

IN THE MATTER OF THE ARBITRATION BETWEEN) AAA CASE NUMBER
) 75 390 00235 11
WASHINGTON FEDERATION OF)
STATE EMPLOYEES,)
Union) ARBITRATOR'S
) OPINION AND AWARD
)
And) GRIEVANT:
) A.I.
STATE OF WASHINGTON)
DEPARTMENT OF CORRECTIONS,)
Employer)

ARBITRATOR: ANTHONY D. VIVENZIO

OPINION AND AWARD DATE: NOVEMBER 28, 2012

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PROCEDURAL HISTORY

The Washington State Department of Corrections is hereinafter referred to as the "Employer," or "DOC." The Washington State Federation of State Employees is hereinafter referred to as the "Union." Collectively, they are hereinafter referred to as "the Parties." This arbitration addresses the Employer's discipline of a Community Corrections Officer, hereinafter referred to as "the Grievant," referenced in its termination letter dated December 28, 2010. In the interest of privacy, the Grievant shall be referred to as A.I, and offenders who gave statements in this matter shall be referred to by their identification numbers.

The Employer and the Union are parties to a collective bargaining agreement effective July 1, 2009, through June 30, 2011, hereinafter referred to as the "Agreement." The Union filed its grievance on January 14, 2011. Following unsuccessful attempts to resolve this matter through the grievance procedure set forth in Article 29 of the Agreement, the Union then invoked arbitration. Using the services of the American Arbitration Association, Anthony D. Vivencio was appointed as Arbitrator. The arbitration hearing was held at the offices of the Washington State Attorney General in Spokane, Washington, on June 21 and 22, 2012. The Parties stipulated that all prior steps in the grievance process had been completed or waived, and that the grievance and arbitration were timely and properly before the Arbitrator. During the course of the hearing, both Parties were afforded a full opportunity for the presentation of evidence, examination and cross-examination of witnesses, and oral argument. A transcript was taken of the proceedings by a duly licensed court reporter. The evidentiary record was closed on June 22, 2012. The Arbitrator received timely post-hearing briefs from both Parties on September 17, 2012. The full record was deemed closed and the matter submitted on September 17, 2012.

STATEMENT OF THE ISSUE BEFORE THE ARBITRATOR

At the hearing, the Parties were able to agree to a statement of the issue to be decided in this matter. The statement of the issue was as follows:

Was there just cause for the Employer to discipline A.I., and, if so, was that discipline commensurate to the misconduct?

BACKGROUND

The Community Corrections Division of the Employer supervises offenders who have either been confined in a county jail or prison for felony convictions of more than a year, or were sentenced to direct supervision in the community. Offenders report to Community Corrections Officers (CCO) who monitor each offender's activities based on their sentence from the court. Most offenders are required to follow specific conditions of supervision which may include submitting to urinalysis testing (UA) and participating in substance abuse treatment programs, offender change programs, and family reunification programs. Failure to abide by the conditions will lead to penalties including jail time. DOC operates Community Justice Centers where services and core programming are offered to offenders. The goal is to reduce recidivism by strengthening individual support networks through a continuum of programming offered from prison into the community. The Washington Federation of State Employees is Council 28 of AFSCME, the American Federation of State, County, and Municipal Employees. WFSE/AFSCME represents more than 37,000 state and public service employees in Washington. AFSCME is the largest public employees union in the United States with more than 1.6 million members.

On June 2, 2010, the receptionist at the Maple Street, Spokane, office of the Employer came to believe that the Grievant had wrongfully reported taking urine samples from offenders for testing when he had not. Typically, when a urine test is administered, the community corrections officer (CCO) accompanies the offender into a restroom located in the lobby, and remains there with the offender until the process is completed. The receptionist believed that some offenders who usually receive UAs did not enter the bathroom with the Grievant for the test. She checked entries the Grievant made in the unit's "chronos" system, a running account that is part of the Employer's "OMNI" database, and found that the Grievant had made entries stating he had performed the tests. The receptionist conveyed this belief to the unit's supervisor, and an investigation was undertaken. Following that investigation, the Grievant was disciplined with a reduction in pay.

PERTINENT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT

From the Agreement by and between the State of Washington and the Washington Federation of State Employees effective July 1, 2009 through June 30, 2011:

Article 27 – Discipline

27.1 The Employer will not discipline any permanent employee without just cause.

Article 29 - Arbitration Clause

If the grievance is not resolved at Step 4, or the OFM/LRO Director or designee notifies the Union in writing that no pre-arbitration review meeting will be scheduled, the Union may file a request for arbitration. The demand to arbitrate the dispute must be filed with the American Arbitration Association (AAA) within thirty (30) days of the mediation session, pre-arbitration review meeting or receipt of the notice no pre-arbitration review meeting will be scheduled.

Selecting an Arbitrator

The parties will select an arbitrator by mutual agreement or by alternately striking names supplied by the AAA, and will follow the Labor Arbitration Rules of the AAA unless they agree otherwise in writing.

Authority of the Arbitrator

1. The arbitrator will:

- a. Have no authority to rule contrary to, add to, subtract from, or modify any of the provisions of this Agreement;
- b. Be limited in his or her decision to the grievance issue(s) set forth in the original written grievance unless the parties agree to modify it;
- c. Not make any award that provides an employee with compensation greater than would have resulted had there been no violation of this Agreement;
- d. Not have the authority to order the Employer to modify his or her staffing levels or to direct staff to work overtime.

2. The arbitrator will hear arguments on and decide issues of arbitrability before the first day of arbitration at a time convenient for the parties, through written briefs, immediately prior to hearing the case on its merits, or as part of the entire hearing and decision-making process. If the issue of arbitrability is argued prior to the first day of arbitration, it may be argued in writing or by telephone, at the discretion of the arbitrator. Although the decision may be made orally, it will be put in writing and provided to the parties.

3. The decision of the arbitrator will be final and binding upon the Union, the Employer and the Grievant.

POSITIONS OF THE PARTIES

Position of the Employer

A summary statement of the Employer's position is as follows:

On June 2, 2010, CCO A.I. was performing his job functions in that role, including the administration of urine analysis tests (UAs), as he later recorded in his daily chronological report, a "chrono," or, he took shortcuts during a busy and stressful day and did not actually conduct some of the UAs that he entered into his chronology as having performed. The DOC cannot accept a CCO saying they conducted a drug test on an offender when they did not. A number of significant liabilities and consequences would arise from such a practice. The only question presented in this grievance is whether A.I. did or did not conduct the UAs on offenders in his charge as he has repeatedly declared he has. If he did not perform those UAs, there can be no question about the necessity of appropriate discipline. The discipline imposed by the Employer was fair and proportionate to the Grievant's offense. It should be noted that there was

no question submitted to arbitration concerning any procedural defect or investigative failure on the part of the Employer that would excuse A.I. from his misconduct. A.I. did not conduct all the UAs he said he conducted that day. A preponderance of evidence supporting this fact was found by everyone who subsequently considered this matter, including the appointing authority, prior to disciplining A.I. A preponderance of evidence supporting the accusations against A.I. was presented at the arbitration hearing.

Position of the Union

A summary statement of the Union's position is as follows:

A.I. did not do what he is being accused of having done. Moreover, the only way that the Employer can meet their burden in this case is to rely on hearsay testimony of convicted felons, hearsay testimony that is not in the form of a signed, sworn statement, nor in the form of a transcript of an actual interview, but is in the form of snippets of interviews that are conclusory paraphrasing of the actual interview that took place, with no chance to cross-examine these individuals, and with no actual ability to grasp the parameters of any discussion that did actually take place between the interviewer and the interviewee. If the Employer wants to rely on hearsay testimony, there has to be some indication that these individuals have some indicia of trustworthiness in order to believe those statements, and that is lacking.

The central witness in this matter had a significant dislike for A.I. The reason she looked up the offender's record which started the investigation in this matter was because her son was apparently spending the night at this offender's house. Despite policy that requires her to report such contact, she did not do so. Instead, she looked up in the chronological records, "chronos," information on this particular individual. She noticed that A.I. recorded that this

individual took a UA and it was negative. She recalled, "I don't remember A.I. taking this offender to the restroom to administer a UA." She informed her supervisor of this. When contacted, that offender said "I did give a UA," and then gave many contradictory statements after that. The Employer then interviewed other offenders. Their responses as to whether they were given UA's by A.I. varied in content. A.I. was sent home knowing only that he was being accused of falsifying information in the chronos records. It was eight weeks before he was asked whether he remembered those offenders and events, which had occurred over a two day period after Memorial Day Weekend with over 100 offenders that came in to report. A.I. was "officer of the day" on one of those days. He not only took UAs and met with his own charges, but he met with offenders on the caseload of other officers who were absent that day. When questioned eight weeks later, A.I. responded, "If I put it in there, then I firmly believe that it's true because I would not and could not knowingly put a false statement in that record." A.I. does not cut corners. He is a conscientious worker who takes his job seriously. Though he is required to meet with offenders once per month, he chooses to meet with offenders twice per month because he doesn't think that once is enough. As he takes hundreds of thousands of UAs as a routine part of his job, it makes no sense that he would shirk on that duty just to save a few minutes of his time. In the end this is one of those cases where the Employer simply cannot meet its burden.

DISCUSSION

At the outset, I would like to express his appreciation for the professional manner in which the Parties conducted themselves in the course of the proceedings, rendering vigorous, but courteous, advocacy.

It is well established in labor arbitration that where, as in the present case, an Employer's right to discipline an employee is limited by the requirement that any such action be for "just cause," the Employer has the burden of proving that its discipline of an employee was so supported by the evidence upon which it based its action. Therefore, the Employer here had the burden of persuading your Arbitrator that its discipline of the Grievant, A.I., was for just cause.

"Just cause" consists of a number of substantive and procedural elements, but their essence may be summarized as follows: Primary among its substantive elements is the existence of sufficient proof that the Grievant engaged in the conduct for which he or she was disciplined. The second area of proof concerns the issue of whether the penalty assessed by the Employer should be upheld, mitigated, or otherwise modified. Factors relevant to this issue include a requirement that an employee knows or is reasonably expected to know ahead of time that engaging in a particular type of behavior will likely result in discipline or termination, the existence of a reasonable relationship between an employee's misconduct and the punishment imposed, and a requirement that discipline be administered even-handedly, that is, that similarly situated employees be treated similarly and disparate treatment be avoided, or another equitable ground.

These considerations were summarized, and then popularized, in what became a commonplace in labor arbitration, known as the "Seven Tests," pronounced by Arbitrator Carroll Dougherty, in Enterprise Wire Co., 46 LA 359 (1966):

1. Did the Employer give to the employee forewarning or foreknowledge of the possible or probable disciplinary consequences of the employee's conduct?
2. Was the Employer's rule or managerial order reasonably related to (a) the orderly, efficient, and safe operation of the Employer's business and (b) the performance that the Employer might properly expect of the employee?
3. Did the Employer, before administering discipline to an employee, make an effort to discover whether the employee did in fact violate or disobey a rule or order of management?

4. Was the Employer's investigation conducted fairly and objectively?
5. At the investigation, did the "judge" obtain substantial evidence or proof that the employee was guilty as charged?
6. Has the Employer applied its rules, orders, and penalties even-handedly and without discrimination to all employees?
7. Was the degree of discipline administered by the Employer in a particular case reasonably related to (a) the seriousness of the employee's proven offense and (b) the record of the employee in his service with the Employer?

Your Arbitrator in this case utilizes an approach that mirrors it to some extent, while recognizing principles of evidence.

The Arbitrator has studied the entire record in this matter carefully and considered each argument and authority cited in the Parties' briefs. That a matter has not been discussed in this Award does not indicate that it has not been considered by the Arbitrator. The discussion which follows will center on those factors which the Arbitrator found either controlling or necessary to his decision.

The Arbitrator begins his analysis with a review of the work processes in which the Grievant was engaged. The Arbitrator finds the following to be an adequate portrayal of the usual procedures for a Community Corrections Officer obtaining a urine sample from an offender for testing:

Procedure for Obtaining Urine Samples from Offenders

The Physical Layout of the Facility:

Offenders scheduled to meet with their CCO step in the front door of the facility and are immediately in the lobby. They check in with the receptionist, the main witness in this case, who writes their name into a time log and then notifies the offender's CCO, who occupies an office in a portion of the building behind a security door. The CCO enters the lobby after the security door has been buzzed, or by using their personal key. The receptionist views the lobby from their

station behind three Plexiglas windows. From the point of view of the receptionist, the door to the only bathroom which is used for the taking of UAs is located off to the left in the lobby. It is relatively visible from the receptionist's station, though not absolutely so. It is not far from the station, but it is not always in direct line of sight, depending upon the receptionist's activities, and it may be blocked by offenders standing in the lobby. On a "report day" following a three-day weekend, in this case, Memorial Day, there may be 100 or more offenders passing through the lobby during the day. There is seating for 8 to 10.

CCO process with an Offender:

Typically, the CCO exits the security door to meet the offender in the lobby, and after a brief chat, escorts them to the bathroom for the urine sample. The CCO is present in the bathroom with the offender until a sample has been obtained. The amount of time required for this process varies depending upon the offender's "readiness" to provide a sample and by some estimates has been known to vary from one minute to 20 minutes. If all goes well, the CCO will have a sample which can subject to a testing strip immediately, and which can be read from 45 seconds to three minutes later. The CCO will then have interview time with the offender, typically in the CCO's office. If the offender was not initially ready to provide a sample, the CCO will urge them to drink a lot of liquid and proceed with an interview before asking them make another attempt at providing a sample. The CCO will enter minutes of his contact with the offender in a computer log known as a "Chrono" that is part of a database the Employer maintains for operations management purposes known as "OMNI." These records, so generated, are considered public records, and may also become relevant in court proceedings involving an offender or the Department itself.

Just Cause Analysis

Having reviewed the subject work process, your Arbitrator considers whether there was just cause for the Grievant's discipline. The "Seven Tests" are used as a starting point for an analysis of this matter:

1. Did the Employer give to the employee forewarning or foreknowledge of the possible or probable disciplinary consequences of the employee's conduct?

The Employer's letter of December 28, 2010, notifying the Grievant of his discipline, notes that the Grievant was subject to, and had been trained in, DOC policies germane to this matter, including training in UA Specimen Collection Procedure, DOC Policy 380.200 Community Supervision of Offenders, and DOC Policy 420.380 Drug/Alcohol Testing. The Arbitrator finds that these materials, whose length and detail need not be repeated here, provide ample notice that CCO's, as a required part of their employment, are not to enter false statements involving contact defenders into the Employer's information system, chronos, and as a necessary corollary, disciplinary consequences would result from infraction. Even in the absence of such policies, an employee would be deemed to have "known or should have known" that taking such action would be prohibited and lead to discipline. Your Arbitrator answers this question, "Yes."

2. Was the Employer's rule or managerial order reasonably related to (a) the orderly, efficient, and safe operation of the Employer's business and (b) the performance that the Employer might properly expect of the employee?

For reasons cited in response to Item 7, below, and considering the obvious need of a facility managing and recording the behavior of a large number of drug-involved offenders for accurate records, records which may impact law enforcement and the judiciary as well as the Employer, where "even mistakes raise issues," *Testimony, Conner*, I find that the Employer's workplace expectations as contained in policy and common sense reasonably relate to the

orderly, efficient, and safe operation of the Employer's workplace and the performance that the Employer might properly expect of the Grievant.

3. Did the Employer, before administering discipline to an employee, make an effort to discover whether the employee did in fact violate or disobey a rule or order of management?

I have reviewed the considerable resources of time, personnel, and expense the Employer has brought to bear in this investigation, as well as the process and methodology employed at the various steps of the investigation, first by supervisor Wiggs, and then by the investigators commissioned by the Human Resources Department of the Employer, and find that the Employer made a good-faith effort to discover whether the Grievant did in fact violate or disobey its rule, policy, or order.

4. Was the Employer's investigation conducted fairly and objectively?

Two investigations were conducted in this matter. The first was of a preliminary, informal nature conducted by the unit's supervisor, Todd Wiggs. This consisted of interviews with offenders cast as "quality control" interviews in which the offender was first asked a number of questions about their experiences in supervision and their relationship with their CCO, the Grievant. These interviews resulted in three offenders indicating they had not provided UAs on the day the Grievant recorded he had administered them. This investigation provided the basis for the appointing authority to commission a more thorough interview.

Cindy Greenslitt, an Investigator 3 for the Washington State Department Of Corrections, produced the investigative report upon which the Employer relied upon to a great extent in its decision to discipline the Grievant. She is in a different division of the Employer than the Grievant's appointing authority, Deborah Conner, who is not above or below Ms. Greenslitt in the Employer's organization chart. *Tr. pp. 114-117.* In the past, she had conducted numerous

human resources investigations and staff misconduct investigations, but she had never interviewed an offender before this investigation. As support, Ben Brink, a community corrections supervisor working in the Walla Walla area, was assigned to assist her in the investigation, given his knowledge of the employer's computer system and database that holds all of the offender information, and his experience with offenders.

The Grievant expressed concern over not knowing the specific offenders, dates, etc., prior to his interview on July 22. Considering that the Grievant was informed on June 7 of the reason for his being placed on home assignment, as well as the opportunity to exchange comments with the investigator afforded the Grievant, and the discovery aspects of the grievance process, your Arbitrator does not find prejudice to the Grievant sufficient to cast the investigations as unfair and subjective.

As is the case with virtually every investigation, criminal, civil, or administrative, this was not a textbook perfect investigation. I have examined the investigation as a whole, considered what material was of value, and weighed that against the materiality of any potential "flaws," such as the "translation" of offender 322576's statement from "I don't think I did," with regard to giving a UA, to "he said he did not provide a UA." The bulk of the investigation, supported with an array of documentation, does not appear to suffer from errors of process that would tend to undermine its value. The Arbitrator finds that, taken as a whole, the investigation relied upon by the Employer was conducted with sufficient fairness and objectivity.

5. At the investigation, did the Employer obtain substantial evidence or proof that the employee was guilty as charged?

The "charging document," the appointing authority, Deborah Conner's December 28, 2010, letter to the Grievant notifying him of the decision to impose a reduction in his salary

noted the Employer's conclusion that the Grievant had "entered false or incorrect information into the OMNI chronological records of five offenders; 322576 (male), 705161 (male), 751864 (female), 864138 (female), and 332360 (male)." This conclusion was based upon a coworker's initial report, an initial informal investigation, and the formal investigation that followed. This being a case not involving the discharge or suspension of the Grievant, your Arbitrator here applies a standard that the Employer must prove that the Grievant failed to perform the recorded UA's by a preponderance of the evidence .

Corine Corbin, testifying for the Employer as an eyewitness to the events of June 2, 2010, described matters leading up to her reporting her suspicions of the Grievant's actions as follows: Her son had asked to have a friend stay with them for an evening. In conversations with that friend, she found inconsistencies that gave her pause. She also wondered about the friend's mother not contacting her to talk about the stay-over. Ms. Corbin learned the friend's last name, and remembered that the office caseload included an offender with the same last name, offender 930508. She conferred with the Grievant the next day, and learned that the friend's father was on the Grievant's caseload. Offender 930508 reported to the Maple Street office on June 2, 2010, to meet with the Grievant. She testified that, as her son was apparently hanging out with 930508's son, she should learn more about him. She became curious, and looked up the report of contact that the Grievant had entered into chrono that day. There she found that the Grievant had noted that he had taken a UA, which had tested negative. Ms. Corbin testified that she was at her station with a view of the Grievant and 930508 the whole time, the Grievant never took 930508 to the bathroom, and their entire encounter lasted less than five minutes. She thought that perhaps the entry was a mistake, or that the Grievant had forgotten, so she checked the entries made by the Grievant for other offenders on his caseload that day. In addition to offender

930508, she found offenders 705161, 322576, and 751864. The Grievant made entries indicating he had taken UAs of these offenders, with all testing negative. 322576 had been in the office for only a minute or two, spoke with the Grievant, and left without entering the bathroom. 751864, a female, was there only about a minute, chatted with the Grievant, and left without entering the bathroom. Ms. Corbin would've called a female officer to take the sample in place of the Grievant. *Tr.p., 41-48*. The witness expressed certainty concerning her findings, as well as anguish at making her discovery because of its possible repercussions, both for the Grievant, and for herself. The witness testified about the various work-related distractions in her workplace. She related that, although her relationship with the Grievant had its "ups and downs," she did not hate him. *Tr. pp. 26,30,35*. Ms. Corbin testified that, from her station, she was able to hear the Grievant talking to 930508 about his going off supervision. She acknowledged that taking urine specimens was a routine part of a CCO's job, and that the Grievant was usually not reluctant to take them. *Tr. pp. 61,62*. Some discrepancies emerged between her testimony at the hearing, and statements she had made to the Employer's investigator: Re: 705161, Ms. Corbin told the investigator he was presented with and had signed paperwork at the unit on June 2. In the course of her interview with Ms. Greenslitt, she stated:

(705161) came in with his girlfriend and two children. CCO Hills gave him some release paperwork... He signed the 5990 and left with his family. No UA was done.

Er. Ex. 3.

At the hearing, she did not recall Mr. 705161's signing paperwork. Ms. Corbin did recall that a UA was not done. In 705161's July 13, 2010, interview, the investigator noted:

"...he last met with his assigned CCO, A.I., on June 2, 2010 at the DOC Maple Street office. With him (in the car, he noted) was his girlfriend at the time... He was a little concerned about the office appointment as he was not told about any "paperwork" to fill out in order to close out his supervision. *Er. Ex. 39.*

After worrying over whether to report her findings, and consulting with a coworker, Ms. Corbin spoke with Supervisor Todd Wiggs. At the suggestion of Debra Conner, DOC Field Administrator, he performed an “informal investigation.” Within a few days he’d spoken to some of the involved offenders, casting the conversations as quality control checks, asking how they were progressing, how treatment was going, and the like. He reserved questions about UAs until later in the interview. Within this two or three day period, he learned from 322576 that “...when he reported on June 2, 2010, Mr. Hills did not ask him to submit a UA sample.” He did not know why. Offender 751864 stated that “since she has been on supervision she has only submitted a couple UAs” On June 2, “she did not and was not asked to submit a sample.” Mr. Wiggs also contacted another offender on the Grievant’s caseload, 864138. She stated that she told the Grievant she was in treatment the past 28 days. She was not asked to submit a UA sample. When she told the Grievant that she needed to use the restroom, so if he wanted a UA she could provide one, he stated he did not want to collect a sample. Offender 864138 had not provided a UA when the Grievant noted that they had. *Er. Ex. 5, dated June 7, 2010, Tr., pp. 82, 88, 91.* Mr. Wiggs was unable to make contact with offenders 930508 or 705161 during this early initial investigation. *Er. Ex. 5.* Mr. Wiggs related his findings to Debra Conner, the DOC Field administrator who felt there was sufficient basis to initiate a more detailed and thorough investigation of the matter.

Cindy Greenslitt, a Human Resources Consultant, within the DOC, but not in a line of authority with Ms. Conner, the Grievant’s appointing authority, opened her investigatory file on June 15, 2010, and began interviewing offenders on the Grievant’s caseload with whom he may have made notations in the chrono regarding UAs on or about June 2, 2010. For many of the interviews, she was accompanied by Mr. Brink. On those occasions, she often took notes. Some

inconsistencies exist among some of the statements attributed to interviewees in Ms. Greenslitt's reportage and in documentation elsewhere. For example, 930508 is recorded as having stated on August 19 that he gave only one in June and that was to Mr. Wiggs. *Er. Ex. 39; Tr. p. 178.* However, a Chrono entered by Mr. Wiggs on June 24, 2010 has 930508 stating he "submitted a UA last time he reported," *Un. Ex. 3*, which would've been June 2, the date at issue here. Offender 930508 is not later listed by the Employer as part of the falsification events. When interviewed on July 7, by investigator Brink, 322576 indicated that he wasn't sure whether he'd given a UA on June 2 and added, "I don't think I did." *Er. Ex. 39, Tr. 167.* In Ms. Greenslitt's report to the Employer, this statement became, "Offender 322576 said he did not provide a UA on June 2 as the chrono entry states." *Er. Ex. 1.*

Mr. Brink was able to obtain an interview with 705161 on July 13, 2010, at the Benton County jail. Offender 705161 indicated that he was prepared to give a UA on June 2, 2010, but did not provide a urine sample for the Grievant as it was not requested. He further reported that the last day he did provide a UA was during the month of May, 2010. *Er. Ex. 39.*

On July 7, Mr. Brink interviewed offender 751864. She had been on community supervision since April 12, and stated that she had done UAs twice since being on supervision. The first time she tested positive due to her being on medication, and the second time she "missed the bucket." She stated she did not provide a UA on June 2, because there were no females in the building to assist. *Er. Ex. 39.*

Also on July 7, Mr. Brink interviewed offender 864138. She stated that she was prepared to provide a UA when she reported to the Grievant on June 1. She told the Grievant that she had not provided a UA during her 28 day treatment. When she asked if he was going to require a UA, he told her, "not today." *Er. Ex. 39.*

In the course of these interviews, offender 332360 told Mr. Brink that on June 2 he met with the Grievant and was told that “there would be no drug test that day.” *Er. Ex. 39.*

Other offenders on the Grievant’s caseload that were interviewed stated that they had provided UA’s on or about June 2 as noted by the Grievant: Bowman, Cawley, Mitchell. *Er. Ex. 39.*

Ms. Greenslitt interviewed the Grievant twice, once on July 22, 2010, and again on August 25, 2010. His responses to statements made by subject offenders were as follows:

322576: If I wrote it, I or one of my coworkers took it. I may have made a mistake. I am not perfect. It was not intentional. Maybe I wasn’t paying attention and thought I took it or a coworker took it. It’s possible I screwed up. I would not fake a chrono.

705161: Sometimes I meet with them and don’t take a UA. His have all been clean as far as I know. I thought I took one. He was supposed to go off supervision soon. If I messed it up, I messed it up. It was not intentional if I did.

751864: The Grievant said he did not remember that one, but did recall that the offender is mentally ill and has a hard time some days. He emphasized that he was officer of the day and it was also a report day for him. Half of the office was gone and he may have gotten busy. He recalled that CCO Tonya Wick collected a UA for a female offender for him that day. He said that he was aware that CCS Wiggs directed her to chrono that she took the UA.

864138: The Grievant said he couldn’t remember, and that if he wrote it, it was done.

332360: The Grievant pointed out that the chrono entry had the same language as all the others. He stated it must’ve been his “mental thing,” not intentional.

Er. Ex. 9.

CCO Tonya Wick testified that she may have taken UAs during the first week in June 2010, but did not remember documenting any. She was familiar with 864138, and was sure it was after June 1, 2010 she collected a UA from her, possibly two times. She was not familiar with and did not recall taking a UA from 751864, but then she was not familiar with any of the offenders. She did confirm that the Grievant was acting as an OD one day that week. *Er. Ex. 40.*

The Union’s responses to the Employer’s case were, in brief, as follows:

Ms. Corbin was not asked by an investigator whether officers had their own keys to the security door leading to their offices, eliminating the need to attract her attention to “buzz” them into the lobby. *Tr. p. 210.* There was conflict in Ms. Corbin’s testimony regarding details of 705161’s visit of June 2. *Compare Er. Ex. 3 with Er. Ex. 50.*

Offender 751864 was an unstable person, *Tr. p. 48,* with significant mental health issues.

Witness Wiggs testified under cross examination:

Q. And were you aware that she was in jail for eight months for a new crime at a time prior to June 2010?

A. I believe I had some knowledge of that.

Q. So would that have been the reason that she had only given two UAs while she was under supervision?

A. That could be the reason.

Witness Cooper, a DOC employee for over 25 years, now a CCO 2, testified that UAs for a given offender can be given once a month or more, depending upon that offender and their history of drug use. She would not tend to remember a given UA event unless something extraordinary had happened. June 2 was an extraordinarily busy day. Over 100 people showed up, and a lot of them would’ve been in the lobby. *Tr. pp. 289, 290.*

Witness Clark, a CCO since the early 1990s, left the Maple Street office because of the “toxic environment” created by witness Corbin. The witness generally described an array of unprofessional behaviors in her job performance, grooming at the front desk and showing favoritism among them. If she did not like a given CCO, she would not talk to them, do support tasks for them, or, contrary to protocol, she would not notify them that they had an offender waiting in the lobby, leaving the offender to wait for perhaps 45 minutes. She did not like the Grievant. She used to say she was “the head bitch, and nobody better fuck with her.” She was referred to as “Princess” by CCS Wiggs in front of everyone. Though not appropriately trained,

Ms. Corbin would take mouth swabs from offenders. The witness confirmed that a given UA would not be remembered a month later. She characterized the Grievant as someone who did a good job, thorough, and cooperative with other CCO's giving UAs. She confirmed that a CCO did not need to draw the attention of the receptionist to be buzzed by her in order to enter the lobby, as they had their own key. *Tr. pp. 276-286.*

Witness Davis, a CCO 2 at Maple Street, carries a caseload of between 30 and 45 offenders. He felt that offenders were not trustworthy as a group. The witness testified that the UA process takes about five minutes and that a CCO would not have a memory about the event unless something special had occurred. He characterized Ms. Corbin as acting like a "de facto CCO" who thought that the Grievant was a substandard CCO. *Tr. pp. 292, 294, 297, 300.*

Witness Turner testified that Ms. Corbin had a "hostile relationship" with "no interaction" with the Grievant. She would not buzz the security door for the Grievant, and she would run to the coffee machine, the restroom, or the break room, and was often away from her station for work-related activities. *Tr. pp. 305, 306.*

Witness Smith, a DOC employee for 21 ½ years, an Office Assistant 3, worked at the Maple Street office until three years ago. In 2009, she transferred out of that office to "get away from Ms. Corbin," who was rude, and had intimidated and pushed her. The witness generally confirmed the behaviors previously noted. Corbin told the witness that she did not like the Grievant, and was observed not notifying the Grievant when he had people waiting. She indicated that there was not a perfect line of sight between the receptionist station and the restroom used for taking UAs. A "stretch" would be required, and offenders could block that view. She characterized the Grievant as a "great" CCO. *Tr. pp. 310-314.*

The Grievant, a Community Corrections Officer for 20 years, testified, in sum, as follows:

At the Maple Street unit, the Grievant was more involved with drug offenders than gang members. He took UAs from offenders on his caseload twice a month, more often than required otherwise there would be too much time between tests for offenders to get into trouble. He would switch the test days to provide a confusing schedule for the offenders. He feared for the liability consequences of failing to do his job: crime, injury, or death resulting from an offender's drug use. He first became aware of the allegations in this matter on June 7, the day he was put on home assignment. He was not told which offenders were involved, how many, their names, or dates of the alleged falsifications. At his questioning by Ms. Greenslitt eight weeks later, he was shocked when he was told the specifics of his offense and, being upset, he couldn't specifically remember details of the alleged events. The Grievant stated, "I wouldn't write I did a UA if I knowingly didn't do a UA." He noted, "But I'm human," and it had been a long weekend and one of the CCO's was out. He noted that Ms. Corbin had felt 100% sure about offender 930508, but his name had been omitted from the charges. The Grievant believed "her observation skills are severely lacking, she's very busy" with 12 other CCO's and 100 offenders on the day in question.

The Arbitrator begins his analysis with the eyewitness, Ms. Corbin. Testimony given by a number of witnesses portrayed behaviors that were unprofessional and beyond the scope of her position, violations of protocols, rudeness, and the like. This testimony further suggested that her behavior was known and tolerated within the unit. What the testimony does not sufficiently do is establish a willingness to knowingly lie in this matter. The actions and behaviors described do not meet the appropriately high standard necessary to successfully attack the specific element

of veracity, that is, to show that a witness willingly perjured herself in this matter. There have been repeated discussions in this case of what motivates people to lie. The threshold seems to be whether, on balance, it is within their interest to lie. While assuming that a person may be motivated by malice, and some degree of malice has been shown here, it has not been developed to the point of having ripened to perjurious intent and action. It has not been developed to the point where I would find that Ms. Corbin was so overcome by malice and blunted in reason that, at the real risk of losing her own job, not just the Grievant's, and the collateral harms that would do to her life, her livelihood, and her future employ, she would so act against her own personal interest.

It must be admitted her testimony is not without its potential weaknesses: matters of normal workday distractions, filing reports, checking-in offenders; entering chronos, fielding phone calls, some personal time, the unusual number of offenders on a report day following a Memorial Day weekend, and other distractions to one's attention; some conflicts of recall, for example, details of offender 705161's visit to the unit; and, possible visibility problems posed by the number of offenders, some standing in the lobby, the positioning of the reception station in relation to the bathroom door. Your Arbitrator considers the evidence from other sources as well. Much of the evidence comes from Ms. Greenslitt's report. The report contains statements from offenders taken by Ms. Greenslitt, Mr. Brink, or by Mr. Brink with Ms. Greenslitt in attendance taking notes. As the makers of the statements were not present at the hearing and subject to cross-examination, the statements constitute hearsay evidence. In arbitral practice, it is commonly held that hearsay evidence, by itself, will not support a core element in a discharge case. Otherwise, hearsay evidence is admissible subject to consideration of its weight. In considering that weight, your Arbitrator looks to many of the same factors as might be explored

in cross-examination, e.g., the ability of the maker of a statement to observe, recollect, and relate facts, possible bias, voluntariness, conditions under which a statement is taken, and factors tending to corroborate the statement. Two days after his June 2 visit to the Grievant, offender 322576 was contacted by Mr. Wiggs and related that he had not given a UA on that date. *Er. Ex. 5*. A month later, at a July 7 meeting with Mr. Brink, he seemed a little less sure, but ended with “I don’t think I did.” *Er. Ex. 39*. Offender 751864 also told Mr. Wiggs during his initial investigation on June 4 that she had not provided a UA sample to the Grievant on her June 2 visit. She gave a consistent account to Mr. Brink on July 7. *Er. Ex. 39*. Offender 864138 told Mr. Wiggs on June 4 that on June 1 she told the Grievant that she needed to use the restroom so if he wanted a UA she could provide one. The Grievant declined. *Er. Ex. 5; Tr. pp. 88-91*. She gave a consistent account to Mr. Brink on July 8. *Er. Ex. 39*. I found Mr. Wiggs credible in his depiction of the statements given by the offenders, and the process used to obtain them. Arbitrators will tend to credit the truth of statements nearest in time to the event described. Also, the process, undertaken as a “quality control” interview, provided an atmosphere of neutrality, neither threatening to the offender, nor prejudicial to the Grievant. In the course of the subsequent investigation by Ms. Greenslitt and Mr. Brink, offender 705161 told Mr. Brink on July 13 that the last date he provided a UA was during the month of May 2010. He was prepared to give a UA on June 2 but did not provide one as it was not requested. *Er. Ex. 39*. The Arbitrator finds the statement credible because the offender recalled matters that made June 2 stand out in his memory: needing to sign papers for his upcoming release, and urinating in the unit restroom, being ready to provide a UA, but not being asked by the Grievant to provide one. Offender 332360 told Mr. Brink on July 7 he was told by the Grievant that “there would be no drug test that day.” It is noted that there were also several offenders that were interviewed during this

round of investigatory interviews who stated that the Grievant had administered UAs to them on June 2: 336355, 764302, and 734822, discounting a coercive element in the interviews.

None of the offenders who reported not giving UA's to the Grievant at the time in question had any motive to lie. They had nothing to gain by lying about the matter, and were not at risk of losing anything if they did not lie. To some extent, they can be said to have been making statements against their own interest if they believed they were required to provide UA's and could be penalized for not doing so. Also, if the offenders believed that if a CCO doesn't request a UA and they then don't give one that they won't get in trouble, again, no motive to lie is present.

The Grievant made statements to the investigators, and in the arbitration hearing, to the effect that he wouldn't knowingly enter a false chrono entry, that the passage of time had diminished his memory of specific events with specific offenders for the time in question, that it had been an unusually busy day, and that he is human and not perfect. Other statements made by the Grievant veered from the core issue of UA entries: bias by the appointing authority, delay of his interview in the investigation, policies permitting correction of the record, and the like. The Arbitrator has discounted the theory of bias as the motivation for the Grievant's discipline based upon the investigators' distance from the appointing authority on the Employer's organizational chart and his assessment of the process followed by the investigators. Policies permitting later correction are, at their core, not installed to serve to excuse an initially false entry, intentionally made or not. The Arbitrator perceived the Grievant in much the same light as did Union witnesses: an intelligent, cooperative, effective CCO, and therefore, not given to carelessness in his work. The timing of his chrono entries suggest they were not later crammed together at the

end of a work day, but made at intervals, and not by someone who is absent-minded due to stress, a trait that the Grievant appears too disciplined to exhibit.

As in all contested matters involving testimony, exhibits, and argument, proof of matters of fact are like threads, threads of evidence. Your Arbitrator looks to the evidence as a whole to determine whether a sufficient pattern of internal consistency exists to support a finding of the Grievant's commission of the acts leading to his discipline. In this case, the Arbitrator finds that the strengths of the Employer's case outweigh its weaknesses. Ms. Corbin's testimony and the statements given by the offenders in the course of the investigation mutually reinforce and tend to corroborate each other. Ms. Corbin's reaction to her discovery and decision to report her observations left her observably "upset" as testified to by Union witness Cooper. *Tr. p. 273.*

There was not the gleeful expression of victory by one who has achieved vengeance or satisfaction.

The unfolding of events leading to cast suspicion on the Grievant, Ms. Corbin finding her son's friend's father to be on the Grievant's caseload, leading her to inquire into the father's history, leading to her finding the entry that disturbed her and led her to look further and find more offenders with questionable chrono entries, leading to a number of offenders affirming not being given UA's by the Grievant, and the number of offenders involved in the same time period suggest a pattern of circumstances supporting the Grievant's responsibility. The number of incorrect entries, by themselves, is unusual for a mistake in the subject workplace. *Tr. p. 300.* The inference raised by the evidence, that the Grievant knowingly entered false chromos, is more probable and natural than any other explanation, even though it does not exclude every possible theory presented by the Union except guilt. *Elkouri, Sixth Edition, p. 382-384.* The Arbitrator finds that the evidence, testimony at the hearing and exhibits, provide a sufficient basis upon

which to find that, by a preponderance of the evidence, the Grievant, on or about June 1 and June 2, 2010, knowingly stated that he administered UA's to the involved offenders when he in fact had not.

6. Has the Employer applied its rules, orders, and penalties even-handedly and without discrimination to all employees?

The Arbitrator finds that there was no sufficient showing of evidence other than that the Employer has applied its rules, orders, and penalties even-handedly and without discrimination to all employees including the Grievant.

7. Was the degree of discipline administered by the Employer in a particular case reasonably related to (a) the seriousness of the employee's proven offense and (b) the record of the employee in his service with the Employer?

The mission of the Employer involves preserving the public's safety through monitoring the behavior of offenders and their progress through treatment and support services designed to support their refraining from criminal behavior and from the use of drugs that lead to such behavior. Jeopardy to the public, and potential liability for the Employer may arise from an offender's drug use status being inaccurately tracked and addressed: property crimes, crimes to persons, driving under the influence resulting in injury or death, etc. The mission also involves the safety and rehabilitation of the offender in connection with those services. Further, the records involved with offender management may be used in court proceedings, making their accuracy important to the criminal justice system and to the credibility and effectiveness of the Employer. As discipline of the Grievant, the Employer imposed a 5% reduction in salary for a three-month period from January 16, 2011, through April 15, 2011, resulting in an approximately \$624 reduction in salary. Given the foregoing, your Arbitrator finds that the discipline administered by the Employer is consistent with the seriousness of the Grievant's proven offense. The Grievant's record is a favorable one, and the discipline imposed is consistent with

that fact. The Arbitrator notes that the Employer's letter of December 28, 2010, imposing discipline, referred to false entries being made regarding five offenders. Within the context of the Grievant's role in this workplace, I would find the imposed discipline appropriate if fewer, or one, such entry had been found.

Last, the Arbitrator takes note of the twenty successful years of service the Grievant has rendered to the Employer. In addition, the offenders, to a one, expressed appreciation and respect for him and his work, and attributed their successes to his efforts. This was echoed by the Grievant's coworkers produced by the Union as witnesses. As there was no evidence presented that this matter was more than a unique lapse in his performance, the Arbitrator is inclined to uphold the discipline, but provide a sunset of its record, both as a recognition of the forgoing, and as an incentive.

CONCLUSION


Based upon the record in this matter, and applying the "just cause" standard of review bargained by the Parties, the Arbitrator finds that the Employer has carried its burden of proving by a preponderance of the evidence that on or about June 2, 2010, the Grievant intentionally made false entries in the records of offenders he was supervising. The discipline imposed by the Employer is to be upheld, and its record shall be subject to sunset. The Arbitrator will enter an award consistent with the above analysis and conclusions.

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| IN THE MATTER OF THE ARBITRATION BETWEEN WASHINGTON FEDERATION OF STATE EMPLOYEES, Union |) AAA CASE NUMBER) 75 390 00235 11))) ARBITRATOR'S) OPINION AND AWARD))) GRIEVANT:) A.I.)))) |
| And | |
| STATE OF WASHINGTON DEPARTMENT OF CORRECTIONS, Employer | |

The Arbitrator having heard or read and carefully reviewed the evidence and arguments in this case, and in light of the above discussions, the grievance in CASE NUMBER: 75 390 00235 11 is denied:

1. The Employer had just cause to discipline the Grievant with a 5% reduction in salary from January 16, 2011, through April 15, 2011.
2. All references to this discipline, or references to recommendations for, or intent to, discipline, shall be purged from all of the Employer's files in whatever form they are kept or may be retrieved, by close of business November 28, 2013, if the Grievant has had no instances of discipline to that time.

RESPECTFULLY SUBMITTED this 28th day of November, 2012.



 Anthony D. Vivenzio, Arbitrator