IN THE MATTER OF ARBITRATION BETWEEN

ARROWHEAD REGIONAL CORRECTIONS	)	**BMS CASE NO.09-PA-0001**
"EMPLOYER"	)	
	)	**DECISION AND AWARD**
And	)	
AMERICAN FEDERATION OF STATE COUNTY AND MUNICIPAL EMPLOYEES, COUNCIL 5, LOCAL UNION NO. 66	)	**RICHARD R. ANDERSON ARBITRATOR**
"UNION"	)	**MAY 16, 2009**

JURISDICTION

The hearing in the above matter was conducted before Arbitrator Richard R. Anderson on May 5, 2009 in Duluth, Minnesota. Both parties were afforded a full and fair opportunity to present their case. Witness testimony was sworn and subject to cross-examination. Exhibits were introduced by both parties and received into the record. The hearing adjourned on May 5, 2009, at which time the record was closed and the matter was then taken under advisement since both parties waived the filing of post-hearing briefs.

This matter is submitted to the undersigned Arbitrator pursuant to the terms of the parties' collective bargaining agreement, hereinafter the Agreement, which was effective from January 1, 2006 to January 1, 2008.[1] The relevant language in Article 6 [GRIEVANCE

[1] Joint Exhibit No. 1.

PROCEDURE] of the Agreement provides for the filing, processing and arbitration of a grievance including the authority of the Arbitrator. The parties stipulated that this matter does not involve contract arbitrability or any other procedural issues; and that it is properly before the undersigned Arbitrator for final and binding decision on the merits of the grievance.

APPEARANCES

For the Employer:

Dale O. Harris, Assistant St. Louis County Attorney
Jennifer L. Wright, Senior Court and Field Supervisor
Thomas A Roy, Executive Director
David "Fuchi" Newland, Group Facilitator
Kelly Hartlieb, Employee Relations
Kay Kavlie Arola, Chief Probation Officer

For the Union:

Marsh Stenersen, Business Representative
Timothy Comrie, Grievant and Probations Officer
David Patton, Probation Officer

ISSUE

The parties stipulated to the following issue. "*Whether the Employer had just cause to discipline the Grievant, Tim Comrie? If not, what is the appropriate remedy?*"

BACKGROUND

Arrowhead Regional Corrections (ARC), hereinafter the Employer, provides correctional services to five counties (Carlton, Cook, Koochiching, Lake and St. Louis) in Northeastern Minnesota's Arrowhead region. ARC was formed under the auspices of the Minnesota Community Corrections Act and a joint powers agreement between the five participating counties. ARC is administered by an Executive Board, which is made up of

eight County Commissioners from the five participating counties. St. Louis County appoints three members, with the remaining counties selecting one member each. Carlton, Cook, Koochiching, and Lake Counties have an additional member that rotates between counties every year.

Executive Director Tom Roy is the highest ranking ARC official. ARC operates the Arrowhead Juvenile Center, which is a 48 bed short-term and long-term juvenile treatment and detention center; and the Northeast Regional Corrections Center, which is a 150 bed minimum-level security institution that provides services to adult males who are sentenced to the facility by the courts of the five ARC counties. ARC also has a Court and Field Services Department organized under Chief Probation Officer Kay Kavlie Arola, who reports to Roy. The Unit Supervisors in Court and Field Services report directly to the Chief Probation Officer. There are probation/parole offices in Duluth, Hibbing, Virginia, Carlton, Grand Marais, Silver Bay, Two Harbors and International Falls.

The American Federation of State County and Municipal Employees (AFSCME), Council 5, Local Union No. 66, hereinafter the Union, represents a unit of approximately 124 non-essential employees (Basic Unit) including Probation Officers. The Union has represented this unit since approximately 1976.

On July 24, 2007, David "Fuchi" Newland[2] and Grievant Timothy Comrie were involved in two juvenile client incidents that prompted Senior Court and Field Supervisor Jennifer Wright to conduct an investigation into their conduct. Both Fuchi and the Grievant were immediately placed on administrative leave pending the outcome of the investigation. The investigative findings were subsequently reported to Executive Director

[2] Everyone refers to him as Fuchi.

Roy who recommended termination for both Fuchi and the Grievant to the ARC Board of Commissioners. Fuchi and the Grievant were subsequently terminated. The Board agreed to reduce the termination of Fuchi to a 90-day suspension period during grievance processing. Fuchi subsequently accepted this Board action.

The Board also reduced the Grievant's termination to a 90-day suspension period by letter which was issued on March 3, 2008.[3] Thereafter, on March 11, 2008, the Union filed a grievance protesting the Grievant's 90-day suspension.[4] The Grievant's suspension was further reduced to 75 days by the Board on June 20, 2008 during grievance processing[5]. The Grievant and the Union were not satisfied with this action and proceeded to file for arbitration.[6] The undersigned was notified of my selection as the neutral Arbitrator in this matter by letter from the Union dated March 23, 2009.

RELEVANT CONTRACT PROVISIONS

ARTICLE 6—GRIEVANCE PROCEDURE

> **Section 2. Arbitrator's Authority.** *The arbitrator shall have no right to amend, modify, nullify, ignore, add to, or subtract from the provisions of this Agreement. He shall consider and decide only the specific issue or issues submitted to him in writing by the parties to this Agreement, and shall have no authority to make a decision on any matter not so submitted to him. The arbitrator shall be without power to make decisions contrary to, inconsistent with, or modifying or varying in any way the application of laws, rules, or regulations having the force and effect of law. If the arbitrator determines that the grievance is an issue of law, the arbitrator shall refer the grievance back to the parties without decision or recommendation. The decision shall be based solely upon the arbitrator's interpretation and application of the expressed terms of this Agreement and to the facts of the grievance presented.*

[3] Employer Exhibit No. 1.
[4] Joint Exhibit No. 2.
[5] Employer Exhibit No. 1. p. 3.
[6] Exact date unknown.

ARTICLE 25— DISCIPLINE AND DISCHARGE

Section 1. Discipline. *Disciplinary action may be imposed upon an employee only for just cause. Any disciplinary action imposed upon any employee may be processed as a grievance through the regular grievance procedure as provided hereafter. If a supervisor has reason to reprimand an employee, it shall be done in a manner that will not embarrass the employee before other employees or the public. An employee will not be questioned during an investigation that may lead to disciplinary action against the employee unless the employee has been given an opportunity to have a Union representative present at such questioning.*

Section 2. *If a supervisor desires to issue a written reprimand to an employee for a violation of a regulation or instruction of the Employer, or deficiencies in his work performance, the statement of the fact shall be placed in the employee's personnel file, with a copy to the employee. Only such reprimands or other critical statements as are entered in the official personnel office records may be used as evidence against an employee in any disciplinary action or hearing. This does not restrict, limit, or prohibit the Employer from submitting supportive documentation and/or oral testimony in any disciplinary action or hearing.*

Section 3. *Each employee shall be furnished with a copy of all performance evaluations or disciplinary entries in his/her personnel record and shall be permitted to respond thereto but only as to matters of fact, not opinion. The contents of an employee's personnel records shall be disclosed to the employee upon his/her request. They shall also be disclosed to the employee's Union representative upon the written request of the employee. In the event a grievance is initiated under Article 6 (Settlement of Disputes), the Employer shall provide a copy of any items from the employee's personnel file upon the request of the employee.*

Section 4. *Disciplinary action or measures shall include only the following:*

1.Written reprimand
2.Suspension
3.Demotion
4.Discharge

When any disciplinary action is intended, the Employer shall, before or at the time such action is taken, notify the employee in writing of the specific reason(s) for such action.

Section 5. Discharge of Permanent Employees. *The Employer shall not discharge any permanent employee without just cause. If, in any case, the Employer feels there is just cause for discharge, the employee will be suspended for five (5) days and the employee and the Local Union will be notified, in writing, that the employee is subject to discharge and shall be furnished with the reasons thereof.*

FACTS

The Grievant was initially employed as an ARC Probation Officer in 1999. Prior to that, he was employed as a Probation Officer by the Florida Department of Corrections for approximately 7 years. The Grievant served from 1978 until 1991 in the military. He initially served in the Army beginning in 1978. After the Army, he enlisted in the Air Force in 1982. He was on active duty as a security policeman until his discharge in 1985. He left the Air Force to finish his college education and participated in the Army "Boot Strap" educational program. The Grievant graduated from college as an Army Second Lieutenant in 1987. He entered active duty initially with an Armor unit in 1988 until an injury forced his transfer. He then joined a MP unit where he rose to the rank of Captain. During the first Gulf War he commanded three MP companies that were responsible for security at the Fort Polk Louisiana Army base.

On July 24, 2007, the Grievant was a member of the Intensive Supervised Probation (ISD) unit supervised by Wright. The Grievant was working a 3:00 p.m. shift with a team of two other Probation Officers—Fuchi, who had thirty-one years of experience, and Julie Haenke, who was working her first shift as a Probation Officer although she had 200 hours of experience as an ARC Probation Officer during an internship earlier that year.[7] During the course of the evening, the team went to visit a juvenile client, who is being referred to as "CW" in this decision for obvious privacy reasons. When they arrived at

[7]Fuchi's current job classification is Group Facilitator. Fuchi initially was a Group Facilitator; however his classification was changed to Probation Officer by the ARC Board because he was essentially doing the same job duties as a Probation Officer (exact date unknown). Fuchi was then. given six years to obtain a college degree, which was a pre-condition to his receiving a permanent Probation Officer classification. He did not obtain his college degree so his classification reverted back to Group Facilitator during the period 1988 to 1990. Although his classification is Group Facilitator, he essentially functions as a Probation Officer and is considered one by the ARC staff, the general public and the clients he supervises.

CW's home he was not there. During an ensuing discussion with CW's grandmother, she told the team that CW considered the Grievant to be a "pushover".

The team then proceeded to visit another juvenile client, "AJ", who also is being referred to by his initials for privacy reasons.[8] AJ was also not home, but as the team was going to drive away they observed him walking with another juvenile, who had also been one of Fuchi's clients. Fuchi called AJ over to the car rather than talking to him in the presence of the other juvenile. Fuchi had him stick his head into the car through the passenger side window where the Grievant was sitting. Fuchi activated the up button on the power window when AJ stuck his head into the window and trapped his head inside the car.

Based on the hearing testimony of Supervisor Wright, the Grievant, Fuchi and the investigative notes of Wright involving Haenke, the following occurred.[9] Fuchi was upset because AJ was violating his curfew. Fuchi testified that he did trap AJ's head in the window; however, the window was stopped short of his neck and AJ had no difficulty talking.

The Grievant testified that AJ was in obvious distress and had difficulty talking because the window was pressing on his neck. He also testified the incident lasted only a short time; and that he thought about releasing the window from AJ's neck, but he was afraid that he might push the wrong up/down window button further exacerbating AJ's predicament. The Grievant further testified that he was so concerned about AJ's well-

[8] According to Supervisor Wright, then sixteen year old AJ had a border line IQ who was on a 60-90 day Intensive Supervised Probation. AJ was born addicted to heroin and cocaine; and has fetal alcohol syndrome making it very difficult for him to learn from his consequences.

[9] Wright's notes involving Haenke hearsay version of what transpired were introduced into evidence as Employer Exhibit Nos. 9 and 10. Haenke, according to Employer Council had left her ARC employment and could not be located.

being he could not remember any of the conversation ensuing between Fuchi and AJ except for Fuchi asking AJ why he was out of the house without calling him, and AJ struggling to respond because of the window pressing against his neck.

Haenke, according to Supervisor Wright's investigative notes, stated Fuchi was angry over AJ violating his curfew. She did not remember much of conversation because she was in the back seat writing notes on previous client visits. She only recalled that Fuchi was speaking in an angry tone of voice. Wright's notes further reflect Haenke's observation that the Grievant appeared to be upset during the course of the incident, but did not know if it was what AJ was saying that was upsetting him since could not hear AJ who normally speaks in a soft tone.

The Grievant testified that he made no effort to stop Fuchi from keeping the window pressed up against the Grievant's neck although he should have. He further testified that he was the individual who brought this incident to Supervisor Wright's attention during the investigation of the CW incident. Wright's notes of Haenke's recollection indicate she also did nothing to stop Fuchi's actions. She indicated, however, that she was going to discuss it with Fuchi and the Grievant the next day, but the investigation had already started.

The team then proceeded back to visit CW. After leaving CW's home the first time, there was a discussion between Fuchi and the Grievant about CW labeling the Grievant as a "pushover". According to the testimony of Fuchi and the Grievant corroborated by Haenke in Supervisor Wright's investigative notes, a plan was developed to have the Grievant assert himself by having CW clean dog feces off of Fuchi shoe with a toothbrush, which had been acquired earlier during another client visit. The toothbrush cleaning idea

emanated from the Grievant's military background where it was used to assert authority and teach recruits a lesson in respect.[10] The Grievant acknowledged discussing this plan; however, he never had any intentions of carrying it out.

When the team arrived back at CW's home, he was sitting in the car with a juvenile male and juvenile female. The Grievant instructed CW to go get his toothbrush, which he did. The Grievant then told CW that the toothbrush was to be used to clean dog feces off of Fuchi's shoe. Fuchi then instructed CW to take his shoe over to the house and hose it off. Fuchi had CW reclean his shoe two or three times because Fuchi was not satisfied with its cleanliness. During the course of the cleaning, Fuchi and CW argued over whether the shoe was clean enough. Whereupon, Fuchi directed Haenke to get a mint out of her purse in the car which he then placed on the heel of the cleaned shoe.[11] Fuchi then told CW that if the shoe was clean enough he should eat the mint off the shoe. CW questioned if Fuchi was kidding to which Fuchi replied he was not. After this bantering, CW suddenly grabbed the mint off of the shoe, put it in his mouth and immediately spit it out saying "there, are you happy".

The Grievant testified that it never was his intent to have CW clean Fuchi's shoe with a toothbrush. According to him, he told CW, after he brought back the toothbrush, that the purpose for the toothbrush was for him to clean dog crap off of Fuchi's shoe. Adding that he was not going to have him do this but he (CW) should not "confuse kindness with weakness". The Grievant thought the incident was over until Fuchi handed CW his shoe

[10] Fuchi took credit for the toothbrush idea during his testimony.
[11] Fuchi testified that this was his idea and it was never discussed with the Grievant prior to it happening.

and told him to go wash it off. The Grievant acknowledged that he made no attempt to stop the incident from escalating; and remained silent, as did Haenke.

As stated earlier, both Fuchi and the Grievant were terminated and subsequently reinstated.[12] The reinstatement of Fuchi and concurrent reinstatement of the Grievant appears to be related to the support Fuchi received at a Step 3 grievance hearing where prominent judges and law enforcement officials testified as character witnesses on his behalf. Also, a letter Fuchi sent to Executive Director Roy, Chief Probation Officer Dave Nyquist and Supervisor Wright wherein he acknowledged his guilt, expressed remorse, asked for forgiveness and vowed to do a better job if given another opportunity appears to have also been a reinstatement factor.[13]

The Grievant testified that when he received his termination notice, he was shocked because Supervisor Wright indicated to him during his investigative interview that he should expect a verbal counseling for his actions. Supervisor Wright acknowledged making a statement that she did not see the Grievant's actions as grounds for discipline. However, as things played out after she had all of the facts, she had a different perspective. Wright also acknowledged that she does not have disciplinary authority and informed the Grievant that she could not make any promises concerning the level of the discipline the Grievant would receive.

As stated earlier, verbal counseling is not discipline under the contract. Article 16 provides for the following discipline—1. Written reprimand 2. Suspension 3.Demotion and 4. Discharge. Executive Director Roy testified that discipline under the contract is

[12] Haenke was not disciplined because it was her first day on the job and she played a minor role. She, however, was verbally counseled by Supervisor Wright, which is not discipline under the contract.
[13] Undated letter from Fuchi. Union Exhibit No. 3.

progressive and intended to correct behavior rather than to be punishment or to be punitive. Roy also testified that progressive discipline may not always be appropriate in situations where the misconduct giving rise to the discipline is egregious.

Roy further testified that the 90-day suspension discipline was meted out to the Grievant because he violated the Employer's policies and procedures[14] as well as the Employer's ethics policy.[15] These reasons are spelled out in the suspension letter to the Grievant from Executive Director Roy dated March 3, 2008.[16]

> *This letter serves as official notification of a 90 day suspension from your position within Arrowhead Regional Corrections. Your suspension is a result of a complaint received on July 25, 2007, from the parent of a client of ARC. Information gathered in the course of the investigation revealed conduct inconsistent with the mission and purpose of ARC. As a result of these pending allegations you were placed on administrative leave while the investigation commenced.*
>
> *Information gathered in the course of the investigation supports the following:*
>
> ***1.*** *Violation of the ARC Ethics Statement which states in part,*
>
> > *"I, whether on or off duty, will be law abiding by following all federal, state and municipal criminal laws, as well as those laws governing the conduct of ARC employees and ordinances and rules enacted or established pursuant to legal authority.*
>
> ***1.*** *I, in the performance of duty, will carry out my duties with integrity, fairness and impartiality.*
>
> ***2.*** *I will perform my duties with respect and apply the law with impartiality and without prejudice or discrimination, appreciating the inherent worth of the individual.*
>
> ***3.*** *I will conduct my personal life with decorum, and will act in a manner that does not compromise my ability or that of other employees to perform assigned work and/or duties in an efficient, unbiased and professional manner or which is detrimental to the proper discharge of my duties, or which is in conflict with the mission of ARC. I will continually strive to improve my professional competence through the seeking and sharing of knowledge and understanding.*

[14] Employer Exhibit No. 2
[15] Employer Exhibit No. 3 Ethics Statement.
[16] Employer Exhibit No. 1.

4. *I will treat all members of the public courteously and with respect, including offenders under my supervision, office visitors and colleagues.*

Violation of this statement was evident in your interaction with a juvenile client wherein you were with another co-worker who required the client to repeatedly clean dog feces from his shoe, which he got in another clients yard. In addition, you watched as your coworker required this client to eat a mint from the bottom of his shoe. You did not stand up in the defense of the client during this entire interaction.

Additionally, you were present when there was another interaction with a second juvenile client who your co-worker required to place his head inside the window of your vehicle and proceeded to roll the window up on his neck, restricting his ability to speak and breath. In this instance you did not speak up either and let the abuse of the minor continue.

2. *Violation of ARC's Policy #100-2 and Minn. Stat. §626.556 — Mandatory reporting of Maltreatment of Minors.*

In accordance with this policy and statute, you in your position of Probation Officer, were responsible for reporting maltreatment of minors. This statute and policy were designed to promote responsible child care in alt settings. Had you witnessed a parent, guardian or other caregiver engaged in the conduct described above, you would have been statutorily required to report that behavior. In this instance, you observed another staff member engaging in the conduct that we are responsible for protecting youth from and failed to intervene.

3. *Violation of ARC's Policy #100-12 — Personal Conduct of Employees, which states in part;*

All agency employees, when on and off duty, will conduct themselves in a manner that will not bring discredit or criticism to the agency.

A. *Employees are expected to treat fellow employees, offenders and the public with respect and courtesy at all times.*

B. *Employees will immediately provide written notification to the appointing authority of any knowledge of criminal activity that has the potential to threaten public safety or the safety of staff or offenders, or the security of a correctional facility.*

G. *Employees will address offenders respectfully."*

More specifically, your conduct displayed a total disregard for the health and safety of two juveniles and displayed a purposeful abuse of power. Such conduct did not have any basis in correctional practice and to the contrary, seemingly for your amusement, promoted an atmosphere of fear and intimidation. Rather than display positive behavior that these juvenile offenders could model, they were exposed to behavior that if replicated, would lead them into further criminal conduct.

These acts were extreme, repulsive and dangerous and not acceptable nor tolerated in an organization which has been entrusted by the public to improve and care for the lives of young offenders.

Your position of Probation Officer is a position responsible for the guidance and safety of juvenile clients who are on probation with ARC. In that role, you are expected to counsel clients, maintain ongoing safety, and report issues involving your client's activities and problems. Your actions reflect poorly on your character and call into question whether you possess the judgment, integrity and maturity to continue in your current position. As a result, you are hereby notified that you are suspended with no pay for 90 days starting March 10, 2008 through June 9, 2008.

Your employment with ARC is no longer being terminated and a suspension is taking place instead. Therefore, pursuant to Minn. Stat. § 197.46, there is no longer a statutory right to a veterans' hearing.

Please be advised, in accordance with Article 6, Grievance Procedure, of the current labor agreement, you have the right to grieve this disciplinary action as long as the grievance is presented within twenty-one (21) calendar days of receipt of this letter.

Executive Director Roy and Supervisor Wright testified, which the Grievant acknowledged, that Probation Officers receive substantial training on how to de-escalate situations and when to use force. Probation Officers are also trained to present a united front when dealing with clients in order to avoid mixed messages. However, they are also trained to step in on situations where fellow Probation Officers are mistreating a client.

Testimony during the course of the hearing indicated that Fuchi wielded a great deal of influence, both before and after the July 24, 2007 incidents, with judges and senior law enforcement officials. This influence was well known by other Probation Officers and was probably instrumental in Fuchi's termination being reduced to a suspension. The Grievant

testified that he was well aware of Fuchi's influence and reluctant to "cross" him. In his investigative notes compiled by Supervisor Wright and in his hearing testimony, the Grievant expressed fear of Fuchi and described him as vindictive. He alleges Fuchi set him up on a previous discipline; and was told by Fuchi that he was well connected and could cause him to lose his job if he wanted to. Haenke also indicated in her investigative notes that she "was told by others that Fuchi is a very bad man to be on his bad side, which "contributed to her silence".

Evidence was also adduced at the hearing that the Grievant had a recent history of discipline. He received a letter of reprimand (written warning) on June 30, 2005 for an incident that occurred on or about March 27, 2005 wherein he misrepresented facts involving an administered breath analysis of a client.[17] The Grievant also received a letter of reprimand on July 7, 2005 for using official time and telephone to conduct personal business.[18] On June 6, 2006, the Grievant received a two-day suspension, that was reduced to one-day during grievance processing, involving his failure to take action on an out of control juvenile.

Evidence presented by the Grievant indicated that he was going through personal problems due to a divorce during the time period of the aforementioned disciplinary actions. In fact, he took a nine-month leave of absence following the June 6, 2006 incident in order to deal with his personal problems that were affecting his job performance.

[17] It appears no grievance was filed. Employer Exhibit No. 4.
[18] Employer Exhibit No. 5. The Grievant settled this matter by agreeing to restitution and not grieving the matter.

The Grievant took another leave of absence from July 26, 2007 through June 9, 2008. Since he returned, he appears to be functioning satisfactorily in his job performance according to his last evaluation compiled in October 2008.[19] Supervisor Wright states,

> *Tim has been back to work for over four months. During his past evaluation that was completed while Tim was on leave, I indicated that he had made progress towards working well in a team, effort, focus, and his ability to consequence rather than just warn clients. Tim also appeared to be making significant progress towards not letting personal issues interfere with his work. He is functioning well in the current unit, and appears to be able to make on the spot judgments based on client behavior. He gets along well with his co-workers and they are happy with him as a team member. He has expressed that he is stilt in training mode regarding his ability to present court cases. As a ten year employee with every position having court or hearing responsibilities, I do not see this as a training issue, but rather a confidence issue with Tim. I will observe him in a court process in the near future to determine any potential training needs, and give him feedback regarding his process.*
>
> *When I interviewed Tim about his goals, he indicated that his primary goal is to not let things get to him. Especially the small stuff. "I come here to do a job, and I'll do it. I'll focus on that" Tim indicated that during and following his divorce, he let personal issues interfere with work. His goal is to not allow that to happen again. He also expressed that he will not focus on past work issues. He wants to maintain professionalism and produce quality work.*
>
> *In my review of his chronological entries, I found him communicating well with his peers. Tim also has implemented appropriate consequences for client misbehavior as well as doling out praise for good behavior.*
>
> *I observed Tim on an evening shift on October 21, 2008 and found the following out about his work habits. Tim is much more focused and alert in his dealings with clients. Seeing him interacting with the youth on the shift I observed made me realize just how impacted he was previously by personal events. Tim used effective communication through motivational interviewing. He was clear with clients about limits, and worked hard to get clients to take charge of their own lives and decisions.*
>
> *I sincerely hope Tim can meet his own goals and stay focused on his work no matter what is going on in his personal life. The Tim I saw last night is an asset to the youth and the agency.*

[19] Union Exhibit No. 4

EMPLOYER POSITION

The Employer's position is that it had just cause to discipline the Grievant. The Employer argues that:

- The Employer has policies and procedures governing the conduct of Probation Officers. Probation Officers are made aware of and trained in the Employer's policies and procedures. The Grievant, who was an eight year employee at the time of his suspension, was given copies of the policies and procedures and participated in regular training on how to de-escalate situations. Probation Officers are responsible for their own conduct as well as the conduct of fellow team members whenever visiting or interacting with a client. Probation Officers are taught to step in and stop their partner when they are going too far with a client.
- The Grievant and Fuchi engaged in serious misconduct that affected the well-being of two clients, and was detrimental to the role of Probation Officers and the Employer's mission.
- The Grievant admitted that he participated in the incident where CW was subjected to unacceptable behavior and he even planned part of it. When things got out of hand, the Grievant stood by when he should have interceded on behalf of CW. Although he did not participate in the AJ incident, he remained silent when he should have stepped in when the situation got out of hand and there was an obvious threat to AJ's well-being.
- There needs to be discipline because the Grievant stood by and allowed unacceptable conduct by a fellow team member. The alternative would be for Probation Officers to stand by and let their partners get out of control.

The Employer also argues that the level of the Grievant's discipline was appropriate based on all of the underlying factors.

- The Grievant and Fuchi were initially terminated. Fuchi's termination was later reduced to a 90-day suspension period during grievance processing. Therefore, it was also appropriate to reduce the Grievant's discipline to a 90-day suspension period. The Grievant's suspension period was then reduced to 75-days since the Grievant was not as culpable as Fuchi.
- The comparative careers of Fuchi and the Grievant were taken into consideration when the Grievant's discipline was imposed. Fuchi had been a Probation Officer for 31 years and had an unblemished career. The Grievant had been employed only eight years and had a recent history of discipline—letters of reprimand on May 4, 2005 and June 30, 2005; and on May 16, 2006 a two-day suspension period was imposed, which was later reduced to one day on June 6, 2006. When you consider that the Grievant was on a personal leave of nine months after the June 6, 2006 suspension until March 2007, little time transpired between his first suspension and the one being litigated herein. Moreover, two of the prior disciplines had to do with the Grievant's inactions and failure to hold clients responsible for their actions.
- There was no disparate treatment when Haenke did not receive any discipline. July 24, 2007 was her first official day as a Probation Officer. She was essentially along for the ride. She sat in the back seat during the AJ incident logging previous visits and was with the Grandmother during most of the CW incident. She was

hardly in a position to assert herself during either situation or react differently than an eight year employee.

- Finally, Probation Officers are engaged in a tense line of work. Everyone is going to have a bad day. All Probation Officers will run into that client who tries to push their buttons. The partner who has your back must be able to step in and de-escalate the situation and save the Probation Officer from that situation; and more importantly, save the client. It would be very easy to put all the blame on Fuchi for what happened on July 24, 2007; however, there has to be accountability on the part of the Grievant.

UNION POSITION

The Union's position is that the Employer violated Article 24 of the Agreement when it suspended the Grievant for 75 days without just cause. The Union argues that,

- Fuchi assumed responsibility during the hearing for what happened on July 24, 2007. It was Fuchi who raised the car window that pressed against AJ's neck. It was also Fuchi who directed CW to clean the dog feces off of his shoe and eat the mint off of it.
- The Grievant acknowledged in hindsight that he should have stepped in during both situations. It is understandable why he did not when you consider that Probation Officers have to display solidarity in dealing with clients. Fuchi was the Probation Officer in charge that evening. The Grievant was reluctant to confront Fuchi because he feared Fuchi could affect his employment status.

The Union further argues that even if the Grievant was complicit, the punishment assessed the Grievant was too severe.

- The Grievant was the individual who reported the AJ incident to Supervisor Wright during the investigation of the CW incident. During the course of the Supervisor Wright did not view the Grievant's conduct as egregious and indicated during the Grievant's investigative interview that he would not receive any discipline.
- The Employer treated the Grievant disparately. Haenke did not receive any discipline for her failure to take action to de-escalate the July 24, 2007 incidents. Granted, it was her first day on the job; however, she had been an Intern earlier that year and had been trained in the Employer's policies and procedures, including de-escalation.
- The Grievant's discharge was too harsh under all of the circumstances herein. The Grievant ultimately received a suspension of 15 days less than Fuchi even though it was Fuchi who engaged in the actual mistreatment of the juvenile clients. Fairness dictates that the Grievant should not have been so harshly disciplined.
- The Agreement calls for a progressive disciplinary system. Executive Director Roy testified that the contractual disciplinary system is supposed to correct behavior rather than punish it. Fifteen weeks without pay is hardly corrective action.

OPINION

The issue before the undersigned is whether the Employer had just cause to suspend the Grievant for 75 days; and if not, what is an appropriate remedy. This issue presents a well-settled two-step analysis. First, whether the Grievant engaged in activity which gave the Employer just and proper cause to discipline him; and second, whether the discipline

imposed was appropriate under all the relevant circumstances.[20] It is the Employer's burden to establish that the Grievant engaged in conduct warranting discipline and that the appropriate discipline was a 75-day suspension period.

The evidence clearly established that Fuchi engaged in mistreating juvenile clients on July 24, 2007 that violated the Employer's policies and procedures. The evidence also established that the Grievant stood by and allowed Fuchi to continue in his mistreatment of the two juvenile clients, as did Haenke. Both Haenke and the Grievant received de-escalation training, with the Grievant obviously receiving considerably more training because of his tenure. Both also received client treatment training including when to intercede if a partner is going too far with a client. The Grievant admitted that, in hindsight, he should have stepped in on both situations, but failed to do so. Clearly, the Grievant was complicit on Fuchi's acts of July 24, 2007.

Haenke may also have been complicit giving the Employer just cause to discipline her; however, the Employer declined to do so. Instead, the Employer administered non-disciplinary verbal counseling. At first glance, there appears to be disparate treatment in the Employer's actions of disciplining the Grievant while not disciplining Haenke. The Employer cites mitigating circumstances as the reason for not disciplining Haenke. Although she had been an Intern for 200 hours earlier that year, she was essentially a rookie Probation Officer on her first day of duty. She was under the tutelage of Fuchi and the Grievant, seasoned 31-year and eight-year veterans, respectively. It could hardly be expected that she should intercede and usurp Fuchi's actions under these circumstances, especially when the Grievant remained silent and took no action. Moreover, she had

[20] Elkouri & Elkouri, HOW ARBITRATION WORKS p. 948(6th ed. 1997)

been forewarned about “crossing” Fuchi. Finally, it is clear that her actual involvement in the two incidents was limited at best. Therefore, contrary to the Union’s assertions, I see no disparate treatment under the circumstances herein.

Thus, the evidence has clearly established that the Employer has sustained its burden of proof and had just cause to discipline the Grievant. It must now be determined if a 75-day suspension period was the appropriate discipline under all the circumstances herein. Arbitrators are generally reluctant to modify disciplines imposed by employers. However, absent contrary contract language, Arbitrators have authority to review penalties imposed by management[21].

More serious offenses such as drug policy violations, theft, work place violence and failure to obey a legitimate direct order usually justify harsh penalties including long suspensions and discharge even when there is a progressive disciplinary policy in effect. Less serious offenses such as tardiness, absences without prior approval, plant rule or policy violations, and poor work performance call for milder progressive discipline in order to correct behavior even if it is the second or third offense. Arbitrators are also willing to modify disciplinary penalties and impose lesser discipline or impose progressive corrective discipline especially where there are mitigating circumstances present.[22]

The Employer cites an equity argument when it initially imposed the same discipline on the Grievant that Fuchi settled for in lieu of discharge during grievance processing. Later, the Employer reduced the Grievant’s suspension period to 75 days because the

[21] Id., p. 53-962.
[22] Id., p.964.

Grievant's actions were less serious than Fuchi's.[23] On the surface, this rationale appears to be equitable; but only if the appropriate discipline meted out to Fuchi was justified. Fuchi never challenged the severity of his discipline; rather, he appeared to willingly accept it in order to retain his job.[24] Thus, the length of Fuchi's suspension period is not dispositive of the length of the Grievant's suspension period.

The Union makes a strong argument to modify the Grievant's discipline because of mitigating circumstances. I see merit in this argument. Although the Grievant was complicit in the CW incident, the evidence disclosed that the Grievant never intended to have CW clean Fuchi's shoe with a toothbrush. He also had no idea Fuchi was going to actually require CW to clean his shoe or eat a mint off of it. He also had no actual involvement in the AJ incident nor did he know that Fuchi was going to trap AJ in the car window.

Clearly Fuchi's actions were more egregious than the Grievant's. Nevertheless, even the Grievant admitted that in hindsight he should have interceded during the CW incident. However, it is understandable why he may not have interceded during the AJ incident. The incident happened very quickly and lasted a very short time. The Grievant, whom I credit, said he "zoned out" (froze); and wanted to back the window down with his window control, but was afraid that he would move the window up tighter on AJ's neck if he pressed the wrong button. Further, the Grievant feared possible retaliation by Fuchi if he attempted to usurp Fuchi in the presence of the two juveniles and Haenke. Fear of

[23] The Employer also alleges that it took into consideration the Grievant's past disciplinary record. This will be discussed further herein.

[24] It appears that Fuchi may have willingly accepted the suspension in lieu of termination thus giving up his right to file a grievance over the length of the suspension in order to retain his job rather than risk an adverse ruling during grievance processing. An adverse ruling would have meant that he could never work as a Probation Officer again because he could not satisfy the State's college degree licensing requirement for Probation Officers.

“crossing” Fuchi was also the same fear expressed by Haenke. Although it is hardly a defense to his inaction on July 24, 2007, it also was a mitigating factor in his failure to intercede.

It appears that the Grievant never made any attempt to hide his or Fuchi’s actions for what transpired on July 24, 2007. In fact, he was the one who first reported Fuchi’s mistreatment of AJ including his involvement to Supervisor Wright. The Employer may have never found out about this incident; and absent this information, it may not have been a factor in his discipline.

It should also be noted that Supervisor Wright initially viewed the Grievant’s conduct as non-disciplinary. Although Wright does not have authority to assess discipline she has been a Probation Officer with the Employer for over 20 years, four of which as a supervisor. As such, she has experience in assessing the severity of Probation Officer’s conduct.

Finally, all the evidence adduced at the hearing indicated that the Grievant’s job performance has been satisfactory with the exception of the incidents that occurred when the Grievant was facing a troubling divorce. His last evaluation reflected that he continues to be an asset to the ISD unit and to the Employer.

Earlier, I found the Employer’s failure to discipline Haenke was not disparate treatment While it was not disparate treatment in my finding that the Employer had just cause to discipline the Grievant, it nevertheless needs to be examined in assessing the severity of the discipline issued to the Grievant. The Employer may be justified in not disciplining Haenke. However, at the same time administering a severe penalty to the Grievant for

similar conduct (failure to intercede) strikes me as unfair, not withstanding Haenke was a rookie Probation Officer.[25]

The parties have a contractual progressive disciplinary policy. The Employer, through Executive Director Roy's testimony, acknowledged that the disciplinary policy is formulated to correct behavior rather than punish it. A fifteen week, 75-day, suspension period without pay goes beyond being corrective and falls under the category of punitive. A reasonable person would also find that a quantum leap from a one-day suspension period to a 75-day suspension period is hardly progressive discipline issued to correct behavior.

The Employer argued in its closing statement that a 75-day suspension period was justified because of the Grievant's past disciplinary record. Although it appears that his past disciplinary record was never considered in the Employer's initial determination of the severity of the Grievant's discipline since it was not mentioned in his March 8, 2008 suspension letter, it will be considered in deciding the appropriateness of the Grievant's discipline.

Based on all the evidence adduced, I conclude that the Employer's 75-day suspension of the Grievant was harsh and severe and constituted punitive rather than corrective action under the parties' progressive disciplinary policy. There were also mitigating circumstances present that warranted a reduction in the severity of the Grievant's 75-day suspension.

The Grievant's misconduct warrants more than a mere slap on the wrist. The Grievant's involvement in the July 24, 2007 incidents together with his prior disciplinary

[25] Although Haenke was a "rookie", she had training in the Employer's policies and procedures and de-escalation techniques.

record also justifies more than a short suspension period. The length of the suspension period should, however, be administered in an equitable manner consistent with a progressive disciplinary policy that is corrective rather than punitive in substance. I, therefore, will reduce the Grievant's suspension period from 75 days to 30 days.

AWARD

IT IS HEREBY ORDERED that the grievance in the above entitled matter as it relates to the imposition of discipline shall be and hereby is dismissed for the reasons set forth in this Decision.

IT IS FURTHER ORDERED that the grievance in the above entitled matter as it relates to the nature of discipline shall be and hereby is sustained for the reasons set forth in this Decision.

IT IS FURTHER ORDERED the Grievant's 75-day suspension period be reduced to a 30-day suspension period; and any reference to the 75-day suspension shall be expunged from his personnel file, consistent with my Decision herein.

IT IS FURTHER ORDERED that the Grievant be made whole for any loss of wages, economic benefits, seniority, or any other benefits or rights or privileges suffered as a result of the additional 45 days of suspension improperly imposed, less any interim earnings.

The undersigned Arbitrator will retain jurisdiction in this matter for a period of forty-five (45) days from the receipt of this Award to resolve any matters relative to implementation.

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Dated: May 16, 2009

Richard R. Anderson, Arbitrator