LABOR GRIEVANCE ARBITRATION
BEFORE ARBITRATOR MICHAEL T. LOCONTO

In the Matter of the Arbitration between

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL WORKERS, COUNCIL 75, LOCAL 974,

Issue: Demotion ([redacted] Grievant).

and

STATE OF OREGON, DEPARTMENT OF CORRECTIONS.

Oregon Employment Relations Board (Written Grievance dated March 1, 2023).

AWARD OF THE ARBITRATOR

The Employer did not have just cause to demote the Grievant, [redacted] from the rank of Corporal on or around February 10, 2023.

The Employer restored the Grievant's rank on or around February 28, 2024. The Employer did not have just cause to substitute a one-step reduction in pay for a period of two months in lieu of demotion. Accordingly, the Grievant shall be made whole for all lost wages, benefits, and seniority. All related disciplinary records shall be expunged from the Grievant's personnel records. The Employer is solely responsible for full payment of the Arbitrator's fees in this matter.

The Arbitrator will retain jurisdiction for a limited period of sixty (60) days and for the sole purpose of resolving any disputes regarding the implementation of this remedy.

Michael T. Loconto, Esq.
Arbitrator
Dated: May 6, 2024

In the Matter of the Arbitration between

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL WORKERS, COUNCIL 75, LOCAL 974,

and

STATE OF OREGON, DEPARTMENT OF CORRECTIONS.

OPINION AND AWARD

Oregon Employment Relations Board ([redacted] demotion – March 1, 2023 grievance).

The parties submitted this matter to arbitration pursuant to Article 51 of the DOC Security unit collective bargaining agreement ("Agreement") effective July 1, 2020 through June 30, 2023 between the American Federation of State, County and Municipal Employees, Council 75, Local 974 ("AFSCME" or the "Union") and the State of Oregon Department of Corrections ("DOC" or the "Employer"). The grievance alleges that the Employer violated Articles 47, 49 and 50 of the Agreement when it demoted Grievant [redacted] ("[redacted] or "Grievant") from the rank of corporal to the rank of corrections officer on or around February 10, 2023. The Union further alleges that the Employer took such disciplinary action without just cause, and that the Employer failed to provide a timely and adequate response to a reasonable request for the Grievant's personnel records and other information related to this matter. The Employer modified the discipline on or around February 28, 2024, reinstating the Grievant to the rank of corporal and substituting a one-step reduction in pay for a period of two months in lieu of the prior demotion. A remote arbitration hearing was held via the Zoom video conferencing platform on March 4, 2024.

Tyler Anderson, Esq., Senior Assistant Attorney General with the Oregon Department of Justice in Salem, appeared on behalf of the Employer. Jason Weyand, Esq. of the Tedesco Law

Group in Portland, appeared on behalf of the Union. Post-hearing briefs were filed on April 5, 2024, at which time the Arbitrator declared the record closed.

ISSUES

The parties agreed to frame the issues as follows:

1. Whether DOC had just cause to demote Corporal [redacted] If not, what shall be the remedy?

2. Whether DOC had the authority to issue a 2-month, one step pay reduction to Corporal [redacted] If not, what shall be the remedy?

RELEVANT PROVISIONS OF THE AGREEMENT

ARTICLE 49 - PERSONNEL FILES

…

Section 3.

If any material reflecting critically on an employee is proved to be incorrect, it shall be removed from the employee's official personnel file and supervisory working file. Written reprimands will be removed no later than two (2) years provided no incident of a similar nature has reoccurred in the intervening time. Other disciplinary actions will be removed no later than three (3) years unless incidents of a similar nature have reoccurred in the intervening time. Early removal will be permitted when requested by the employee and approved by the Appointing Authority or designee.

ARTICLE 50 - DISCIPLINE AND DISCHARGE

Section 1.

The principles of progressive discipline shall be used when appropriate.

No employee who has completed the initial trial service period shall be disciplined or dismissed without just cause.

…

ARTICLE 51 - GRIEVANCE AND ARBITRATION

…

Section 5.

The arbitrator's fees and expenses shall be paid by the losing party. If, in the opinion of the arbitrator, neither party can be considered the losing party, then such fees and expenses shall be divided as in the arbitrator's judgment is equitable. All other expenses shall be borne exclusively by the party requiring the service or item for which payment is to be made.

BACKGROUND

This matter arises out of an interaction between two employees at the Two Rivers Correctional Institution (TRCI) in Umatilla, Oregon. TRCI is a medium-security prison facility maintained by the State of Oregon Department of Corrections (DOC). TRCI maintains a population ranging from 1,400 to 1,800 adults in custody (AICs) across several buildings. The facility is managed by Superintendent Erin Reyes.

Correctional staff at TRCI follow a paramilitary command structure in rank and direction. Entry level corrections officers report to officers at the rank of corporal, who in turn report to officers at the rank of sergeant. Corrections officers, corporals and sergeants are part of the same bargaining unit represented by AFSCME Council 75, Local 974; Darren Holden, a former corrections officer at nearby Eastern Oregon Correctional Institution (EOCI), is the Council representative assigned to TRCI. Command staff at the institution includes lieutenants and captains, as well as assistant superintendents who report to Superintendent Reyes. The facility also employs other staff in a wide variety of roles, including human resources officials, medical staff, and clerical staff. About 400 individuals work at TRCI.

The Grievant. Corporal [redacted] has worked at TRCI for six years and has held the ranks of corrections officer and corporal during this time. Generally speaking, correctional

staff protect the safety of AICs and other staff while maintaining the security of the institution. As a corporal, the Grievant supervises a zone of control within the institution, and supervises corrections officers and AICs assigned to the zone. The Grievant may provide training and authorize discipline for corrections officers, and occasionally works out of grade as a sergeant.

Correctional staff maintain a high level of alertness during the work day, given the dangerous environment present in the institution. Despite its medium-security status, AICs at TRCI include those convicted of a variety of offenses ranging from simple robbery and assault to more serious crimes such as rape and murder. Staff deal with the emotions generated by the dangerous environment using a range of approaches, from humor to counseling and mutual support for fellow staff members.

Prior Discipline. The Grievant was previously demoted from the rank of corporal to the rank of corrections officer. The June 17, 2020 demotion resulted from an incident involving a consensual physical relationship between the Grievant and another staff member, which ended earlier that year. On November 20, 2021, TRCI Assistant Superintendent of Security Matthew Turner met with the Grievant and agreed to remove the record of the Grievant's prior demotion from his disciplinary file.[1] The Grievant then applied for an open position and was restored to the rank of corporal in April 2022. The Grievant's personnel record included no other significant discipline at the time of the incident.

[1] The parties spent considerable time debating whether Turner had the authority to remove the Grievant's prior discipline from his personnel record, and whether the prior discipline had been effectively removed as a result. *See* Agreement, Article 49.3 ("Early removal will be permitted when requested by the employee and approved by the Appointing Authority or designee."). Turner, an assistant superintendent at TRCI, was not available for testimony in this matter. The Union produced an inventory document from the Grievant's personnel record indicating that a document purge took place on November 20, 2021. The parties also agreed that the Grievant's prior demotion was not present in the Grievant's personnel record. In brief, it is clear that Turner, as the Grievant's commanding officer, removed the record from the Grievant's file. By doing so, the Employer should not have considered the Grievant's prior demotion when assessing potential sanctions for disciplinary violations that may have occurred after that date.

The Incident. On November 20, 2022, [redacted] was working on the graveyard shift in the key distribution area – known at TRCI as "key dist" – with Sergeant Ryan Watson. Key dist is a small room located within the institution's gatehouse building. The room can get busy, with multiple staff working in the area. Correctional staff working in key dist have responsibility for controlling inmate and staff movements within the facility. The room has three entrances, and includes access to an armory, key rooms, and a bathroom. Work can ebb and flow during the course of a shift in key dist, and staff have time to talk to one another.

Watson and the Grievant have known one another for approximately five years. The two do not socialize outside of work, but maintain a professional relationship at work. The Grievant – who is more outgoing than Watson – sometimes jokes around with Watson and other staff as a means of relieving the stress of the job. Watson, who is a superior officer, regards the Grievant as a good worker.

During the shift in question, the Grievant and Watson carried on a serious conversation that led the Grievant to believe that Watson was having a tough day. The Grievant offered a hug to Watson, who declined. The Grievant then asked Watson why he was not interested in a hug. Watson replied that he was not comfortable with the Grievant's offer. Watson recalled that the Grievant was persistent in asking for a hug, which he described as "kinda weird" given that Watson had declined the offer and previous offers. Shortly thereafter, the Grievant indicated that he understood Watson's position and left the area.

Watson Reports the Interaction to Lieutenant Zumwalt. After the incident, Watson spoke to Lieutenant Joshua Zumwalt about his interaction with the Grievant. Watson believed that he was simply relaying a strange interaction with a co-worker to another colleague and did not believe that he was reporting a policy violation to Zumwalt.

Lieutenants perform administrative duties at TRCI and are not members of the bargaining unit. Lt. Zumwalt has known Sgt. Watson for approximately eight years, having previously worked with him at EOCI, and has known the Grievant for at least five years. During this time, Zumwalt has achieved promotions from the rank of corrections officer to sergeant and to his current rank of lieutenant.

Zumwalt recalled that Watson was "extremely uncomfortable" and "very upset" when he described his conversation with the Grievant in key dist. Zumwalt also recalled that Watson was not interested in seeking discipline, but did not want to work with the Grievant again. Zumwalt spoke to another lieutenant and a captain to determine next steps. After conferring with other command staff personnel and considering the lack of witnesses, Zumwalt directed Watson to compose his report of the incident.

Watson initially declined to file a report on the incident, but later relented and filed a memorandum that described the incident as follows:

> On 11/20/2022 I was working my assigned post Key Distribution Sergeant. At approximately 10:15pm I was in Key Distribution with Corporal [redacted] who was assigned to Shift C/O, when he asked me, "How come you don't want to hug me Watson?" I immediately felt uncomfortable because over the past two years Corporal [redacted] has asked me multiple times if I wanted a hug. I have told him no every time he has asked me. Corporal [redacted] asked me, "Do you hug your wife? Do you hug your kids? Do you hug your brother? Then I don't see why you can't hug me since I am like your brother." Corporal [redacted] proceeded to tell me, " I am your brother and I hope you know I would always have your back." Corporal [redacted] kept asking me, "What's wrong?" Corporal [redacted] stated, "I know you don't like me and you're mad at me all the time." I told Corporal [redacted] it makes me uncomfortable when you ask me for a hug since I've already told you multiple times I don't want to hug you." Corporal [redacted] stated, "You've never asked me not to ask you." This is not true I have had this conversation with him before and I have told him on numerous occasions I don't want to hug him or him to hug me. Even after I told Corporal [redacted] I was uncomfortable he asked me, "Why does it make you

> uncomfortable?" The whole conversation made me feel uncomfortable and he keeps bringing it up.
>
> Corporal [redacted] is pushy, manipulative and inappropriate and is persistent in bringing it up after I have told him not to.
>
> I want this to be on record that I told him on 11/20/2022 to stop asking me if I want a hug and stop talking about the fact that I told him no several times because it makes me feel uncomfortable.

Personal Boundaries. Watson described the Employer's training on boundary setting, which is important in a correctional environment with potentially dangerous AIC interactions occurring on a daily basis. In brief, corrections officers are taught to establish verbal and physical boundaries for clarity and safety. Boundary setting assists with establishing appropriate norms during interactions with other staff and AICs, and can deescalate or otherwise prevent unintended interactions. Zumwalt reinforced the importance of boundaries within the institution, given that the staff often have to discipline AICs about maintaining proper boundaries among one another and with TRCI staff. The Grievant received training on maintaining professional boundaries on February 5, 2018 and February 4, 2020.

Within this context, Watson believed that the Grievant had trouble understanding his boundaries. For example, the Grievant had previously offered Watson what he referred to as "bro hugs" and made light of the offers. Watson declined those offers, and became irritated that the Grievant continued to push the issue during their interaction. Watson also described the Grievant as someone who speaks to others at a close range. When the Grievant has spoken to Watson in such a manner, Watson takes a step back to reestablish his own personal boundaries.

The Policy. After reviewing Watson's report, Zumwalt believed that the Grievant's behavior constituted a violation of the Employer's Discrimination and Harassment Free Workplace policy. The policy states in part:

> Oregon state government provides a work environment free from sexual harassment. Employees at every level of the organization, including state temporary employees and volunteers, must conduct themselves in a business-like and professional manner at all times and not engage in any form of discrimination, workplace harassment, workplace intimidation, sexual assault or sexual harassment.

Zumwalt also believed that Watson was troubled by a "significant fear of retaliation" by the Grievant, but did not provide further basis for his belief. Zumwalt believed that the report would result in the Grievant's transfer, but acknowledged that he did not have the authority to make a transfer. Zumwalt has worked with the Grievant since the time of the incident, and has spoken to the Grievant about the incident. Zumwalt believes that the Grievant is a "different officer" today, based on their respectful interactions that have followed the incident.

Watson expressed regret for mentioning the interaction to Zumwalt. Watson further indicated that he does not have any hard feelings toward the Grievant nor has he experienced any trauma or lasting effects from the incident. Watson and the Grievant have not spoken to one another since the incident took place, although the two have worked on the same shift on a few occasions during the intervening period.

The Investigation. Watson's report was reviewed by DOC's Employee Services Division, which assigned Bonny McCoy (the "Investigator") on November 23, 2022 to conduct an investigation of the interaction between Watson and the Grievant. The Investigator filed a report on January 6, 2023.

The Investigator substantiated the allegation that the Grievant has frequently sought hugs from Watson, who was made uncomfortable by the requests and has repeatedly told the Grievant not to ask. The Investigator based her findings on interviews with the Grievant and with Watson. During the investigation, Watson told the Investigator that the Grievant had offered a "bro hug"

on four to six occasions over the course of the two years prior to the November 20 incident, and that Watson had declined each offer. Watson substantially repeated his written statement for the Investigator, and then relayed his conversation with Zumwalt following the interaction with the Grievant. Watson told the Investigator that he did not believe the Grievant's requests were sexual in nature, but were nevertheless unwelcome.

The Grievant was represented by the Union when he met with the Investigator on December 29, 2022. The Grievant recalled that Watson was having a rough day at the time of the incident and that he offered a hug as he would for any friend. The Grievant added that he had seen Watson engage in hugs with other staff. The Grievant also recalled jokingly offering "bro hugs" to Watson in the past, which were rejected. The Grievant believed that the give and take was "playful banter."

With respect to his November 20 interaction with Watson, the Grievant denied engaging in any physical contact with Watson and denied any malicious intent or sexual desire motivated him to seek a hug. He confirmed that he asked Watson about whether he hugged other family members and told Watson that he had witnessed him hug other co-workers. The Grievant did not recall asking Watson more than once about engaging in a hug during their interaction.

The Grievant is Demoted to Corrections Officer. TRCI Superintendent Reyes is the appointing authority for the institution. Reyes indicated that she initially recommended termination of the Grievant, relying on a summary of the Investigator's report that was composed by Sherry Iles, the senior human resources business partner at TRCI. Reyes did not listen to the recorded interviews of Watson and the Grievant or review the transcripts that followed. Reyes did not review the list of comparable sanctions that were developed by the DOC's central

Employee Services Division (ESD). In composing the summary that she submitted to Reyes for review, Iles solely relied on the Investigator's report.

Discipline at DOC. The Employer's decision making process on discipline can best be described as complicated. Despite her role as the appointing authority, Reyes indicated that she does not have final decision making authority on discipline. Reyes attributed all final decision making authority on staff disciplinary measures to ESD. Reyes provided her recommendation on the Grievant's discipline to ESD, which assessed her recommendation in light of other similar circumstances across the Employer's multiple correctional intuitions. Reyes also provided her recommendation to DOC's East Side Administrator, Mark Knupf, who is her direct supervisor. Knupf also received a recommendation from ESD, which consulted with Iles. Knupf then made his own recommendation to DOC's Assistant Director of Operations, Rob Persson. The recommendation for disciplinary sanction could be amended at any level.

During this process, Reyes indicated that other DOC representatives considered the Grievant's prior training on the Discrimination and Harassment Free Workplace policy. The Grievant received training on discrimination and harassment issues at least annually from 2018 through 2021. The Employer also considered the 2020 incident that resulted in the Grievant's previous demotion from the rank of corporal to corrections officer.[2]

The Grievant was scheduled for a pre-dismissal hearing on January 23, 2023. Union representative Darren Holden appeared on behalf of the Grievant. Iles, Assistant Superintendent of Security Theron Rumsey, and Assistant Superintendent of Correctional Rehabilitation Tonia Ridley represented the Employer. Superintendent Reyes did not participate in the hearing but consulted with Iles after the hearing.

[2] The removal of that discipline from the Grievant's personnel record was discussed at fn. 1, *supra.*

On February 7, 2023, DOC found that the Grievant violated five state or department policies, including the Discrimination and Harassment Free Workplace policy.[3] The Grievant was subsequently notified that he would be demoted to corrections officer, effective February 10, 2023.

The Grievance. A step one grievance meeting was held on February 21, 2023. A formal grievance followed at step two of the process on March 2, 2023. The Union alleged that the Employer violated Articles 10, 47 and 50.1 of the Agreement by issuing discipline to the Grievant without just cause. The Union claimed that the Employer's investigation was tainted because command staff erroneously believed that physical contact occurred between the Grievant and Watson. The Union also believed that the sanction imposed – demotion – was arbitrary and capricious relative to discipline given to other similarly situated staff who engaged in more serious actions. The Employer denied the grievance at step three of the process on May 10, 2023, and at step four of the process on July 18, 2023.

The Union thereafter sought arbitration pursuant to the terms of the Agreement. On November 9, 2023, the parties mutually agreed to select Arbitrator Michael Loconto from the Oregon Employment Relations Board's roster of arbitrators to hear this matter.

[3] The other policies included: Department Mission, Vision and Core Values; Code of Ethics; Code of Conduct; and Maintaining a Professional Workplace. The professional workplace policy states, in part,

> Inappropriate Workplace Behavior: Unwelcome or unwanted conduct or behavior that causes a negative impact or disruption to the workplace or the business of the state, or results in the erosion of employee morale and is not associated with an employee's protected class stats…Examples of inappropriate workplace behavior include, but are not limited to, comments, actions or behaviors of an individual or group that embarrass, humiliate, intimidate, disparage, demean, or show disrespect for another employee…

Comparable Discipline. The list of comparable discipline assembled by ESD can contain certain non-disciplinary responses such as a letter of instruction or expectation (LOI or LOE). ESD shares the list with DOC administrators to illustrate the range of sanctions available to address employees found responsible for similar policy violations.

On February 13, 2024, the Union requested the list of comparators used by the Employer in seeking the Grievant's demotion. The Employer first responded with only two comparable incidents, and later provided a roster of comparators that included 19 incidents that involved offenses in the category of "unwanted touching." The list included the date of discipline, the action taken, some description of the incident and other related information. Some of the incidents listed resulted in a non-disciplinary LOI or LOE.

At the hearing, Holden testified about several of these incidents, which the Union asserted were evidence of the Grievant's disparate treatment. These include:

Institution	Rank / Role	Incident Details	Disciplinary Sanction
TRCI	Sergeant	Inappropriate physical contact with AIC of opposite sex; harassment, discrimination	Verbal Warning
EOCI	Sergeant	Workplace violence	Reprimand
Snake River Correctional Institution (SRCI)	Corrections Officer	Sexual harassment	Reprimand
TRCI	Nurse	Kicked an inmate	Reprimand
SRCI	Corrections Officer	Racial slur	Reprimand
Columbia River Correctional Institution (CRCI)	Food service coordinator	Unwanted sexual contact – individual kissed another co-worker on the back of the neck	Verbal counseling
TRCI	Not indicated	Sexual misconduct incident involving unwanted compliments and touching	Verbal counseling
Not indicated	Not indicated	Off-duty harassment of a co-worker via text message	Letter of Expectation

Iles testified that the comparator list provided to the Union prior to the hearing was not used in making the decision on the Grievant's discipline, because it included cases that were decided after the date of the Grievant's discipline.[4] After the hearing, the Employer provided a second list of comparators – the list that DOC administrators used to assess the appropriate level of sanction for the Grievant. The 17-page list included 146 examples of comparable offenses that included an allegation of sexual misconduct or harassment. The list does not identify a time frame, or the rank or collective bargaining status of the individuals implicated in each matter. The list does not include whether the individual had a record of prior offenses. Of the 146 prior instances of discipline:

- 6 individuals received letters of instruction or expectation;
- 64 received verbal or written reprimands;
- 10 were suspended;
- 21 received pay sanctions;
- 5 were demoted; and
- 25 were terminated.

In addition, eight individuals resigned in lieu of discipline and four other matters were settled. In three cases, no discipline was issued.

The Employer Rescinds the Demotion and Modifies Discipline. On February 28, 2024, the Employer unilaterally restored the Grievant's rank of corporal and modified the discipline imposed for his actions on November 20, 2022. Specifically, the Grievant's discipline was limited to a reduction in pay equivalent to one step on the salary scale for a duration of two

[4] The first list covered sanctions issued between February 2014 and February 2024.

months. Reyes indicated that the DOC's labor relations unit made the decision to modify discipline.

POSITION OF THE EMPLOYER

The Employer met its burden to demonstrate that it had just cause to sanction the Grievant for his disrespectful treatment of a co-worker, and appropriately imposed a two-month, one-step reduction in pay.

The Grievant was trained on sexual misconduct and harassment, which included setting boundaries with AICs and fellow staff members. Nevertheless, the Grievant failed to act in a professional and respectful manner on November 20, 2022 when he repeatedly asked to hug a co-worker. The co-worker told the Grievant on several previous occasions that he was made uncomfortable by hugs, but the Grievant persisted in making requests. The co-worker reported the interaction to a supervisor, and the Employer initiated an investigation.

During the course of the investigation, the co-worker reiterated his discomfort with the Grievant's behavior. By contrast, the Grievant failed to take responsibility for his actions and described his past requests for hugs as a joke and his action on November 20 as an expression of concern for a friend. The Grievant had a history of engaging in similar inappropriate conduct when he failed to respect the boundaries of a co-worker with whom he had recently ended a romantic relationship. The Grievant, who was a superior officer at the time of the incident, was demoted and did not contest the discipline.

By a preponderance of the evidence, the Employer has demonstrated that it had just cause to issue discipline to the Grievant for his behavior on November 20, 2022, which violated workplace policies. Arbitrators typically uphold discipline when the sanction is reasonably

supported by the evidence and the Grievant's behavior. As such, the Employer respectfully requests that the Arbitrator deny the grievance in full and sustain the discipline imposed.

POSITION OF THE UNION

The Employer failed to provide convincing evidence that it had just cause to first demote the Grievant, and later issue a pay sanction in lieu of demotion. Just cause requires evidence that the Grievant engaged in wrongdoing, that the Employer provided the Grievant with due process, and that the sanction imposed was proportional to the offense committed. By contrast, the Grievant's admitted behavior did not constitute a violation of workplace policy and, accordingly, at most warranted a non-disciplinary response consistent with prior similar instances at DOC.

The Grievant did not deny that he offered to hug his co-worker on November 20, 2022. The Grievant considers his co-worker to be a friend, and was seeking to comfort him because he appeared to be having a bad day. The Grievant also told the Employer's investigator that he had engaged in hugs with other staff members, and that he was aware that the co-worker in question had received hugs from other staff members. The Grievant did not touch the co-worker. Once the co-worker refused the hug, the Grievant understood that a boundary had been set. The Grievant left the work area and did not engage further with the co-worker.

Moreover, the co-worker did not wish to report this interaction with the Grievant. The co-worker spoke to a superior officer about the interaction, and the superior officer ordered the co-worker to make an official report. The co-worker did not want discipline to result from the interaction, which he described as awkward, not sexual in nature, and "just unwelcome behavior."

The Employer provides training that encourages staff to resolve disputes at the lowest level. In this instance, a non-disciplinary counseling session would have been an appropriate

response to address a misunderstanding between two co-workers. Instead, the Employer initially sought termination, relying on a prior demotion that the Grievant received in 2020 and which had been removed from his file prior to the incident in question. The Employer demoted the Grievant for his actions of November 20, 2022, and a few weeks prior to the arbitration hearing rescinded the Grievant's demotion and unilaterally imposed a two-month, one-step reduction in pay in lieu of demotion.

Pay reductions and demotions are typically the third or fourth level of discipline imposed in the Employer's system of progressive discipline – preceded by oral and written reprimands, and followed by termination. In this instance, the Employer engaged in disparate treatment by seeking to impose sanctions on the Grievant that are inconsistent with the progressive discipline. As an initial matter, the Union asks the Arbitrator to draw an adverse inference from the Employer's refusal to timely provide a complete record of the comparable discipline considered by DOC administrators when assessing an appropriate sanction for the Grievant in early 2023. The Employer first identified only two comparators, and subsequently provided an incomplete list of comparators that included offenses involving "unwanted touching" – which did not occur in this case. It was only after the close of the arbitration hearing on March 4, 2024 that the Employer provided the complete, 17-page list of 146 comparators that were relied upon by DOC administrators in assessing the appropriate level of discipline.

Even if the Arbitrator considers the full list of comparators, the Union asserts that the Grievant's sanctions exceed those received by other DOC staff in comparable offenses. At the hearing, the Union provided evidence of several staff members found responsible for sexual misconduct or harassment violations who received non-disciplinary letters, or oral or written reprimands. The Union also asserts that the list of comparators considered by the Employer further reinforces that the Grievant, who had a clean record after his prior demotion was removed

by a superior officer in 2021, received disproportionate sanctions for his admitted behavior on November 20, 2022. The Employer's last-minute reduction in sanctions reinforces the lack of just cause for the discipline imposed.

In summary, the Union respectfully requests that the Arbitrator award the grievance in its favor and find that the Employer violated the Agreement by imposing discipline on the Grievant without just cause. The Union requests that the Grievant be made whole for pay, benefits, seniority, and other contractual benefits, with interest on back pay, and that all documents relating to the underlying discipline be expunged from the Grievant's personnel record. The Arbitrator should also find that the Employer is liable for the full fee associated with this arbitration, as provided by the Agreement. The Union requests that the Arbitrator retain jurisdiction for 60 days in order to resolve any issues with implementation of the remedy.

OPINION

TRCI has implemented a series of policies and a system of paramilitary operations to maintain order within the correctional institution. The aims of these various policies and procedures are to provide a safe working environment for staff and a secure custodial environment for incarcerated individuals. These policies must be viewed in context, and the Employer encourages staff to resolve disputes at the lowest levels possible. Here, the Grievant had an interaction with a co-worker who was made uncomfortable by the Grievant's offer of a hug. There was no physical contact during the limited interaction, and the co-worker did not wish to report the incident as a policy violation. The co-worker suffered no lasting trauma, and has worked on several shifts alongside the Grievant since the incident took place.

Rather than address the interaction through counseling, TRCI command staff and DOC administrators unnecessarily elevated the seriousness of the Grievant's actions, based on

assumptions about the nature of the interaction, improper consideration of the Grievant's prior demotion, and apparent disregard for the lesser sanctions given to other staff found responsible for more serious offenses.

The grievance must be granted and the Grievant's discipline must be vacated for the reasons described herein.

DOC Did Not Have Just Cause to Discipline the Grievant. At the outset, the Employer's response regarded the Grievant as an aggressor during his interaction with Watson on November 20, 2022. The record that was subsequently developed reflects the tenuous nature of the evidence relied upon by the Employer to determine that the Grievant's behavior violated workplace policies.

The Grievant's Behavior Did Not Violate Workplace Policy. While unwelcomed by Watson, the Grievant's behavior did not violate the Employer's Discrimination and Harassment Free Workplace policy. Watson, who was made uncomfortable by what he described as the Grievant's "awkward" and "kinda weird" request for a hug, did not intend to report the interaction as a violation of policy nor did he view the interaction as sexual in nature. On the contrary, Watson refused the Grievant's offer of a hug, as he had in prior instances where the Grievant had jokingly offered hugs. The Grievant questioned Watson about why he declined the offer, yet respected the boundaries set by Watson. The Grievant did not touch Watson during the exchange, and left the area where the incident took place shortly thereafter.

The list of comparators considered by DOC administrators in assessing the proper sanction for the Grievant illustrates the arbitrary and capricious nature of the Employer's decision to find a policy violation. Generally speaking, DOC has disciplined staff for a wide range of policy violations that involve assaults, violence, and unwanted sexual advances. By contrast, the Grievant offered a hug to a colleague. Undoubtedly, Watson was made

uncomfortable by the exchange, and the Grievant evidently continued the conversation for a brief time to question Watson about his discomfort – which was sufficient enough for Watson to relay the interaction to another co-worker. Nevertheless, the limited interaction was devoid of any overt or implied sexual themes or other evidence of an attempt by the Grievant to exert undue influence or intimidate his co-worker.

Zumwalt, the lieutenant who spoke with Watson shortly after the interaction, was circumspect about the nature of the interaction. As a superior officer, Zumwalt was correct to assess Watson's complaint in light of workplace policy and to confer with other members of the command staff to determine next steps. However, the initial assessment was premised on several false assumptions. First, Zumwalt initially believed that the Grievant touched Watson; no contact occurred during the interaction. Second, Zumwalt believed that Watson feared retaliation by the Grievant if he reported the matter, yet never articulated a basis for his belief beyond mere speculation.

After Watson filed a report at Zumwalt's direction, the Investigator found that the Grievant failed to take responsibility for his actions. I disagree. The Grievant admitted to offering a hug to Watson, but did not agree with the Employer's view that the offer was a violation of workplace policy. The Investigator's conclusions ignored Watson's reluctance to report the incident and his view of the interaction as minor. Iles, the human resources representative at TRCI, then composed a summary of the Investigator's report for review by Superintendent Reyes. Using the limited information available from the summary and her knowledge of the Grievant's prior demotion, Reyes initially moved to terminate the Grievant. While the Grievant was eventually demoted for his interaction with Watson, it was evident that the Superintendent and others in the DOC administration failed to consider mitigating factors in assessing the Grievant's culpability and resulting sanction.

Discipline Imposed on the Grievant was Excessive. The Employer's unilateral reduction of the Grievant's sanctions on the eve of the arbitration in this matter illustrates the tenuous nature of the evidence that workplace policies were violated. Moreover, it is problematic that the Employer had a substantial list of comparable discipline to consider when assessing a sanction for the Grievant's infraction yet settled on a penalty that is regarded in this workplace as a prelude to termination.

The Agreement calls for progressive discipline. This concept is intended to promote a corrective approach to problematic workplace behavior, and is not intended to be punitive. Simply put, employees should be given an opportunity to rehabilitate their behavior and learn from their mistakes in all but the most serious offenses. It is abundantly clear that the Employer has consistently followed this principle in other, more serious examples of policy violations. These lesser sanctions reflect the Employer's overall approach to resolving conflicts within the institution at the lowest level possible.

Providing counseling to the Grievant would have been consistent with this approach. A co-worker made an allegation that the behavior of another co-worker made him uncomfortable at work. The individuals worked together, and the apparent disconnect about personal boundaries had a clear link to the institutional priority of safety. Simply put, the Employer could have resolved the issue through a conversation or series of conversations involving the Grievant and Watson. By erroneously relying on a previously rescinded demotion as a basis for escalating discipline in this instance, the Employer missed an opportunity to resolve this matter in an efficient manner and to continue the Grievant's development as a supervising officer.

The Reduced Discipline Was Also Excessive. As Lietenant Zumwalt observed, the Grievant is now a "different officer" when compared to the time of the incident. The Employer's unilateral decision to rescind the Grievant's demotion earlier this year further reinforced this

observation. By replacing the demotion with a pay sanction, the Employer failed to remain consistent in its approach to progressive discipline.

The Employer's disciplinary spectrum begins with an oral reprimand, and can be followed by a written reprimand, pay sanction, demotion and, eventually, termination, for more serious, escalated or repeated offenses. The Employer also occasionally issues non-disciplinary letters of instruction or expectation to reinforce policies and behavior in low-level offenses. Here, the Grievant's record was essentially clean at the time of the incident, with Assistant Superintendent Turner's decision to remove the 2020 demotion from the Grievant's record in late 2021. By starting at the fourth step of the progressive disciplinary process – demotion – and subsequently amending the discipline imposed to the third step – a pay sanction – the Employer remained out of step with its typical practices.

Undisclosed Comparators Compound the Arbitrary and Capricious Nature of the Grievant's Sanctions. The scant evidence relied upon by the Employer in deciding to discipline the Grievant for his actions on November 20, 2022 is sufficient to support a finding that just cause did not exist in this matter. However, the Employer also handicapped the Union's ability to defend the Grievant by withholding the list of comparators that it relied upon to determine the Grievant's sanction. A casual review of the 146 comparators assessed by DOC administrators in considering the Grievant's discipline demonstrated that far greater offenses have resulted in only a reprimand. Without recounting the cases in detail, 70 cases of sexual misconduct or harassment resulted in non-disciplinary letters of instruction or expectation, or initial discipline at the level of a verbal or written reprimand. By contrast, there were only 21 instances of pay sanction and five demotions.

The Union's brief highlighted four instances where the discipline imposed exceeded the level of a reprimand. In each instance, the sanctioned employee either engaged in a physical

assault or had a prior record of discipline sufficient to support an elevated level of discipline. These factors were not present in the Grievant's case. The record in this matter amply demonstrated that the imposition of a pay sanction or demotion was inconsistent with the Employer's extensive record of progressive discipline in similar cases.

REMEDY

The Grievant shall be made whole for lost wages, benefits, and seniority, and any records of the underlying incident and resulting discipline shall be immediately expunged from the Grievant's personnel record. The Union's request for an award of interest on the back pay amount is denied.

At the Union's request, the Arbitrator will maintain jurisdiction over this matter for a period of 60 days from the date of this Award and for the limited purpose of addressing any disputes that may arise from the implementation of this remedy.

The Employer is the losing party in this matter and, pursuant to Article 51.5 of the Agreement, is solely responsible for payment of the Arbitrator's fees and expenses.

AWARD

The Employer did not have just cause to demote the Grievant, [redacted] from the rank of Corporal on or around February 10, 2023.

The Employer restored the Grievant's rank on or around February 28, 2024. The Employer did not have just cause to substitute a one-step reduction in pay for a period of two months in lieu of demotion. Accordingly, the Grievant shall be made whole for all lost wages, benefits, and seniority. All related disciplinary records shall be expunged from the Grievant's personnel records. The Employer is solely responsible for full payment of the Arbitrator's fees in this matter.

The Arbitrator will retain jurisdiction for a limited period of sixty (60) days and for the sole purpose of resolving any disputes regarding the implementation of this remedy.

Michael T. Loconto, Esq.
Arbitrator
May 6, 2024