the Union challenged the Warden's decision¹⁶ in grievance
12 27-19 (04-12-13) 3816-01-03 ("Grievance").¹⁷

13 The Parties were unable to settle the dispute, appointed the Undersigned to hear it, and scheduled an
14 arbitral hearing for August 4, 2005. The Undersigned heard the matter on the date scheduled at ORW. At
15 the beginning of the hearing, the Parties offered several factual stipulations, joint exhibits, and a submission
16 agreement. In addition, the Union raised several procedural issues, though none challenged the
17 Undersigned's jurisdiction to hear this dispute on the merits. The Agency and the Union were represented
18 by their respective advocates, each of whom had a full and fair opportunity to produce testimonial and

⁹ Joint Exhibit 1, at 25.
¹⁰ Id. at 24.
¹¹ Id. at 26, 29, 30.
¹² Id. at 11.
¹³ Id. at 10.
¹⁴ Joint Exhibit 3, at 5-6.
¹⁵ Joint Exhibit 1, at 1.
¹⁶ Joint Exhibit 3, at 1.
¹⁷ Joint Exhibit 1, at 1.

1 documentary evidence in support of their cases. All witnesses were duly sworn and fully available for direct
2 and cross-examination. Documentary evidence introduced into the arbitral record was available for relevant
3 objections. Because the parties could not complete their presentations on the first hearing day, they
4 scheduled a second hearing for August 29, 2005.

5 The second-day hearing commenced as scheduled at ORW, and the same evidentiary and procedural
6 rules set forth above also applied to the second day. At the end of the second-day hearing, the Parties opted
7 to submit post-hearing briefs via e-mail in lieu of closing arguments. They agreed to e-mail the briefs on
8 September 16, 2005 when the arbitral record was officially closed.

9 II. The Stipulated Issue

10 Was the Grievant, Robert Edmonds, terminated for just cause? If not, what should the remedy be?

11 III. Relevant Contractual and Regulatory Provisions

12 **24.01-Standard**

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

15 **24.02- Progressive Discipline**

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

18 **24.04 - Pre-Discipline**

19 When the pre-disciplinary notice is sent, the Employer will provide a list of witnesses to the event or act
20 known of at that time and documents known of at that time used to *support* the possible disciplinary action.

21 If the Employer becomes aware of additional witnesses or documents that will be *relied upon* in imposing
22 discipline, they shall also be provided to the Union and the employee The Union and/or the employee
23 shall be given the opportunity to ask questions, comment, *refute or rebut*.¹⁸

24 **24.05- Imposition of Discipline**

25 Disciplinary measures imposed shall be reasonable and commensurate with the offense and shall not be used
26 solely for punishment.

27 **25.08**

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

¹⁸ The Contract, at 73 (emphasis added).

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**DISCIPLINARY GRID
PERFORMANCE TRACK**

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10	Rule 24	Interfering with, failing to cooperate in, or lying in an official investigation or inquiry.
11	Rule 46E	Unauthorized Relationships . . . committing any sexual act with any individual under the supervision of the Department.
12	Rule 46F	Unauthorized Relationships . . . engaging in any other sexual conduct with any individual under the supervision of the Department.

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**IV. Summaries of the Parties' Arguments
A. Summary of the Agency's Arguments**

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1. The Grievant was terminated for just cause because the Agency's witnesses credibly and consistently described how he sexually victimized them.
 2. The existence of the Grievant's active discipline and his reprehensible conduct establish just cause for his removal.
 3. The charges leveled against the Grievant in this case individually and collectively carry a penalty of removal for a first offense, and the Grievant violated each of the cited rules.
 4. The Union failed to assert an adequate defense.
 - a. When addressing the merits of the case, the Union offered only the Grievant's inconsistent, inexplicable, and self-serving testimony as well as character testimony that overlook the merits.
 - b. Nor did the Union adduce evidence sufficient to support a reasonable inference that the allegations against the Grievant were merely conspiratorial.
 5. Finally, the Union failed to prove any of its procedural claims.

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B. Summary of the Union's Arguments

1. The Agency failed not only to produce numerous documents but also to produce its investigator as a witness in this case. The Agency created and subsequently concealed documents, including C/O Smith's Incident Report, which shows that an inmate's voluntary statement was also concealed.
2. The Agency's witnesses conspired to falsely accuse the Grievant so that the Agency would fire him and the witnesses could perhaps be transferred to lower security correctional facility. Each of the alleged victims is an incredible witness.
 - a. Ms. Webb lacks credibility because she admitted to contriving a false claim on another occasion
 - b. Ms. Bennett testified that she was threatened with punishment if she did not falsely accuse the Grievant, and her parting statement shows that she was not a voluntary witness: "A man shouldn't lose his job over a piece of ass."
 - c. Ms. Sheldon is a fabricator as evidenced by the statement, "[H]e strikes [me] as the type that would do something like that."
 - d. Ms. Rotelleni is not a credible witness because she waited approximately one month after the Grievant was on administrative leave to submit her statement.
 - e. Ms. Penny Ray and Ms. Embro's written statements have little probative value because the Union had no opportunity to question either inmate.
3. The Grievant never *admitted* that he touched an inmate's breast. In fact, the Grievant said, "he 'might

1 have' brushed against up against an inmate."¹⁹

- 2 4. Inmate Wilkins' testimony establishes that the Grievant was a well respected, strict Correction Officer,
3 whose reputation, character, and demeanor are inconsistent with the type of charges leveled against him.
4 5. The testimony of Ms. Ary further erodes the substance of the Agency's charges against the Grievant.
5 Ms. Ary testified that she heard nothing of the charges before the inmates mentioned them to the Agency.
6 Yet, reason dictates that some inmates would have mentioned such misconduct to a female correction
7 Officer before mentioning it to C/O H. Smith.

8 **V. Analysis and Discussion**
9 **A. Evidentiary Preliminaries**

10 Because this dispute involves discipline, the Agency has the burden of proof or persuasion regarding its
11 charges against the Grievant. To establish those charges, the Agency must adduce *clear and convincing*
12 evidence in the arbitral record as a whole, showing that the Grievant engaged in the alleged misconduct.²⁰
13 Doubts regarding the existence of any alleged misconduct shall be resolved against the Agency. Unless the
14 Agency sufficiently establishes the purported misconduct, it cannot prevail, *irrespective* of the strength or
15 weakness of the Union's defenses. Similarly, the Union has the burden of persuasion (preponderant
16 evidence) as to its allegations and affirmative defenses—such as the procedural issues raised in the instant
17 dispute—doubts about which shall be resolved against the Union.

18 **B. Procedural Issues**

19 The Union raised several procedural issues, alleging that the Agency was unresponsive to the Union's
20 documentary requests, gave the Union outdated telephone numbers and addresses for witnesses, and had
21 essentially barred the Union from fully participating in the predisciplinary hearing.

22 **1. Documentary Requests**

23 First, the Union claims that the Agency denied its global request for *any and all documents* of any and
24 all investigations of the Grievant, including the investigation packets. Beneath this expansive evidentiary
25 request are four specific requests, each of which is discussed below. The Union claims that it requested all

¹⁹ Union's Post-hearing Brief, at 1

²⁰ In this case, the clear and convincing standard replaces the traditional preponderance standard because of the highly stigmatizing nature of the charges of sexual misconduct leveled against the Grievant.

1 voluntary statements written by inmates on inmate forms. These statements were made *before* the Agency
2 launched its investigation and likely prompted the Agency investigation. Inmates' statements that are part
3 of the predisciplinary packet were given to the highway patrol *after* the Agency initiated its investigation.

4 Two Agency representatives responded to this procedural complaint. First, Labor Relations Office 3 and
5 Agency Advocate, Christopher Lambert, noted that statements of all witnesses whom the Agency intended
6 to present at the arbitral hearing were included in the predisciplinary conference package and were part of
7 the arbitral record in the instant dispute. Labor Relations Officer Roland M. Alvarez testified that the Union
8 did request voluntary inmate statements, some of which were in the predisciplinary packet. Officer Alvarez
9 also acknowledged that C/O Howard Smith wrote two incident reports, one of which indicated that Inmate
10 Russell wrote a voluntary statement.^{\21} Also, Officer Alvarez agreed that the Union had requested that
11 voluntary statement but, despite a diligent search, he *was unable to locate it*. Nor could Officer Alvarez
12 explain the disappearance of a piece of perhaps important evidence in the Agency's possession. Officer
13 Alvarez was unaware of voluntary statements from inmates Hale, Culberson, Johnson, and Sheldon. In
14 Officer Alvarez's view, the predisciplinary packet contained all evidence that he had received.

15 **a. Discussion of Documentation Requests**

16 As a general proposition, Article 25.08 gives the Union the right to "request specific documents or
17 witnesses reasonably available from the Employer and relevant to the grievance under consideration."^{\22} The
18 key phrase here is "reasonably available from the Employer." At some point, the documents requested were
19 reasonably available to the Agency and would have remained so, but for the Agency's oversight. Still, the
20 record does not show that the Agency deliberately withheld inmates' voluntary statements from the Union.
21 That fact is inconsistent with finding an actionable procedural violation by the Agency. Nor is there a clear
22 showing of the potential impact the of the missing documents on the Union's case, ultimately, however, one

^{\21} Union Exhibit 1, at 2.

^{\22} Contract at 81. Usually the Contract is designated Joint Exhibit 1, but in this dispute, the Parties gave a different document that designation.

1 would hope that in the future the Agency takes whatever steps necessary to avoid losing or misplacing
2 evidence in its custodial care such as the voluntary statements mentioned in C/O Smith's statement.¹²³

3 **2. Lack of Access to Witnesses**

4 When the Union sought to contact inmates who offered voluntary statements, it encountered outdated
5 telephone numbers and addresses from the Agency. However, evidence in the record does not show that the
6 Agency is the culprit here. Instead, the Agency gave the Union the addresses and telephone numbers in its
7 records. The difficulty is that many of the inmates were no longer under the Agency's control or supervision.

8 Also, the parole authority was less than cooperative with the Union, flatly refusing its request for the
9 address of a former inmate, Ms. Kristy Webb, who was no longer on parole. With respect to the Union's
10 request for incident reports, Officer Alvarez was unaware of any incident reports that either Lieutenant
11 Toriano or Lieutenant Winks obtained. Also, the Union claims it requested but was denied copies of all
12 inventory sheets for the janitor's closet from April 1-30, 2004.

13 **a. Discussion of Lack Access to Witnesses**

14 The Parties did not produce any witnesses or other evidence on this issue. Consequently, the Arbitrator
15 has no basis for addressing it. Nevertheless, the Arbitrator offered the Union an opportunity to interview
16 inmates or other witnesses that it had not interviewed before the August 4 arbitral hearing. Understandably,
17 this offer did not squarely address the gist of the Union's concern, which is to interview *all* inmates with *any*
18 knowledge of the facts and circumstances surrounding the dispute, irrespective of whether the Agency
19 decides to use those inmates as witnesses in its case.

20 **3. Representational Issue**

21 The Union asserts that the Agency prevented it from fully participating in the predisciplinary hearing.
22 Union advocate, Timothy Roberts, attended the predisciplinary hearing and testified at the arbitral hearing.
23 According to Mr. Roberts, the Predisciplinary Hearing Officer and Deputy Warden of Special Services,

¹²³ Union Exhibit 1.

1 Francisco Pineda, absolutely gagged the Union during the predisciplinary hearing. Mr. Roberts testified that
2 Mr. Pineda limited the Union and/or the Grievant to yes-or-no answers during the hearing and rejected any
3 documents or testimony the Union offered in the Grievant's behalf. Also, Mr. Roberts insisted that the
4 Agency's advocate at the predisciplinary hearing, Mr. Rufus Smith, rejected the Union's evidence as
5 irrelevant or non-beneficial to his case.

6 Conversely, Mr. Pineda either could not remember the details or disagreed with the Union's version of
7 them. For instance, he testified that he simply could not recall if Mr. Rufus Smith made that statement. In
8 any event, the Union produced neither documents nor testimony to rebut charges against the Grievant.
9 According to Mr. Pineda, the Union wanted to engage in role playing to show that the alleged touching of
10 inmates could not have happened. Mr. Pineda said he rejected this proposal and insisted on traditional
11 testimonial or documentary evidence. Finally, Mr. Pineda insisted that he allowed the Union to elaborate
12 on answers as set forth in his report.²⁴ Finally, Mr. Lambert responded that Management is only interested
13 in relevant evidence.

14 **a. Discussion of Representational Issue**

15 Article 24.04 explicitly affords the Union and/or the Grievant an opportunity to "ask questions, comment,
16 refute or rebut."²⁵ Nevertheless, the record does not support the claim that Mr. Pineda either gagged the
17 Union or otherwise violated Article 24.04. The following excerpt from Mr. Pineda's Pre-disciplinary
18 Hearing Report supports this holding:

19 Neither Mr. Roberts nor Mr. Hawke talking on behalf of Mr. Edmonds admitted to any
20 wrongdoing when Mr. Edmonds supervised inmates while performing his duties as an
21 officer. They always denied that Mr. Edmonds violated the aforementioned rules of the
22 standards of employee conduct. *They stated that the investigation performed after the*
23 *alleged charges contained inaccurate information and lies as the report was filled with*
24 *statements never made by people interviewed, and also on inmates whose credibility is*
25 *questionable. They believe Mr. Edmonds was a victim of Inmates retaliating against a good*
26 *and strict officer. They stated that another motive for inmates to tell lies on Mr. Edmonds*

²⁴ Joint Exhibit 1, 6-8.

²⁵ Contract at 73.

1 was possible if not probable. But there is more. Second, the Grievant admitted that even before Warden
2 Andrews summoned the Grievant, inmates informed him that other inmates had lodged complaints against
3 him. Again, assuming, *arguendo*, the Grievant did not immediately know the nature of these inmates'
4 accusations, it is likely that the inmates who warned him also apprised him of the nature of the accusations.
5 Under these circumstances, almost any accused would inquire about the identity of both the complainant and
6 the complaint, unless, of course, the accused is aware of this information. Finally, the Grievant admitted that
7 before he went to the Warden's office, Lieutenant Crow advised him to stay away from Hale Cottage that
8 day, April 18, 2004. Warnings from the inmates and the Lieutenant together with a union representative
9 waiting to accompany him into the Warden's office must have alerted or notified the Grievant that a serious
10 issue had arisen, one that could lead to discipline. Indeed, once he was in the Warden's office, the Grievant
11 acknowledged, without any prompting, that he may have accidentally touched an inmate's breast. Yet,
12 during the arbitral hearing, he testified that he entered the Warden's office completely ignorant of why he
13 was there. Under the foregoing circumstances, that assertion is simply incredible.

14 Based on the foregoing discussion, the Arbitrator fails to see how the Grievant was harmed by the
15 absence of formal notification as to why he was summoned to the Warden's office. If he did not know, he
16 certainly should have known. It is, therefore, highly unlikely that the Grievant would have been any better
17 prepared to defend himself had he been *formally* notified of why the Warden sought his presence and that
18 their conversation could lead to discipline. Nevertheless, in the future, it would clearly behoove the Warden
19 and other Agency officials to conform to contractual notice when summoning employees to their offices to
20 discuss disciplinary or potentially matters, especially since the employees are expected to follow the rules.

21 **C. The Merits**

22 **1. Whether the Grievant Violated Rule 24**

23 Rule 24 prohibits employees from "[i]nterfering with, failing to cooperate in, or *lying* in an official

1 investigation or inquiry.”¹²⁷ The Agency alleges that the Grievant lied during an official investigation.
2 Specifically, the Agency asserts that during an investigatory interview on July 28, 2004 the Grievant flatly
3 contradicted his earlier admission in the Warden’s office, on April 18, 2004, that he had touched an inmate’s
4 breasts in Hale Cottage. Conversely, the Union contends that the Grievant never actually *admitted* touching
5 inmates’ breasts. Therefore, according to the Union, the Grievant’s subsequent denial is not a contradiction
6 of his statement in Warden Andrews’ office.

7 Resolution to this issue lies in the Grievant’s own words. The following exchange occurred between the
8 Grievant and Warden Andrews in her office on April 18, 2004:

9 Warden Andrews asked the Grievant, “[I]f he knew why he was in her office?” the Grievant
10 responded, “I am here from some Hale inmates allegations.” The Warden asked, “What
11 allegations?” The Grievant responded, “that I touched inmates.” Warden Andrews then inquired,
12 “Well Mr. Edmonds, did you?” The Grievant answered, “I may have, on accident, touched the
13 breasts of an inmate. . . .”¹²⁸

14 Subsequently, during an investigatory interview on July 28, 2004, the Grievant offered the following
15 responses to the questions set forth below:

16 Q: Is it possible, that you *may* have touched an inmate’s breast while taking the buckets from them
17 in the shower area of Hale Cottage

18 A: No

19 Q: Did you ever touch an inmate’s breast area?

20 A: I’ve never touched I’s breast intentionally not intentionally.¹²⁹

21 Q: Once again, did you ever touch, grab, or stroke an inmate’s breast while removing the bucket
22 of water from her?

23 A: Not int¹³⁰

24 While in the Warden’s office, the Grievant said he may have *on accident* touched an inmate’s breast.
25 That is an admission that he could have touched (not necessarily that he did touched) an inmate’s breast. In
26 the subsequent interview, however, he flatly denies that he even *could* have so touched an inmate. In other

¹²⁷ Joint Exhibit 1, at 1 (emphasis added).

¹²⁸ Id. at 12 (emphasis added).

¹²⁹ Id. at 29.

¹³⁰ Id. at 30

1 words, he is retracting his earlier admission of the *possibility* that he improperly touched an inmate. Even
2 in the realm of *possibility* as distinguished from *probability*, only one of those statements can be true; the
3 other is, therefore, untrue. Therefore, the Grievant lied either in the Warden’s office on April 18, 2004, or
4 in the July 28 interview.

5 Also, observe that the Grievant’s answers in the interview are internally inconsistent. He first asserts
6 that he would not touch an inmate’s breast intentionally or unintentionally. Almost immediately afterwards,
7 he says he would not do it intentionally, which suggests that he either would or could have done it
8 unintentionally.

9 Based on the foregoing passages and comments, the Arbitrator is persuaded that the Grievant’s
10 statements in the Warden’s office clearly contradict those in the subsequent investigatory interview.
11 Moreover, the contradiction was such that it could only have been intentional. Consequently, the Arbitrator
12 holds that the Grievant did violate Rule 24 as alleged.

13 **2. Whether the Grievant Violated Rules 46E and 46F**

14 Rule 46E prohibits “[u]nauthorized relationships . . . committing any *sexual act* with any individual
15 under the supervision of the Department. Similarly, Rule 46F prohibits “[u]nauthorized relationships . . .
16 engaging in *any other sexual conduct* with any individual under the supervision of the Department.”³¹ even
17 though these rules are distinguishable, they are considered in tandem because both describe sexual behavior.
18 Rule 46E focuses on a “sexual act” and Rule 46F addresses “any *other* sexual conduct.” Thus, on its face,
19 Rule 46F seems intended to be a catchall that essentially begins where Rule 46E ends, though the
20 demarcation between them is fuzzy. That is Rule 46E references traditional manifestly sexual acts such as
21 intercourse, sodomy, fellatio, or digital penetration; Rule 46F covers sexual conduct other than these pure
22 sexual acts. Touching inmates breasts would, therefore, not constitute a “sexual act” under Rule 46E but
23 would qualify as “other sexual conduct” under Rule 46F. Consequently, if the Grievant touched the breasts

³¹ Joint Exhibit 1, at 1 (emphasis added).

1 and crotches of inmates, he engaged in “other sexual conduct.” If, however, he inserted his finger in an
2 inmate’s vagina, he engaged in a sexual act as contemplated in Rule 46E.

3 In arguing that the Grievant violated Rules 46E and 46F, the Agency wholly relies on the testimonies
4 of Ms. Teya Sheldon, Ms. Kristy Webb, Ms. Kami L. Rotelleni, and Ms. Roberta L. Bennett, all of which
5 the Agency argues offered consistent and forthright testimonies. In contrast, the Union attempts to discredit
6 each witness by highlighting potential bias in their views and inconsistencies in their testimonies.

7 The Agency’s evidence and arguments are more persuasive given the number of its witnesses and, of
8 equal importance, the consistency of their testimonies as to the Grievant’s modus operandi. Each of the
9 Agency’s witnesses testified that Grievant touched essentially the same areas of their bodies, in essentially
10 the same manner, under the same circumstances, and in the same physical surroundings. Specifically, he
11 grazed or brushed against their breasts and/or crotches as he relieved them of buckets of water. Their
12 testimonies are consistent even with respect to how he gripped the buckets when accepting them from the
13 inmates. All witnesses were forthright, unwavering, and very credible regarding the Grievant’s modus
14 operandi. This does not mean, however, that the witnesses did not “stumble” over some details, which
15 naturally diminished but hardly destroyed their credibility regarding the disputed fact of whether the Grievant
16 touched their breasts and pubic areas. Because the testimonies suffered from some inconsistencies, a
17 thorough examination of each witness’ testimony is indicated.

18 Before proceeding with this examination, however, the Arbitrator notes that he views inmates’
19 testimonies exactly as that of non-inmates: All testimony is credible, unless there is *reason* to conclude
20 otherwise. In short, an inmate witness is *not* presumed to be other than credible simply because of his/her
21 status as an inmate.¹³²

¹³²

Such reasons include internal or external inconsistencies in the testimony itself, prior episodes of untruthfulness, or other traditional grounds for impeachment. Also, all impeaching evidence does not necessarily have the impact on a witness’ credibility. For example, impeaching evidence that goes directly to the heart of a witness’ testimony usually (but not always) utterly destroys the witness’ credibility. In contrast, impeaching evidence about tangential matters may or may not destroy a witness’ credibility, depending, for example, on the strength of corroborative evidence, tending to support the witness’ testimony.

1 **a. Teya Sheldon**

2 Ms. Sheldon, a former inmate, offered internally and externally consistent testimony about the Grievant’s
3 modus operandi. Still, her credibility is not unblemished. First, her written statement³³ suggests that she
4 filled the buckets and took them to the Grievant, but her testimony suggests the opposite. Second, when on
5 the witness stand, Ms. Sheldon neglected to mention that, “On the third time, the Grievant reached lower and
6 tried to grab my privates but rubbed against my lower belly instead.”³⁴ Third, Ms. Sheldon and the Grievant
7 had a disagreement about tobacco, an event that could have biased Ms. Sheldon’s testimony. Finally, the
8 Union correctly points out that Ms. Sheldon did not immediately report the Grievant’s conduct, which
9 suggests that perhaps she fabricated her testimony. Regarding her tardy report, Ms. Sheldon testified that
10 she waited until the third shift to report the incident because she was scared.

11 Although the testimonial inconsistency, delay in reporting, and potential for bias clearly erode Ms.
12 Sheldon’s credibility, they do not destroy it. The saving grace for Ms. Sheldon’s credibility is the high
13 degree of consistency between her testimony and the corroborative testimonies of the other three inmate
14 witnesses regarding the Grievant’s *modus operandi*. But for that almost identical overlap, Ms. Sheldon’s
15 credibility would be nonexistent in this dispute.

16 **b. Kristy Webb**

17 Ms. Kristy Webb is a former inmate. When testifying about the Grievant’s sexual aggressiveness, Ms.
18 Webb described his conduct almost exactly as did the other three witnesses. The consistency in describing
19 the Grievant’s conduct is the high-water mark for Ms. Webb’s credibility. From there it descends but avoids
20 self-destruction. A major blow to her credibility is that she is on record at ORW for having fabricated a
21 death in her family and went so far as to hold a memorial service with some fellow inmates. Furthermore,
22 Ms. Webb waited approximately 1.5 weeks to report the Grievant’s sexual conduct allegedly because she

³³ Management Exhibit 1.

³⁴ Management Exhibits 1 & 2.

1 was trying to determine whether the Grievant had touched her accidentally or intentionally. In fact, the
2 Grievant was escorted off ORW premises the day before Ms. Webb decided to report his conduct toward her
3 in the shower area of Hale Cottage. In light of these concerns on her credibility, Ms. Webb's testimony would
4 carry little weight but for the consistency of her description of the Grievant's modus operandi in the Hale
5 shower areas.

6 **c. Kami Rotelleni**

7 Ms. Rotelleni is currently an inmate. She gave the same description as the other witnesses of the
8 Grievant's modus operandi in the showers, but she did not report the incident until approximately one month
9 after the Agency had placed the Grievant on administrative leave. This length of delay raises reasonable
10 concerns about the authenticity of her report. Indeed, Ms. Rotelleni probably would not have come forth at
11 all if she had not been asked for her statement. Ms. Rotelleni admits she was asked to testify and was
12 subpoenaed to appear at the arbitral hearing. Yet, she stated that she did not object to testifying because what
13 the Grievant did was wrong. The question is why did it require a one-month delay, a subpoena, and a request
14 to testify for Ms. Rotelleni to recognize that the Grievant's conduct was in fact wrong? Or was there
15 anything to report in the first instance? These are troubling questions. As was the case with the credibility
16 of the other witnesses thus far, Ms. Rotelleni's credibility is suspect and is in fact held together solely by the
17 external consistency between her description of the Grievant's methods those of her fellow witnesses.

18 **d. Roberta L. Bennett**

19 Ms. Bennett is a former inmate. Ms. Bennett was no longer under the Agency's supervision when she
20 gave her statement to Ohio State Troopers who came to her home. She was the most persuasive and credible
21 of the Agency's witnesses. First, Ms. Bennett had no demonstrable bias against the Grievant and had a
22 good reason for not coming forward immediately after being accosted: She testified that emphatically
23 welcomed, enjoyed the Grievant's sexual touch and reciprocated on at least one occasion.

24 Because she was a willing participant, Ms. Bennett and the Grievant enjoyed a higher level of sexual

1 contact, one episode of which violated Rules 46E and 46F. Regarding the violation of Rule 46E, the
2 Grievant and Ms. Bennett met in the broom closet where they had more time alone and where he *penetrated*
3 her vagina with his *finger* in violation of Rule 43E. While in the broom closet, Ms. Bennett was supposed
4 to be inventorying the brooms and other equipment in the closet. To insure their privacy, the Grievant would
5 assign all other inmates to perform various tasks. And, with respect to Rule 46F, Ms. Bennett testified that
6 in the shower area, the Grievant rubbed against her vagina and breasts when he received buckets of water
7 from her.

8 Because she desired and benefited from the physical contact, Ms. Bennett was reluctant to obviously
9 report her relationship with the Grievant and did so only after she was squarely confronted with the facts of
10 her relationship and effectively coerced to report it. That Ms. Bennett was urged to testify against the
11 Grievant only strengthens her credibility given their relationship. She would not likely exaggerate or
12 otherwise fabricate lies about him because she did not want to harm him. For example, she testified that she
13 had no bad feelings against the Grievant and took the time to say goodbye to him when she was leaving
14 ORW. Furthermore, because she testified that what she and the Grievant did was wrong does not mean that
15 she wanted to harm him or to testify against him. In fact, Ms. Bennett explicitly stated that testifying against
16 the Grievant was not her idea in the first instance and she did not “want to see anyone lose his job over a
17 piece of ass.” Ms. Bennett’s physical relationship with the Grievant was a means to an end: physical arousal
18 and/or satisfaction for her and presumably the Grievant.

19 Even though Ms. Bennett was the most persuasive of the Agency’s witnesses, her testimony was not
20 beyond reproach. For example, under cross-examination, she could not explain why the Grievant would
21 assign her to inventory equipment in the broom closet when he had assigned tasks for all other inmates in
22 the area to insure his privacy with Ms. Bennett. She agreed that under those circumstances there would be
23 little left in the closet to inventory. In addition, Ms. Bennett testified that she never touched the Grievant,

1 but her statement says that on one occasion she touched his crotch and he was surprised or shocked.¹³⁵ She
2 explained this discrepancy by stating that she did not touch his genitals but just rubbed over the crotch of his
3 pants. These discrepancies do not impugn Ms. Bennett's otherwise consistent and wholly credible testimony.
4 The Arbitrator therefore holds that with respect to Ms. Bennett and the other three witnesses, the Grievant
5 violated Rules 46E and 46F.

6 **VI. Penalty Decision**

7 Because the Agency clearly and convincingly established two serious charges of sexual misconduct
8 against the Grievant and one technical charge of lying during an official investigation, some measure of
9 discipline is indicated. Assessment of the proper quantum of discipline requires an evaluation of the
10 mitigative and aggravative factors as well as an ultimate determination of whether the penalty of removal
11 is unreasonable, arbitrary, capricious, or an abuse of discretion under the circumstances of this case.

12 **A. Aggravative Factors**

13 The aggravative factors are the Grievant's gross abuse of his position as a Correction Officer, which he
14 used to exploit inmates under his supervision. His position as a Correction Officer and the sexual nature of
15 his exploitative conduct render his transgressions nothing short of unprincipled, heinous, and wholly
16 intolerable. As a Correction Officer, the Grievant was charged with a responsibility to serve as a model for
17 the inmates rather than to exploit them. A second aggravative factor is that the Grievant made a rather
18 transparent attempt to conceal his wrongdoing by deliberately giving completely opposite statements while
19 discussing his conduct. Finally, when he was terminated, the Grievant had an active written reprimand.

20 **B. Mitigative Factors**

21 The mitigative factors include the Grievant's approximately eleven years of service and job performance
22 that was satisfactory or better.¹³⁶

¹³⁵ Management Exhibit 5, at 2.

¹³⁶ Joint Exhibit 6.

1 **C. Propriety of Removal**

2 This balance of mitigative and aggravative factors leaves the Arbitrator little choice but to hold that
3 removal in this case is for just cause and is not unreasonable, arbitrary, capricious, or an abuse of discretion.

4 **VII. The Award**

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

Robert Brookins

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