

IN THE MATTER OF THE ARBITRATION BETWEEN

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)	
STATE OF MINNESOTA, DEPARTMENT OF CORRECTIONS)	BMS NO. 06-PA-216
)	
“EMPLOYER”)	
)	
And)	DECISION AND AWARD
)	
AMERICAN FEDERATION OF STATE COUNTY AND MUNICIPAL EMPLOYEES UNION COUNCIL 5)	RICHARD R. ANDERSON ARBITRATOR
)	
“UNION”)	APRIL 5, 2006
)	
)	

APPEARANCES

Employer

Trina Chernos, Labor Relations Representative Senior
Lynn Dingle, Warden MCF-Stillwater
Mike Green, Due Process Supervisor MCF-Oak Park Heights
Sean Tolefree, Human Resources Director MCF-Lino Lakes & St. Cloud

Union

Sid Helseth, AFSCME Staff Representative
Mark Dvorak, Grievant and Sergeant Central Transportation St. Paul
Mike Keapproth, Local 915 President and Sergeant MCF Oak Park Heights

JURISDICTION

The hearing in above matter was conducted before Arbitrator Richard R. Anderson on March 14, 2006 at the Minnesota Correctional Facility (MCF) located in Oak Park Heights, Minnesota. Both parties were afforded a full and fair opportunity to present its case. Witness testimony was sworn and subject to cross-examination. Exhibits were introduced and received into the record. The hearing closed on March 14, 2006. The parties waived Post-Hearing Briefs. This matter was then taken under advisement.

This matter is submitted to the undersigned pursuant to the terms of the parties' collective bargaining agreement that was effective from July 1, 2003 through June 30, 2005¹. The language in Article 17 [GRIEVANCE PROCEDURE] provides for the filing, processing and arbitration of a grievance. Section 5 of this Article defines the jurisdiction of the Arbitrator. The parties stipulated that the grievance is properly before the undersigned Arbitrator for final and binding decision. The parties further stipulated that there are no procedural arbitrability issues.

BACKGROUND

The State of Minnesota Department of Corrections, hereinafter the Employer, operates a number of prisons in the State of Minnesota, among these a Level 5 Prison in Oak Park Heights, Minnesota.² This is the only facility involved herein.³ The Union represents a unit of Corrections Officers⁴ at the Facility. The bargaining unit is set forth in Article II [RECOGNITION]. The parties have a history of collective bargaining dating back to 1981.

¹ Joint Exhibit No. 12

² Level 5 prisoners have been convicted of the most violent crimes.

³ Hereinafter, all reference to Facility will refer to the Oak Park Heights facility.

⁴ Hereinafter, referred to as Officers.

The Grievant, Mark Dvorak, filed a grievance on February 16, 2005 alleging that the Employer demoted him in violation of the just cause standard in Article 16 [DISCIPLINE AND DISCHARGE] of the Agreement. Thereafter, the parties were unable to resolve the grievance and the Union filed for arbitration with the State of Minnesota Bureau of Mediation Services (BMS). The undersigned was notified of being selected as the neutral Arbitrator by letter from the Employer's representative dated December 19, 2005.

THE ISSUE

The parties stipulated that the issue is, "Did the Employer have just cause to demote the Grievant for six months"?

RELEVANT CONTRACT PROVISIONS

ARTICLE 2. RECOGNITION

Section 1. Existing Units. *The Employer recognizes the Union as the exclusive bargaining representative of all the employees included in the bargaining unit certified by the Bureau of Mediation Services, 81-PR-1959-A. The composition of this unit is as set forth in Appendix A of this Agreement.*

ARTICLE 16. DISCIPLINE AND DISCHARGE

Section 1. Purpose. *Disciplinary action may be imposed upon an employee only for just cause:*

Section 3. Disciplinary Procedure. *Disciplinary action or measures shall include only the following:*

- 1. oral reprimand;*
- 2. written reprimand;*
- 3. suspension;*
- 4. demotion; and*
- 5. discharge.*

Section 6. Appeal Procedures. *Any disciplinary action imposed upon an employee may be processed as a grievance through the regular grievance procedure as provided in Article 17.*

The Union shall have the right to take up a suspension, demotion, and/or discharge as a grievance at the third step of the grievance procedure and the matter shall be handled in accord with this procedure through the arbitration step if deemed necessary.

ARTICLE 17. GRIEVANCE PROCEDURE.

Section 1. Grievance Procedure. *A grievance is defined as a dispute or disagreement to the interpretation or application of any term or terms of this Agreement.*

Employees are encouraged to attempt to resolve the occurrence of any grievance on an informal basis with the employee's immediate supervisor at the earliest opportunity. If the matter is not resolved by informal discussion, it shall be settled in accord with the following procedure.

If an employee/former employee pursues an appeal procedure under MS. 197.46 or other applicable Veterans Preference law), the employee/former employee shall be precluded from making an appeal under the following grievance procedure.

Section 5. 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/she shall consider and decide only the specific issue or issues submitted to him/her in writing by the parties of this Agreement, and shall have no authority to make a decision on any other matter not so submitted to him/her. 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. 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.*

FACTS

The Grievant, who is a 20-year veteran Officer, was employed as a Sergeant (CO 3) at the Facility at all times relevant herein. The Grievant was in charge of a team of two Officers conducting a search of inmates and their cells pursuant to a "lock down" of the

Mental Health Unit (Complex 4) on December 28, 2004.⁵ The Grievant and Officers' Vance Arrigoni and Dan Meyer proceeded to room 208 to search Inmate X and his room.⁶ During the search an "incident" occurred between the Officers and Inmate X. During this incident, the Grievant sustained bruises and swelling to the right side of his face and ear.⁷

Pursuant to Corrections policy, the Officers were required to submit a written Incident Report⁸ describing in detail the circumstances surrounding the incident with Inmate X. The Reports are composed on a computer, printed and signed by the Officer who records the completion time of his Report. The Report is then given to the shift Watch Commander who reviews and initials it. Thereafter, the Report is input into the computer database by midnight shift staff. Certain Corrections staff personnel including Officers can then access the Report.

The Grievant's Report disclosed that the incident occurred at 1401 hours (2:01 p. m.)⁹ He signed the Report listing 1415 hours (2:15 p.m.) as the time of its completion. A Watch Commander initialed the Report.¹⁰ The Grievant's Report is as follows:

"On the above date and time myself, along with officers Dan Meyer & Vance Arrigoni entered room 208 which housed inmate X. I informed X he needed to be strip searched. He stated he would not comply. I then told him to place his hands behind his back. At this time X delivered a closed fist blow to the right side of my face. Inmate X was taken to the ground by Officers Meyer & Arrigoni. IMS was activated, cuffs were placed behind his back. I directed Officer Mcauliffe to retrieve a camera from the bubble. The A-Team arrived, took control X, and escorted him to ACU."

⁵ The inmate was to be strip-searched and the room was to be searched for contraband.

⁶ For privacy reasons, the inmate's name is not being revealed.

⁷ Joint Exhibit No. 10, pgs. 1 and 2.

⁸ Hereinafter, a Report.

⁹ The Reports of the three Officers is Joint Exhibit No. 1.

¹⁰ According to the Grievant, he immediately began to do his Report once the incident in Room 208 ended. The Report was printed out and given to the Watch Commander at 14:15 p.m. He was later called back to the Facility because he had forgotten to sign the Report.

The Report of Officer Arrigoni listed 1401 hours (2:01 p.m.) as the time of the incident. He signed the Report listing his reporting time as 1700 hours (5:00 p.m.).

A Watch Commander initialed the Report. Officer Arrigoni's Report is as follows:

"On the above date and time this reporting officer was assisting with a routine shakedown along with Sgt. Mark Dvorak and Dan Meyers of offender (X's) room. Sgt. Dvorak informed offender X that a unclothed body search was to be conducted. Offender X at this time stated "I AM NOT DOING A STRIP SEARCH YOU MIGHT AS WELL SUIT UP OR SPRAY ME NOW". Sgt Dvorak gave a direct order to offender X to place his hands behind his back. Offender X proceeded to LAND A CLOSED FIST PUNCH TO SGT. DVORAKS FACE. Myself and officer Dan Meyer took hold of offender X and with the least amount of force necessary took him to the ground. Officer Willie Kantola activated IMS from the bubble. Squad arrived within seconds. Handcuffs, leg irons, and a spit mask were placed on offender X and a staff assisted unclothed body search was conducted by officers Cloutier, Meyer and myself. Offender X was escorted to ACU by squad. The incident was video taped by officer Amy McAuliffe. Personal protective equipment worn by all staff involved. Shakedown was being conducted per routine lockup status of complex 4. It should also be noted that during the incident while taking offender X to the ground I tore a hole in the right leg of my pants scraping skin from my knee. This officer was seen at the Lakeview emergency room all paper work turned in."

The Report of Meyer also indicated the incident occurred at 1401 hours and a Watch Commander initialed it. Meyers, however, did not enter a reporting time. Meyer's Report is as follows:

"On the above date and time, Sgt Dvorak, Officer Arragoni and I entered room 208 which housed offender X to conduct a routine shakedown. Sgt Dvorak informed Offender X that he needed to be stripped searched. X said he would not comply to a strip search. Sgt Dvorak directed offender X to turn around and place his hands behind his back to be hand cuffed. X then threw and landed a closed fist punch to Sgt Dvorak face. At this time Officer Arragoni and I took control Offender X and directed him to the ground. IMS was activated at this time by Officer Willy Kantola who was working the Bubble. Handcuffs, leg irons and spit mask was placed on Offender X and a staff assisted unclothed body search was conducted by Officers Arragoni, Cloutier, and myself. X was then escorted to ACU by SQUAD. The incident was videotaped by Officer Amy McAuliffe."

The next day, as a regular practice the Warden Dingle reviewed the previous day's Reports including the Reports generated by the three Officers. Warden Dingle testified that her initial action was concern because an inmate had assaulted one of her Officers. However, after learning later from a staff member that the videotape did not match the Officers' Reports, she viewed the tape.¹¹ After reviewing the videotape of the incident, she had a different perspective.¹² She testified that, contrary to the three Officers' Reports, the tape did not reveal the incident with Inmate X as they had reported. The tape did not show Inmate X striking the Grievant before the Grievant moved toward the inmate to subdue him, rather, it showed the Grievant being the aggressor. It also showed that the Grievant, rather than Officers Arrigoni and Meyer, "taking down" Inmate X, which was contrary to what all three Officers' reported.

As a result of the discrepancies between the Reports and the videotape, Warden Dingle directed an investigation. On December 30, 2005, Corrections Program Director Lcie Stevenson directed Lieutenant Tom Hell, a supervisor in the Mental Health Unit. to conduct an investigation into the discrepancies.¹³ He interviewed the Grievant as well as Officers Arrigoni, Meyers and Inmate X. His report to Director Stevenson was issued on January 5, 2006.¹⁴ The report disclosed that all three Officers stood by the facts as they had reported in their respective Reports even after they had viewed the videotape. Inmate X did not recall assaulting the Grievant during his interview.

On January 6, 2006 the Grievant sent an e-mail to Lt. Hell, which was subsequently forwarded to Warden Dingle who in turn forwarded it to a number of Corrections'

¹¹ Joint Exhibit No. 2

¹² Inmate X was on suicide watch so his cell was being monitored by video camera.

¹³ The supervisor of the unit involved normally does the investigation.

¹⁴ Joint Exhibit No, 6

officials including Director Stevenson.¹⁵ The e-mail is as follows:

"Mark Dvorak 1/6/2005 7:23:28 AM

Lt Hell, after re-thinking the events of the assault, in my head several hundred times over the last few days, I am %100 convinced that it was a right hand punch that landed to my cheek from inmate X. In the beginning of the tape it shows X making a forward move. This is when the right hand punch was landed, I am positive. The tape shows him move forward, then it shows him stepping backwards as I moved toward him. With the delay in the taping sequence, it does not show his first punch. It then shows me going for his right arm, which is the arm he struck me with. I have an e mail in to Lowell Schmidt to see how many seconds lapse between frames. I would like to review this tape again with you with Lowell present. My integrity is being questioned, and the three other Officers in this investigation integrity is being questioned, and I am 100% positive I did the right thing in this situation. Lets do this before your investigation is reviewed by the Administration. Thank you."

Warden Dingle further testified that Lt. Hell's report left a lot of questions unanswered so she directed Director Stevenson to conduct a further investigation. Director Stevenson's report of the investigation, which involved re-interviewing the Grievant and Officers Arrigoni and Meyer issued on January 28, 2005.¹⁶ According to Director Stevenson's investigative report, the Grievant and Officers Arrigoni and Meyer continued to adhere to their recollection of the incident as they had reported in their respective December 28, 2004 Reports.

During this time period, Warden Dingle, through one of her staff members, contacted a forensic videotape specialist at Target Corporation to do a digital frame-by-frame analysis of the videotape.¹⁷ According to Warden Dingle, she wanted to ensure that the videotape did not leave possible gaps that could result in the tape missing Inmate X's alleged punch. Warden Dingle testified that the frame-by-frame analysis did not disclose

¹⁵ Joint Exhibit No. 5

¹⁶ Joint Exhibit No. 6

¹⁷ The resultant CD is marked as Joint Exhibit No. 3.

a large enough gap to allow Inmate X to step forward, strike the Grievant on the right side of the face and return to exact position he had been in during the previous frame.

Warden Dingle further testified, and the Grievant concurred in his testimony, that Inmate X's alleged punch would have had to occur between frame 14:01:09 and 14:01:10. A review of the frames time stamped between 14:01:08 and 14:01:12 discloses that there are eight relevant frames.¹⁸ The second frame time stamped 14:01:08 shows that the Grievant is standing approximately three to four feet from Inmate X in an upright position with his head turned to his right.¹⁹ His left arm is close to his side and slightly raised at a 20-30 degree angle with his hand in a closed fist. Officer Arrigoni is shown standing slightly to the Grievant's right and directly behind him in a relaxed upright position with his right hand to his side and his left hand on a counter. Inmate X is standing in a tense upright position facing the Grievant with the left side of his body slightly ahead of his right side and his arms straight down at his sides. It also appears that Inmate X's right hand is in a closed fist. There are two frames with the time stamp of 14:01:09. In the first frame, the Grievant is still standing approximately three to four feet from Inmate X in an upright position with his left arm close to his side and now raised slightly less than it was before.²⁰ He is looking directly at Inmate X. His left hand is still in a closed fist and his right hand is behind his back.²¹ Officer Arrigoni and Inmate X are still standing in the same position. In the second

¹⁸This includes five digital pictures of the incident between frames 14:01:09 and 14:01:12. Joint Exhibit No. 4

¹⁹ This frame is not a part of Exhibit No. 4.

²⁰ This frame is also not a part of Exhibit No. 4.

²¹ Joint Exhibit No. 4, picture 1

frame time stamped 14:01:09 the Grievant is in the same position but his left hand now appears to be pointing at Inmate X.²² Everyone else is in the same position.

In the first frame time stamped 14:01:10, everyone is in the same position except the Grievant has dropped his left arm to his side with his hand slightly closed, and Inmate X has leaned his upper body slightly toward the Grievant. In the second frame time stamped 14:01:10, the Grievant is beginning to step forward in an aggressive position. He has assumed a boxer's stance with both arms raised slightly below his chest and his fists closed.²³ Officer Arrigoni has not changed his position or stance from the previous frame. Inmate X is also in almost the identical position as he was in the previous frame, however, his upper body has shifted slightly backward to the same position shown in the first frame time stamped 14:01:09.

Frame 14:01:11 shows the Grievant grabbing Inmate X's arms with both his hands while Inmate X is leaning back and apparently resisting.²⁴ Officer Arrigoni is still standing in the same position and does not appear to have moved any part of his body. Officer Meyer who is standing in the doorway is slightly visible behind Officer Arrigoni. Another frame labeled 14:01:11 shows the Grievant attempting to gain control of Inmate X²⁵. The Grievant has both of his hands on Inmate X's right arm, who appears to still be resisting. Officer Arrigoni is in the same location as in the prior frame, however, he appears to begin to step forward with his hands raised. Officer Meyer is still slightly visible in the doorway of the cell.

²² The Grievant testified that he was ordering Inmate X to submit and reaching behind his back for his handcuffs.

²³ Joint Exhibit No. 4, picture 2

²⁴ Joint Exhibit No. 4, picture 3

²⁵ Joint Exhibit No. 4, picture 4

Frame 14:01:12 shows the Grievant with his back to the camera bracing himself with his left hand against a concrete bed slab and facing the Inmate X²⁶. He appears to be trying to take control of a resisting Inmate X with his body and right hand. It also appears that Officers Arrigoni and Meyer are rushing to the Grievant's assistance. According to the Grievant, in this frame he was trying to catch himself from falling and braced himself while the Officers moved in to "take down" Inmate X.

Subsequent frames on the CD show the Grievant still bracing himself in an awkward position with his head facing down. He is still bracing himself with his left hand while his right hand appears to be holding on to Inmate X.²⁷ At this point Officer Arrigoni has entered the engagement and appears to be trying to take down Inmate X while Officer Meyer is seen moving in closer to the confrontation. In subsequent frames, Officer Arrigoni has pulled Inmate X to the floor while the Grievant's right hand is still holding on to Inmate X. Officer Meyer appears to be trying to give assistance to Officer Arrigoni. The Grievant testified that during this whole sequence Inmate X was pulling him along while Officers Arrigoni and Meyers were "taking down" Inmate X.

Warden Dingle testified that after the investigation was completed, a Work Team consisting of the Facility's Executive Team that includes an Associate Wardens of Administration and Operations, a Captain, a Human Resources (HR) Representative, the Report incident Investigator and herself convened to discuss the investigative results. According to Warden Dingle, they looked at the incident, the results of the investigation and made a recommendation of an appropriate discipline. Warden Dingle further testified that the HR Representative then contacted the Central Office HR

²⁶ Joint Exhibit No. 4, picture 5

²⁷ Frames 14:01:12 through 14:01:16.

Supervisor and she contacted an Assistant Commissioner of Corrections, to run the pertinent facts and their disciplinary recommendation by them. According to Warden Dingle, the Work Committee recommended discharge, however, higher-level Corrections officials changed the discharge recommendation to a demotion. This was later changed to a six-month demotion during the third step of the grievance procedure.

Prior to an employee being discharged or suspended an employee is entitled to a deprivation hearing known as a Loudermill hearing.²⁸ According to HR Representative Sean Tolefree, who was the HR Representative at the Facility in early 2005, he attended the Grievant's Loudermill hearing and took notes along with two Facility Associate Wardens.²⁹ According to HR Representative Tolefree, the purpose of the hearing was to apprise the Grievant of the findings of the Employer's investigation and to notify him of the discipline being imposed. Before discipline was imposed, the Grievant had a chance to discuss his side of the story. HR Representative Tolefree testified that the Grievant disagreed with the both the Employer's findings and discipline leveled. During the discussion, HR Representative Tolefree stated the Grievant made a remark that the inmate was not following directives and he was trying to prevent something from happening, or words to that effect. HR Representative Tolefree added that he was shocked by the Grievant's remark because he was now saying that he initiated the contact with Inmate X. The Grievant testified that his statement at the Loudermill hearing was a reference to his trying to talk Inmate X into submitting to a strip search before any force was necessary.

²⁸ A pre-discipline hearing, which the parties have agreed to.

²⁹ It appears this hearing occurred on or about February 10, 2005, which was the same date the Grievant was issued his initial disciplinary letter.

After the filing of a grievance and grievance negotiations, the permanent demotion was reduced to six months. On June 21, 2005, Warden Dingle sent a disciplinary letter to the Grievant informing him that he was being demoted to a CO 2 classification; retroactively from February 10, 2005 through August 9, 2005. Effective August 10, 2005, he would be restored to his CO 3 classification. The Grievant testified that Officers Arrigoni and Meyer initially received five-day unpaid suspensions, however the discipline was later reduced to a one day unpaid suspension after a grievance meeting.

The duties of a CO 3 are set forth in a State position description.³⁰ One of the priority duties is to give training to lower ranking Officers. According to Warden Dingle, the Grievant is an excellent training Officer who has conducted numerous training exercises for other Officers. Another duty listed in the Position Description is *"To give and receive information in an accurate, timely and dependable manner, so that information can be evaluated and appropriate action initiated."* Warden Dingle testified that all Officers are given Report writing training, and in fact the Grievant has instructed lower ranking Officers in Report writing. Also, all Officers received materials during this training that included a 40-page guidebook entitled "Elements of a Good Report".³¹

The Grievant in his testimony acknowledged receiving Report writing training and receiving a copy of the "Elements of a Good Report" guidebook; however, he stated that he was not actually involved in Report writing training of other Officers. Warden Dingle further testified that the "Elements of a Good Report" have guidelines that Officers are supposed to follow. According to her, this guide requires Officers to report what

³⁰ Joint Exhibit No. 11

³¹ Joint Exhibit No. 8

happened only if they are 100% sure³²; that Report writer follow the 4 C's (clear, correct, concise and complete)³³; that the Report contain accurate information and documents facts that can be verified³⁴; that the Report provides credible evidence of the circumstances of an incident that could lead to appropriate charges; and finally describes what happens to the Reports³⁵. With respect to the latter, Warden Dingle testified that the Officers' Reports could have led to internal disciplinary action or felony assault charges filed against Inmate X. This is why, according to Warden Dingle, it is crucial to have a 100% accurate Report.

Warden Dingle testified that Officers Arrigoni and Meyer were also disciplined, but to a lesser degree than the Grievant. The Grievant received a harsher penalty because he was the Officer In Charge in the Unit and the other Officers were taking directives from him. In addition, he had past histories that led her to be concerned about his decision-making ability. According to Warden Dingle, the Grievant can be an excellent Officer for long periods of time; however, he can make very poor decisions at other times. He had been previously disciplined when he received a written reprimand for sending offensive cartoons and inappropriate drawings via e-mail to outsiders and his family. The Grievant's actions, according to Warden Dingle, concerned her. The Grievant admitted he did it, admitted he knew it was against policy and admitted that he had been previously warned about this inappropriate conduct, but decided to do it anyway. Warden Dingle also testified that after this, she was concerned about his decision-

³² Page 4 of Elements of a Good Report.

³³ Page 12 of Elements of a Good Report.

³⁴ Page 15 of Elements of a Good Report.

³⁵ The Discipline Unit reviews to determine appropriate discipline and whether additional charges should be filed. [Page 40 of Elements of a Good Report.]

making and removed him as a Sniper from the Special Operations Response Team (SORT).³⁶

Warden Dingle also testified that, although the Agreement contains five levels of discipline, there is no progressive disciplinary policy that she is required to follow. She can choose to follow discipline in a progressive manner; however, if the offense warrants a higher level of discipline outside of normal progression, it is an option. Warden Dingle further testified that progressive discipline was not appropriate in the Grievant's case because the videotape showed the Grievant and not Inmate X was the aggressor. She stated that as Warden she has to respond to media and families of these offenders; adding that if this situation was reported to the media, it would look like they were inappropriately handling an offender. She also imposed harsher discipline because the Grievant was a 20-year veteran and Sergeant In Charge, who should have known better than to handle the incident in the way that he did.

Warden Dingle also testified that another Officer was similarly disciplined in the past for falsifying a Report, but could not remember the details. Thereafter, the parties stipulated to an Exhibit involving a previous arbitration award where this was an issue.³⁷ The grievant in this matter received a permanent demotion for unprofessional conduct during an incident with an inmate and for falsifying a Report and lying to investigators.

The evidence, through the Grievant's testimony and his personnel records, disclosed that during his tenure he had been rated "Fully Meets Standard" or "Exceeds

³⁶ This was not a disciplinary action. This is a voluntary Officer assignment; however, she has the authority to remove an Officer at her discretion.

³⁷ State of Minnesota department of Corrections and Minnesota State Employees Union, AFSCME Council 6, 98-PA-1499, December 7, 1998 (Arbitrator Gil Vernon)

Standards" in his performance reviews. He has also received numerous letters of recognition from higher-level Facility officials, including a past Warden.

The Grievant testified that his December 28, 2004 Report correctly described what happened during the incident with Inmate X. He was adamant that the Grievant struck him first on the right side of his face before he took any aggressive action. He also stated that Officers Arragoni and Meyer were the Officers that "took down" Inmate X; and, as stated earlier, he was pulled along by his left arm and landed on top of the pile. The Grievant added that an Officer has the right to subdue an inmate if that inmate refuses to submit to a direct order of an Officer according to Corrections policies and procedures. In the instant matter, he testified that he gave Inmate X repeated opportunities to obey his order to be strip searched in order to avoid any confrontation with him; and he did not attempt to subdue him until Inmate X punched him.

The Grievant further testified that he did not discuss his Report with or collaborate with either Officers Arragoni or Meyer in compiling their respective Reports. He also testified under cross-examination that he met Officer Arragoni coming into the hospital while he was leaving and gave him directions where to get treatment, however, he never discussed the incident or the Report itself with him.³⁸

The Grievant also testified that he contacted the Facility's Department of Investigation to determine if he could take a polygraph test to clear his name and the names of his fellow Officers. A Department official stated he could not polygraph the Grievant, however, he referred him to what the Grievant describes as, "The best polygrapher in the State". Thereafter, the Grievant was the subject of a polygraph

³⁸ Officer Arragoni was being treated for a leg wound suffered during the incident.

examination given by Certified Forensic Polygraphist David Knepelkamp on or about April 6, 2006. In his report Knepelkamp stated:

"At your own request, you were administered a polygraph examination this date to determine whether or not you falsified an Incident Report at MCF/Oak Park Heights.

Following approved and recommended procedures, you were administered three polygrams consisting of relevant, irrelevant and acceptable comparison type questions. Each question was reviewed with you prior to the examination. This examination was conducted utilizing the Lafayette LX4000 computerized polygraph system.

Evaluation of the three polygrams resulting from this examination fails to reveal significant criteria that would indicate deception. It is my opinion, therefore, that you were truthful when responding "No" to the following relevant questions:

1. When you now say Inmate X struck you before you approached him that day, are you lying?
2. Did you make up or falsify any part of your version of what took place with Inmate X December 28th?

Thank you for providing the documentation necessary for the preparation of this examination.³⁹ If you have any questions please feel free to contact me."

POSITION OF THE EMPLOYER

It is the position of the Employer that it was justified in disciplining the Grievant for falsifying his Report involving the incident with Inmate X. The Employer states that the Grievant was disciplined for writing an inaccurate Report. The Employer further states that the Grievant's inaccuracy is not minor. The Grievant alleged in his Report that Inmate X assaulted him. Such an allegation if true has dire consequences for an inmate. Inmate X's incarceration period could be extended, or he could be forced into segregation status or turned over to the County Attorney for prosecution. The Grievant was a twenty-year veteran who was very familiar with what is required of an Officer when writing a Report. He received a copy of the "Elements of a Good Report"

³⁹ According to the Grievant, he furnished his demotion letter and the digitalized CD made from the videotape.

guidebook, underwent Report writing training and also taught it. The Employer further argues that conformity with the policy that an Report be 100% accurate is imperative, not only for safety reasons, but also because of the public scrutiny of incarcerated individuals. This is why Corrections requires absolute correctness in writing Reports.

The Employer states it is not arguing that the Grievant was not struck, only that the videotape and frame-by-frame analysis shows that he was not struck as described in the Grievant's Report. Rather, it appears he may have been struck while subduing Inmate X, well after the blow was alleged to have happened. The Employer argues that the videotape and frame-by-frame analysis of the videotape clearly show that the Grievant, and not Inmate X, was the aggressor. The credible evidence shows that Inmate X did not strike the Grievant first before he was taken down. It also clearly shows that the Grievant was the primary Officer involved in the take down and that Officers Arrigoni and Meyer assisted him.

The Employer also argues that it would have been impossible for Inmate X to move forward and strike the Grievant, much less on the right side of his face with his right fist, and return to the identical position he was in, between frame 14:01:09 and frame 14:01:10. Also, it appears unlikely that if Inmate X had initiated the confrontation by striking The Grievant, Officers Arrigoni and Meyers would have just stood by doing nothing; and only moving after the Grievant is already in the process of trying to control the inmate. The Union also failed to present any evidence or experts to show that there was a gap in the videotape sufficient to support the Grievant's contention..

The Employer further argues that the Grievant's statements at his Loudermill hearing and to investigators right after the incident indicate the Grievant's uncertainty of when

Inmate X hit him. The Grievant states at least three times in his e-mail to Lt. Hell that he was "100%" sure that Inmate X struck him on the right side of his face with his right fist just before he moved to subdue him. However, his words to Corrections Officials at his pre-discipline hearing indicated that he initiated the confrontation. If he was uncertain, he should not have recorded the assault the way he did in his Report.⁴⁰

The Employer further argues that the Union's position that the Report is correct because three Officers described it the same way is not meritorious. This might be true if the three Officers simultaneously wrote their Report. Here it is clear that they did not since the Grievant and Officer Arrigoni's Report times are different and the timing of Officer Meyer's Report is uncertain because it has no recorded time. There is also evidence that the Grievant and Officer Arrigoni had an opportunity to discuss their Reports before they were reviewed and signed by a Watch Commander. The Grievant admitted he had a conversation with Arrigoni while at the hospital before both had signed their Reports.

Finally, the Employer objected to the Union's introduction of the Union's polygraph evidence at the hearing. The polygraphist's examination report was not substantiated. There was no testimony of the polygraphist who prepared the examination report. This negated the Employer's right to cross-examine the polygraphist.

The Employer also argues that a six-month demotion was appropriate discipline as it was directly proportionate to the misconduct. An offense as serious as an inaccurate Report warrants severe discipline, irrespective of any prior discipline or an Officer's 20-year tenure. The Employer argues that a harsh penalty was justified because the

⁴⁰ Warden Dingle testified that she would have accepted an amended Report at any time during the course of the investigation.

Grievant had been warned in the past and failed to correct his behavior. The Grievant also deserved a higher level of discipline because he was the Officer in Charge of the "search" team, and the other Officers were following his directives. Officers who have filed a false Report in the past have been demoted. Finally, the Employer has already reduced the Grievant's discipline, thus mitigating a call for lesser discipline. The original discipline recommended by Warden Dingle was discharge. This was later reduced to a permanent demotion, which was ultimately reduced to a six-month demotion during third step grievance discussions.

POSITION OF THE UNION

It is the Union's position that the Employer did not have just cause to demote the Grievant. The Union argues that the Grievant, as well as his fellow Officers, did not file or falsify their Reports. The Union agrees that the videotape played at regular speeds does not show Inmate X striking the Grievant before any action was taken to subdue him. The CD introduced into evidence clearly shows that not all movements by the individuals involved in the incident were captured. It is entirely possible that one of those movements was the action of Inmate X striking the Grievant.

The Union further argues that speculation is not necessary since the three Officers were eyewitnesses to the punch and reported it as such in their Reports. Given the impeccable integrity of the Grievant and other testimony, the Employer has not sustained its burden of proof. The Employer has not produced any evidence of the uncertainty that the punch did not occur while the Union, through the Grievant's testimony and the Reports of the three Officers, established that the punch did occur.

Finally the Grievant demonstrated in his polygraph examination that his portrayal of the incident was truthful.

OPINION

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. It is the Employer's burden to show that the Grievant engaged in conduct warranting discipline and that the appropriate discipline was a six-month demotion.

I conclude that the Employer has met the first test in that it had just and proper cause to discipline the Grievant for filing a false or inaccurate Report. In reaching this conclusion, I have considered both parties' evidence and arguments. The Grievant's Report states that, *"I informed X he needed to be strip searched. He stated he would not comply. I then told him to place his hands behind his back. At this time X delivered a closed fist blow to the right side of my face. Inmate X was taken to the ground by Officers Meyer & Arrigoni"*. Neither the videotape nor the digital analysis of the tape shows Inmate X delivering a punch to the Grievant before the Grievant attempted to subdue him.

The digital frames may have gaps between them; however, the gaps are less than one second; and it would be impossible for Inmate X to move forward and punch the Grievant, especially with his right hand to the right side of the Grievant's face; and then move back to the identical position where he had been in the previous frame. Moreover, as the Employer points out, Officers Arrigoni and Meyer would hardly have

stood by in the same position as long as they did if a punch had occurred. As evidenced in the subsequent frames, they did not begin to change positions or move until the Grievant had already made contact with Inmate X in his process of subduing him.

A review of the evidence also discloses that the Grievant was the Officer who was initially involved in the "take down" of Inmate X. A review of the videotape and digital frames show this clearly. They also show that the Grievant and Inmate X were engaged in a struggle; and it was Officer Arrigoni, with limited assistance of Officer Meyer, who eventually pulled Inmate X along with the Grievant to the ground.⁴¹

The only evidence presented by the Union involving the actual incident was the Report and testimony of the Grievant. The Reports of the other two Officers were introduced as a Joint Exhibit; however, the Union did not produce Officers Arrigoni and Meyer to testify under oath as to the veracity of their Reports.⁴² The Union also argued that the alleged punch occurred between gaps in the videotape, yet again it produced no witnesses or evidence to establish that a sufficient gap existed for the alleged activity to take place.

Further, a letter from a polygraphist, which may or may not have supported the Grievant, does not establish that Inmate X threw the punch as described in the Grievant's Report. Polygraph examinations are not per se reliable evidence. Even where polygraph examinations have been conducted, arbitrators are reluctant to admit them into evidence since they are subjectively dependent on an individual's emotional

⁴¹ It is not clear if Inmate X was holding onto the Grievant or visa versa, or if that caused the Grievant to be pulled along with the group and eventually landed on top of the pile.

⁴² This is sufficient to establish an adverse inference concerning their Reports.

state.⁴³ Arbitrators are also reluctant to allow them into evidence especially when there is no supporting authority for the accuracy or reliability of the examination, as is the case here. The letter from the polygraphist, under the circumstances herein, is hearsay evidence; and as such, has no direct evidentiary value. The Union failed to produce him as a witness or produce a copy of the test that he administered. Further, the Union's failure to produce the polygraphist precluded the Employer from being able to cross-examine him. Under these circumstances, I am excluding the Union's polygraph evidence. In view of the foregoing, there is no basis to conclude anything other than that the Grievant filed a false or inaccurate Report. Thus, the Employer has sustained its burden of proof and had just cause to discipline the Grievant.

Having determined that the Employer had just and proper cause to discipline the Grievant for his filing a false or inaccurate Report, it is incumbent upon the Employer to show that the appropriate discipline was a six-month demotion. I conclude that the Employer has also met this burden.

It is a well-established arbitral rule that, absent a finding that a disciplinary action is arbitrary, capricious, unfair or violates the collective bargaining agreement, an Arbitrator should be hesitant to alter the discipline.⁴⁴ There is no evidence of discrimination herein or is there a progressive disciplinary provision in the Agreement that hinders the Employer's choice of discipline. The Employer established that Corrections' policy expects Officers to adhere to the requirement that Reports be 100% accurate. The Employer also demonstrated the seriousness of the offense because of its potential ramifications. In the instant matter, the ramification for Inmate X would be serious if the

⁴³ Elkouri & Elkouri How Arbitration Works, 5th Ed., pgs. 436-438 (1997)

⁴⁴ Ibid. pgs. 910-912

allegation that he punched the Grievant was true. If it were not for the videotape, the contents of the Report would have been sufficient to discipline Inmate X internally and refer him to the County Attorney for prosecution. The ramifications to Corrections would also be significant if the media learned that the Facility had mishandled an inmate or an incident.

Warden Dingle testified that she imposed a harsh penalty because the Grievant was a 20-year veteran who was the Officer In Charge when the incident occurred. He was well versed in Report writing, knew the Employer's Report Writing Policy and should have known better. She also testified that he could have changed his Report after he viewed the videotape when it became apparent that the incident did not occur the way it was reported. Warden Dingle testified that a harsh penalty was also imposed because of the Grievant's prior disciplinary record. Finally, she testified that a harsh demotion penalty was consistent with past practice.

The Employer's action in demoting the Grievant for six months was hardly arbitrary or capricious and I am reluctant to change it. In view of the foregoing, I conclude that the Grievant's six-month demotion was justified and; I will, therefore, dismiss the grievance in its entirety.

AWARD

IT IS HEREBY ORDERED that the grievance in the above entitled matter be and is hereby dismissed in its entirety for the reasons set forth in this Decision.

Dated: April 5, 2006

In Eagan, Minnesota

Richard R. Anderson - Arbitrator