



**Lack of III-Intent as Mitigating Factor**

**Grievant's Employment Record as a Mitigating Factor**

**The Severity of the Offense and Grievant's View of his Conduct**

## **VIII. ARBITRATOR'S DECISION and AWARD**

## I. PROCEEDINGS

The State of Washington Department of Corrections (“DOC” or the “Employer”) is party to a collective bargaining agreement (hereinafter “CBA”) with the Teamsters Local Union No.117 (the “Union”). *JT #1*. Jim Aguilar (“Grievant”) was employed under the terms of the CBA at all times relevant hereto.

Grievant’s employment was terminated by DOC on September 4, 2007. *E #1*. A grievance contesting the termination was timely filed and the matter was processed by the parties to the point of arbitration. *E #2*. F.M.C.S.-listed arbitrator Michael G. Merrill, of Renton, WA, was jointly selected by the parties to hear the matter.

On due notice a hearing was held on June 16, 2009 at the CJC Building in Spokane, WA. *TR*. The Union was represented by its General Counsel, Spencer N. Thal, Esq. The DOC was represented by Elizabeth Delay Brown, Esq., Assistant Attorney General in the office of the Attorney General of Washington.

The parties stipulated to their joint agreement that the matter was procedurally and substantively arbitral and that the Arbitrator was properly empowered to decide the matter and issue a remedy. *TR 7-8*. Witnesses were sworn and evidence and testimony were received in an orderly fashion. *TR 12*. Witnesses were sequestered. *Id*. The entire hearing was transcribed by Susan Anderson, RPR, CCR (No. 2493) of Moses Lake, WA.

The hearing was completed on June 16. At the conclusion of the hearing, the parties agreed to present final arguments by written brief. After a mutually agreed extension by the parties, the parties’ briefs were timely transmitted and received in hand on August 6, 2009. The record was then closed, pending the Decision of the Arbitrator.

## II. ADMITTED EXHIBITS

### Joint

JT #1 Collective Bargaining Agreement between State of Washington and Teamsters Local Union No.117, effective 7/1/2007 through 6/30/2009.

### Company

E #1 Disciplinary Packet re Aguilar termination.

E #2 Aguilar grievance processing packet.

E #3 Relevant portions of CBA.

E #4 Aguilar judicial judgment records.

E #5 News reports (copies) re Aguilar.

### Union

U #1 Printout, DOC Website.

U #2 Bargaining unit seniority list, Airway Heights Correctional Center.

U #3 Aguilar judicial plea records.

U#4/5 [Not admitted.]

U #6 Workplace Violence factfinding report by Montana Morton.

U #7 Post order for Tower position, section 3.

### III. RELEVANT CONTRACT TERMS

#### Article 8 – Discipline

- 8.1 The Employer will not discipline any permanent employee without just cause.
- 8.2 Discipline includes oral and written reprimands, reductions in pay, suspensions, demotions and discharges.

### IV. SUMMARY OF FACTS AND TESTIMONY

The Department of Corrections operates the Airway Heights Corrections Center (AHCC), a prison facility just outside Spokane, WA. *Mayfield, TR 32*. Some 2150 minimum and medium security inmates fall under the general authority of Superintendent Maggie Miller-Stout, as also do the approximately 650 staff members at AHCC. *Miller-Stout, TR 195-196*. A bargaining unit of corrections officers (COs) at AHCC is represented by Teamsters Local 117. *Jt. #1*. The Grievant, Jim Aguilar, was a CO at AHCC and a member of this bargaining unit.

Grievant began his career with DOC in March of 1984 when he was hired as a CO for a correctional facility located in Monroe, WA. *Aguilar, TR 251*. In 1995 he transferred to AHCC, where he remained a CO until the events now at issue. *Id.* In his 23+ years Grievant built a record free of formal discipline (suspensions, demotion or pay reductions). *Aguilar, TR 253*. He achieved average-to-good performance reviews, with

only a small number of corrective actions or counseling events through his entire career.

*Mayfield TR 36; Miller-Stout, 197; Aguilar, 253*

As of March, 2007, Grievant was assigned as a regular day off (RDO) officer, a position he had held for some years prior. *Aguilar, TR 254.* As an RDO, Grievant rotated through several CO positions, covering for regularly assigned COs on their days off. *Id.* One regular such position was as perimeter patrol officer. *Mayfield TR 35; Aguilar, TR 254.*

A perimeter patrol officer holds one of two armed positions in the prison. *Byrnes, TR 157.* Most COs, including all officers working within the prison in contact with prisoners, do not carry firearms, for obvious reasons. *Id.* Officers in the guard tower position are armed, in addition to the perimeter patrol officers. *Id.*

Perimeter patrol officers have two primary charges: (1) preventing unauthorized outward movement – escapes by inmates; and (2) protecting the property from unauthorized inward movement – contraband smuggling, rescue attempts and other trespasses from the outside. *Mayfield, TR 36.* To do this, as well as to perform a number of other related security functions, they patrol in vehicles along a roadway running outside the facility's double security fenceline. *Id.* The vehicles are equipped with 12-gauge shotguns, and the perimeter patrol officers carry 9mm handguns, as well as whistles/horns and OC (pepper) spray. *Byrnes, TR 159.*

Accordingly, while every CO at AHCC takes an annual firearms training course, including a deadly force decision-making component, COs performing on perimeter patrol receive "level 2 training." *Byrnes, TR 158.* This consists of multiple annual

training sessions which include vehicle-based shooting, scenario-based decision-making training, and special targeting. *Id.*

The AHCC supervisory operating structure is paramilitary in nature. *Greenwalt, TR 183.* The perimeter patrol officers are directly supervised by Sergeant Robert Byrnes, who is also the AHCC officer in charge of the prison armory. *Byrnes, TR 156.* This position answers in turn to Lieutenant-level officers, including Lieutenant (Lt.) Paul Duenich, the relief duty officer for second shift, the shift to which Grievant was assigned in March, 2007. <sup>1</sup>

Shift lieutenants are required by policy to make their own checks of the perimeter on at least a monthly basis. *Duenich, TR 88.* In such checks, the lieutenants are looking for fence conditions and reviewing perimeter patrol office performance. *Id.* By all accounts, even the Grievant's, these checks as of March, 2007, were often unannounced. *Duenich, TR 89; Mayfield, TR 63; Aguilar, 256, 274.* This was done so that the lieutenants would preserve the ability to discover patrol officers who may be sleeping or otherwise not performing as required. *Id.*

Just after noon on March 6, 2007, Lt. Duenich and fellow lieutenant Leonard Mayfield arranged to check the perimeter jointly. *Mayfield, TR 42; Duenich, TR 91.* The weather was clear and sunny; Grievant had been on duty since 5:00 a.m. per his regular schedule. *Mayfield, TR 42.* From a position in his vehicle in a parking area near the perimeter road (checking such lots is another routine function of the patrol officer) the Grievant saw two individuals who "by appearance...look(ed) like Lt. Mayfield and Lt.

Duenich”. *Aguilar, TR 256-257*. The lieutenants were in full uniform, consisting of blue shirts and trousers, utility belts and boots, with name tags and officer badges on the chest and colorful unit/flag patches on both shoulders. *Mayfield, TR 46*. Grievant turned away, then looked back to see “two heads that had just disappeared” behind a small shack. *Aguilar, TR 257*.

Grievant then radioed the master control officer (a central radio contact in charge of doorway control inside the main prison) to ask if anyone had advised him of intent to go on the perimeter. *Aguilar, TR 258*. The officer, Monte Tucker, advised he had no such notice. *Tucker, TR 172*. As Grievant drove to investigate, he was contacted by the second on-duty perimeter patrol officer, Kevin Downey. *Aguilar, TR 259*. Officer Downey had heard the inquiry to master control and asked Grievant if he needed assistance. *Downey, TR 151*. Grievant advised Downey he did not and continued to the location where he had seen the two walkers. *Aguilar, TR 259*. For his part, Lt. Duenich had also heard the radio call and he, with Lt. Mayfield, slowed in expectation of a vehicle check. *Duenich, TR 116*.

At the point contact was made, there is disagreement among the participants over certain details, on which greater attention will focus in time. Certain other details of significance are undisputed however. The lieutenants recall that Grievant was immediately agitated and upset, initiating contact with questions over why the lieutenants had not announced their presence formally and did not follow the rules “like everyone

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<sup>1</sup> AHCC structure then moves to the facility’s Captain, Ron Haynes, who reports directly to Superintendent Miller-Stout.



else”. *Mayfield, TR 51; Duenich, TR 92*. The Grievant recalls that he calmly asked the lieutenants what their purpose was on the perimeter. *Aguilar, TR 261-262*.

There is no disagreement that within a very short time thereafter, the Grievant drew his loaded handgun from his holster and held it at the “low ready” position, below his waist to the side of his body, with arm slightly bent. *Mayfield, TR 44*. The low ready position is designed to allow the weapon to be raised to sight on target within 1/200ths of a second. *Duenich, TR 102*.

Encapsulated for purposes of this review, the Grievant recalled that having received no answer to his queries, as the lieutenants moved toward him they began to constitute a threat to him. *Aguilar, TR 265*. He ordered the unarmed men to stop advancing. *Id.* For their part, the lieutenants began to order the Grievant to put the weapon away. *Mayfield, TR 45; Duenich, TR 92*. All involved agree that after multiple directives were given to holster the weapon, Grievant did so. *Aguilar, TR 268*.

No party is certain how much time elapsed during this interval. The lieutenants professed to be in fear of their lives in a way that made time seem to stop. *Duenich TR 140*. The Grievant stated that although he had known Lt. Duenich from working with him daily for some ten years, when Duenich kept moving toward him he “didn’t know him then.” *Aguilar, TR 281*. Once the weapon was holstered, the lieutenants called for the Captain and relieved the Grievant of his gun belt. *Aguilar, TR 268*.

An investigation was initiated by Superintendent Miller-Stout. *E #1*. Statements were taken from all involved, and a third party investigator assigned. *Id.* Steve Sinclair, Associate Superintendent of the Washington State Penitentiary, interviewed witnesses

and summarized his findings in a report for Miller-Stout. *Miller-Stout, TR 201; E #1*. A meeting was held with Grievant and Union representative Joe Kuhn. *Miller-Stout, TR 203*. Following this process, Miller-Stout made her disciplinary decision. *E #1*.

In letter dated September 4, 2007, the Grievant was advised of his discharge. *E #1*. The letter stated, in pertinent part:

I find that your actions were misconduct. You drew your gun on two lieutenants whom you admit you recognized. Your assessment of a threat does not demonstrate sound judgment. You state that you perceived a threat, yet did not follow policy regarding detection and notification....

While you contend you were calm and professional, both Lieutenant Duenich and Lieutenant Mayfield observed and perceived you as being very angry and feared for their safety. Additionally, I believe you were insubordinate towards Lieutenant Duenich when you refused, at least two times, to holster your gun.

Your actions violated the following policies/expectations:

1. AHCC 410.230, Use of Lethal Force (attachment 2)
  - I. General Requirements
    - A. AHCC shall have a uniform approach to manage use of force, which requires staff to exercise discipline, caution, restraint and good judgment to minimize great bodily harm and potential death.
  - II. Reasons for Use of Lethal Force

A. Lethal force will only be used for the following reasons and only after all reasonable alternatives have been exhausted:

- a. To prevent potential loss of life or great bodily harm
- b. To prevent escape of offenders during transportation...
- c. To prevent escape from the Main Institution.
- d. Protection of state property only when necessary to prevent an attempted hostage taking, escape from the Main Institution, imminent great bodily harm or loss of life.

2. Policy 410.200, Use of Force (Attachment 3)

I. General Requirements

A. "Staff shall exercise good judgment, discipline and caution and restraint when using force."

3. DOC Employee Handbook, pages 12-25 (Attachment 4)

"You are not allowed to ...engage in verbal assaults, threatening behavior, or physical assaults against staff, offenders or the public..."

4. Position Description – Position Number 2715 (Attachment 5)

Essential Functions:

“Effectively communicate in routine and emergent situations.”

“Remain calm and act professionally during emergent situations.”

*E #1.*

The instant grievance followed and the matter was processed to the point of the current arbitration.

## **V. ISSUE STATEMENT**

The parties stipulated to the following agreed statement of issue:

Did the Employer, the Department of Corrections for Washington State, have just cause to terminate Jim Aguilar, and if not, what is the appropriate remedy?

*TR 11.*

## **VI. POSITIONS OF THE PARTIES<sup>2</sup>**

### Summary Argument of the Employer

The Grievant’s discharge was for just cause and did not violate the CBA; there are no grounds to support the Union’s grievance and it must be dismissed.

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<sup>2</sup> Case citations omitted.

The Grievant had been extensively trained for the duties of his post, notably including use of deadly force. Corrections officers must know and follow guidelines for use of firearms, and this applies especially to those, like Grievant, who occupy armed posts. During the events of March 6, 2007, the Grievant did not apply his training and violated multiple known and published policies on the use of deadly force.

Grievant recognized Lieutenants Duenich and Mayfield before and throughout his contact with them. Nevertheless, he drew his weapon and that constitutes use of deadly force. There is no reasonable basis to conclude, as Grievant claims he did, that the lieutenants were a threat to him at any time or in any way. His use of deadly force was wholly unjustified.

The lieutenants were unarmed. They displayed no intent to physically attack the Grievant. Nothing in the context of the entire contact suggests pending violence by the lieutenants. In the face of these facts, Grievant insists he perceived a threat, but he has never articulated what the threat was. There is no evidence or testimony describing any threat posed to the Grievant. Any determination of a threat was entirely unreasonable.

The proper response to the situation was simple and had been oft-repeated previously, both by the Grievant and other perimeter patrol officers. Once the lieutenants' identities were confirmed, the duty of the perimeter patrol officer is simply to acknowledge the presence, respond as directed to their lieutenants' orders, and be ready to assist them as might be necessary.

On the other hand, had the individuals been in fact deemed a potential threat to security, the Grievant's actions should have followed a wholly different protocol from his

chosen response. In such cases, having identified a potential threatening presence, the perimeter patrol officer is to make a radio report, request assistance, and remain a safe distance away while continuing observation. If contact is impossible to avoid, the officer is directed to exit his vehicle with his shotgun at port arms, while using the vehicle as cover. There is no such thing as port arms with a sidearm. A preponderance of evidence indicates that Grievant's use of lethal force was unnecessary and inappropriate.

Discharge was the appropriate penalty for such egregious misconduct. Improper use of deadly force is the highest level of misconduct, and warrants summary discharge without regard to an officer's prior record. The Grievant also committed insubordination when he refused to obey repeated direct orders to holster his weapon. This additional misconduct only adds to the need for the most severe discipline.

The lieutenants acted appropriately throughout the incident and did not contribute to Grievant's misconduct. Even if the Grievant was somehow placed under stress and was pressured by the situation, he failed to respond with the restraint, calm, caution, restraint and professionalism required of his position. As a result, his co-employees were traumatized as a result of having their lives threatened merely for performing their normal workplace duties.

Finally, the Grievant has never recognized his fault. He does not believe he was insubordinate and believes he properly followed procedure during the incident. In the face of this, Superintendent Miller-Stout rightly concluded that discharge was the only possible disciplinary response.

The Grievant demonstrated he cannot perform the duties of corrections officer at any correctional facility. This is only confirmed by the legal restrictions placed upon him by the judicial system as a result of his criminal conviction as a result of his misconduct.

The Union's grievance should be denied in its entirety.

#### Summary Argument of the Union

The Employer cannot meet its burden to show just cause for the discipline issued to the Grievant. A clear and convincing standard is the minimum that should be applied to establish both the fact of any alleged offense and that the penalty was proportionate to the offense charged.

There is no clear and convincing evidence that the Grievant used excessive force in his contact with the lieutenants. An officer's use of force decision must be given latitude that considers the split-second demands placed upon him and the limited information available at the time – hindsight outside the heat of the moment is not a proper reviewing perspective. Reasonable force determinations are an art, and the Employer used no experts to guide such an effort. Cases show that without expert testimony as guidance, arbitrators are properly reluctant to second-guess an officer's reasonable determination on use of force under exigent circumstances.

The Grievant was faced with a split-second decision. He saw the lieutenants and recognized them, but had also seen them being evasive, non-responsive and aggressive, testing his vigilance and/or challenging him physically by advancing upon him. This advancement occurred despite Grievant's direction to the lieutenant(s) to stay where they

were. On top of this in Grievant's mind was Lt. Duenich's statement about the need to respond to threats with weapon at port arms. In view of these considerations, it is clear that the Grievant acted out of an understandable confusion and, moreover, a sincere perception of threat. There was certainly no malice or other ill-intent in Grievant's split-second decision.

At the same time, the lieutenants' own repeated failures were contributing factors. They failed to follow policy requiring notice to the tower of their presence on the perimeter. Even so, they could have confirmed their status to Grievant when they heard his radio query to master control, but they remained silent. Yet another chance to de-escalate was foregone when they refused to answer Grievant's own immediate and direct question when he met them; the Grievant merely wanted to know what they were doing on the perimeter, but they would not tell him. Under these aroused suspicions, when the lieutenants began to advance on him – and continued to advance even after the weapon was drawn – the Grievant's decision becomes an understandable result of the lieutenants' improper responses. This was not clear and convincing misconduct.

Nor is there evidence of any insubordination. The State failed to charge insubordination at the point of termination, and in such cases, arbitral precedent makes clear the charge may not now be levied. If the charge is considered, traditionally required elements of a legitimate insubordination charge are not present here.

The Grievant was not informed of the consequences of failing to follow the alleged directive. Without this element, insubordination cannot lie. In fact, when the



mere word “insubordination” was mentioned (without even consequences attached) the Grievant immediately responded and holstered his weapon.

A charge of insubordination also requires an employee be given time to respond and correct the purported insubordinate behavior. The Grievant was not given this time. The entire incident happened in seconds, or a minute at most, with escalating behavior by Lt. Duenich ongoing during that time. Given the confusion, the circumstances and the contributory fault of Lt. Duenich, it is unreasonable to conclude the Grievant was insubordinate until he had a reasonable time to correct his behavior. Critically, when he was granted that time – which still happened very quickly -- the Grievant responded as directed.

Even in the face of some finding of misconduct, the discipline fails by virtue of its disproportionate severity. First in this regard, the Employer clearly failed to consider the Grievant’s employment history when determining remedy, as is required by just cause.

The Grievant’s 23-years service are not properly judged by the last few minutes of his employment. Cases show that the Grievant’s long and exemplary work record, with no formal discipline and no behavioral problem of any kind, should mitigate misconduct and result in a reduced penalty.

Nor does a summary imposition of discharge properly consider the contributory fault by Lt. Duenich. A different decision by him in any one of his series of very bad decisions would have avoided the entire situation. He failed to notify tower at the start. He failed to announce his presence after the initial radio query. He failed to respond to Grievant’s questions. He directed Grievant to go to port arms if he felt threatened (the

exact wrong thing to say). Finally, he failed to stop advancing when requested to do so. In light of these facts, one sees the Employer's decision that Grievant is entirely to blame for the incident is simply wrong. This significant contributory fault was not considered and led to disproportionate discipline.

Further, unlike in other cases of insubordination or use of force cases, there is no element of malice or bad intent of any kind in Grievant's behavior. Grievant looked for no trouble that day, but rather intended only to fulfill his duties of vigilance the same way he had for over 23 years. He had the right – the duty – to identify and ask questions of individuals on the perimeter road, and he did that. The real cause of the incident is a terrible miscommunication, but it was borne of misunderstanding, not a malicious or ill-intentioned act of defense.

It must be noted that consideration of the consequences of Grievant's misdemeanor conviction for reckless endangerment is wholly irrelevant. The conviction, as a result not of an admission but of an *Alford* plea, came long after the discipline decision and cannot be considered in evaluating its just cause.<sup>3</sup>

In any event, the Grievant's conviction does not preclude his reinstatement, which, following a reversal of the termination, is the appropriate remedy in this case. The Grievant should be returned to work, with seniority intact. This will be timed to take place after his ability to carry a firearm (August 23, 2009) is restored. The no-contact

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<sup>3</sup> Nor should the *Alford* plea be taken as proof of misconduct. Cases establish an *Alford* plea is not an admission of guilt, but rather is assent to being treated "as if" the defendant were guilty. Even further, had there been some judicial admission of guilt, arbitral authority holds any such determination is not conclusive of the issue in arbitration, which is properly a *de novo* review.

requirement with the lieutenants also is not an impediment. The Grievant is willing, and able, to accept reinstatement to a different DOC facility.

Accordingly, the grievance should be sustained.

## VII. DISCUSSION AND ANALYSIS

### **Just Cause Burden, Standard of Review and Quantum of Proof**

There is no question that the Employer bears the burden to show that the discipline issued to Grievant was for just cause, as required in the parties' CBA. *Jt. #1*, §8.1. This is by now axiomatic.

Neither party submitted a proposed definition of just cause, and the CBA features none. Rather, the parties have offered arguments focused on individual issues widely recognized to be components of just cause. Based on these arguments, it is reasonably implied that the parties intend application of the generally accepted definition developed over the last many decades of labor-management jurisprudence. In the most general sense, the standard is one of reasonableness:

What a reasonable man, mindful of the habits and customs of industrial life and of the standards of justice in fair dealing prevalent in the community ought to have done under similar circumstances and in that light to decide whether the conduct of the discharged employee was defensible and that the penalty was just.

*ATC/Vancom*, 119 LA 844 (Block, 2003) (quoting Arbitrator Platt, *Riley Stoker*, 7 LA 764, 767 (1947)). This general standard will be applied in the discussion of relevant specifics raised by the parties.

The applicable quantum of proof can differ depending on the circumstances of the case. Even in discipline cases there are times when the “preponderance of the evidence” standard will lie over the “clear and convincing evidence” standard. As a summary discharge case involving an excessive force charge against a correctional officer, this matter justifies application of this oft-quoted reasoning:

Imposition of a lesser burden than clear and convincing proof fails to give consideration to the harsh effect of summary discharge upon the employee in terms of future employment.

*General Telephone Co. of California*, 73 LA 531, 533 (Richman, 1979). See also: *City of Redwood City*, 98 LA 306 (Riker, 1991). The Arbitrator will apply the clear and convincing standard.

### **Nature of the Conduct and Applicable Rules**

An early step in virtually all just cause analyses involves examination of the nature of conduct at issue. This point of review asks whether the conduct was proscribed by published rule, or otherwise known to be the kind of act the commission of which would reasonably be known to expose an employee to discipline.

No party has alleged any individual or institutional lack of awareness of the rules, policies and procedures in play in the instant matter. Nor has either party addressed the standard just cause consideration of the legitimacy of these rules in terms of their reasonableness and their importance to the operation involved.

This is almost certainly because of the unassailable truth that when an employee is equipped with a deadly weapon, and empowered to use that weapon in the course of duty, that employee bears a heavy responsibility. That responsibility is rightly governed by strict rules and careful procedure. No party disputed that Grievant was amply trained in relevant procedure and was fully aware of applicable rules; Grievant freely admitted as much. *Aguilar, TR 289-290.*

Thus the required focus becomes the application of these rules and procedures to the conduct in the instant case.

### **Proof of the Misconduct Alleged**

It is of course an axiomatic element of just cause that the employee must be shown to have committed the acts for which he was charged. On at least the baseline facts, there is no disagreement between the parties.

As regards the use of force issue, there is no disagreement that Grievant drew his weapon in facing the lieutenants on March 6, 2007. Nor did the Union contest the Employer witness' common assertion that drawing one's sidearm does constitute use of lethal force by an officer. *Miller-Stout, TR 206 ; Byrnes, TR 160.* The point of inquiry

thus becomes whether this conduct violated the rules (or in Superintendent Miller-Stout's terms, the "policies/expectations") cited in the Grievant's termination notice. *E #1*.

The applicable policies are found in the AHCC Response Emergency Operational Memorandum on Use of Lethal Force, No. 4.10.230, revised 10/16/04. *E #1, attachment 2, at page 2 of 12*. Among the four possible permissible reasons for use of lethal force, three may be ruled out immediately.

The record is clear that at the point he drew his weapon Grievant was fully aware he was facing Lts. Duenich and Mayfield. *Aguilar, TR 261; 282*. Hence, there is no claim from any party that Grievant was acting to "prevent escape from the Main Institution" or "prevent escape...during transportation." *E #1, attachment 2, at page 2 of 12*. Nor is there any claim Grievant was acting to "protect state property [as] necessary to prevent...hostage taking, escape...[or] imminent great bodily harm or loss of life." *Id.*

The sole remaining basis for permissible use of lethal force is that Grievant was acting to "prevent potential loss of life or great bodily harm." *Id.*

#### **Use of Lethal Force and Threat Analysis**

The crux of this matter thus becomes whether Grievant reasonably perceived a threat of great bodily harm, or death, as he faced the lieutenants. The Grievant, of course, made clear he felt such a threat.

Q. [Delay-Brown] You think you were in compliance with  
the Department of Corrections policy and procedure?

A. [Aguilar] Yes, ma'am.

Q. Now, you indicated that you believed this to be so because you have – you were presented with a threat that could have caused you bodily harm?

A. Yes, ma'am.

*TR 272.*

There are a number of factors referenced by the Grievant relevant to his determination that must be reviewed.

***The events preceding the contact***

The genesis of the contact was discussed at length. The record shows Grievant, upon seeing individuals walking the perimeter, radioed for help in identifying those individuals by asking if anyone had been cleared onto the perimeter. Yet, there is much to indicate that even as he radioed master control, the Grievant in fact knew who the individuals were. He had identified them positively when he first saw them moving outside the gate and only seconds had passed before he saw the two bodies again after diverting his gaze. *Aguilar, TR 256.* When fellow perimeter officer Downey called to ask if he needed help just prior to the contact, Grievant stated he did not need help, thus tending to indicate he was under no uncertainty. *Downey, TR 151.* It is not unreasonable to conclude that Grievant in fact recognized the lieutenants the entire time before the contact. However, it is not necessary to make that finding.

This is because the Grievant made clear that by the time he began the contact he knew who he was dealing with. *Aguilar, TR 261.* He also had full reason to know what to expect from the encounter. He acknowledged a long history of meeting both Lt.

Duenich and Lt. Mayfield on the perimeter in exactly such circumstances.<sup>4</sup> *Aguilar, TR* 256. Grievant was equally clear that each prior time – monthly during his multi-year tenure as an RDO perimeter patrol officer – he knew the purpose was uniformly to do simple post and security checks. *Id.* This, of course, was echoed by fellow perimeter patrol officer Downey:

Q. [Delay-Brown] Have you encountered either sergeants or lieutenants along the perimeter while you have been performing your job?

A. [Downey] Yes.

Q. And how do you interact with them when you encounter them?

A. Normally I will see them coming. If they don't announce themselves I will see them coming; I will approach them. I'll say, Good morning, or, Good afternoon, can I help you with anything? And they'll normally say, No, I'm just out doing a fence walk, or I'm just, you know, I'm required to do this monthly or whatever. And I'll say, Well, if there's anything I can help you with, please don't hesitate to call me.

*TR 148.*

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<sup>4</sup> Miller-Stout noted in the termination letter that Grievant told her that on previous occasions Lt. Duenich would enter the perimeter zone and hide behind a lamp post to see how long it would take Grievant to spot him. *E #1.*



Accordingly, Grievant confirmed that at least by the point of contact he was free of any worry about who the lieutenants were, or that they constituted a threat to him:

Q. [Delay-Brown] We've established that they did not have a weapon. And that you hadn't had any interactions on that day where Lt. Mayfield or Lt. Duenich might want to physically harm you. So my question is, do you believe that when you came upon them on the perimeter that they were going to attack you with their hands or their feet or any?

A. [Aguilar] No, ma'am, not at the start of the initial meeting. No.

*TR 273.*

These facts and confirming testimony make it clear that nothing about the lead-up to the contact was at all unusual or suspicious. To the contrary, experience had made the meeting fully routine for all concerned.

***The responses to Grievant's questions***

The next element contributing to his threat determination, according to Grievant, was that when he asked the lieutenants "what they were doing" on the perimeter, they did not answer him. *Aguilar, TR 275-276.* It is indeed true, as pointed out by the Union, that AHCC policy states that uniforms are not to be taken as proof of identity – an obvious reference to the potential for an impostor to obtain a uniform. The Union is also correct that perimeter patrol officers have "not only the right, but the duty" to identify

individuals on the perimeter road, including by asking questions of them if necessary.

*Union Brief at pp.22, citing Mayfield, TR 61.*

A key distinction here involves the difference between determining identity and investigating purpose. Grievant had clearly looked behind the uniforms and positively determined identity before he asked any questions. Established routine explained the purpose. Despite this Grievant felt the need to ask what exactly was the lieutenants' purpose on this occasion. Grievant stated he felt this need because:

Usually on other days when I have encountered them out there, they would initiate the conversations with me. Okay?

They didn't – they didn't come up like they did this time.

*Aguilar, TR 274.*

In this, Grievant offers a mischaracterization of the situation. The lieutenants did not come up to Grievant at all, as they usually did. He came up to them. Indeed, the lieutenants each say that Grievant initiated the contact in "agitated" fashion, "yelling" at them immediately about why they had not reported their intent to be on the perimeter and asking them why they did not think they had to follow the rules "like everyone else." *Mayfield, TR 43; Duenich, TR 92.* Grievant denies any agitation or anger, and it is not at present necessary to resolve the conflict. The point is that Grievant had done his duty by identifying the individuals and establishing his presence. The individuals were his lieutenants and he was on scene to respond to them, not interrogate them.

In affirmatively investigating purpose and intent the Grievant was well beyond the duties of his post and in fact was turning the established order upside down. The

special structure of this workplace must be recognized. In a paramilitary organization, unless required by order, a junior does not have standing to query a higher rank. The sergeant in charge of master control on March 6, 2007, Raymond L. Greenwalt, III, explained why when he saw Lt. Mayfield and Lt. Deunich leave for the perimeter he did not ask where they were going or what their purpose was:

We are a...paramilitary organization; it would be like a private in the military asking a lieutenant colonel, Where you going? You are not going to the get the answer you want. I mean, if a lieutenant or a captain wanted to give information or tell me where he was going he'd tell me where they're going.

*Greenwalt, TR 183.*

The significance is that even if the exchange went as Grievant describes, any uncertainty or imputation of conflict that Grievant perceived in the lieutenant's responses was wholly of Grievant's own making. Grievant had done his duty and, as in all prior cases, had only to stand by and respond. Additional investigation was not his charge. Moreover, by virtue of his long experience, a reasonable officer in that situation would be immediately aware that any level of stress engendered by the hierarchical transgression was fully to be expected and entirely within the norm. To interpret the lieutenants' responses, or lack thereof, as threatening or even as raising a suspicion in any way was contrary to his 23 years as an officer and thus not a reasonable conclusion.

*The “port arms” reference*

The next element involved in Grievant’s threat decision is the reference to “port arms” that all three participants agree came out in some respect during the contact. According to the Grievant, at some point prior to his drawing his weapon, Lt. Duenich said to him, “If you think we are a threat to you, then why aren’t you at port arms?” *Aguilar, TR 262.*

At various points the Grievant, and the Union, have maintained that this acted in Grievant’s mind to further him toward his decision to unholster and brandish his weapon. This offer holds that Grievant was confused by the reference, and thought, variously, that he was either being tested to see if he knew how to respond to a threat, or even affirmatively directed to go to arms. *Aguilar, TR 263; 265; Thal, TR 19-20; and see, Union Brief at pp.7*

For their part, the lieutenants recall the term came up only after Grievant had stated he believed he was facing a threat. There are indeed a number of procedures and practices governing a perimeter patrol officer’s response to a threatening, or even potentially threatening, presence on the perimeter. See generally E #1. These include first radioing with a report, asking for assistance, and then maintaining distance while observing and waiting for the backup. *Id.* If the officer is confronted at shorter range, the officer is directed to leave the vehicle with shotgun at port arms (across the chest), using the vehicle as cover to the extent possible. *Id.* The lieutenants testified that “port arms” came up while referencing these things the Grievant was trained to do if he perceived a threat, and the whole conversational exercise was done only to demonstrate to Grievant

that his own actions showed that he truly did not believe he was facing a threat while dealing with his lieutenants. Otherwise, he would have never so much as approached the men.

Again in this case is it not necessary to find which version is the more likely. This is because Grievant's own subsequent testimony made clear that the "port arms" statement was not the reason he escalated his use of force. Grievant revealed this when he referenced the "OC" (pepper) spray he carried in his patrol vehicle:

Q. [Delay-Brown] So do you believe all other reasonable alternatives had been exhausted prior to drawing your weapon with regards to those two individuals?

A. [Aguilar] At that time, yes. Had I been able to get to my OC like I had told the superintendent when I had that interview with her, had I been able to get to my OC, my OC would have been my first before my handgun.

*TR 279.*

This testimony establishes that a "port arms" effort had nothing at all to do with the Grievant's decision to escalate force. By his own admission, at the moment Grievant went for his weapon the deciding factor had everything to do with availability, and nothing to do with responding to a "weapon at port arms" directive or statement in any context.

*The advancing lieutenants*

The Grievant's most definitive explanation for his threat determination came when he testified on the impact of the lieutenants "advancing" and moving toward him during the contact. His testified:

Once again, Lt. Duenich kept advancing, and I know it was a lot of – a lot of commotion going on between us. And yet, at the same time, Mayfield was advancing on his side. I remember correctly. Like I said. And Lt. Duenich stated, Well you know me. And that's when I told him, Well no, sir, at this time I do not. Okay. By that I meant that I didn't recognize his actions. Not him personally, but more of his actions.

And so as he advanced, by this time he was already in front of the vehicle. And I once again gave him a directive to stay where they (sic) were. And then again, Duenich said, Well, you know who we are, we're not a threat, or something to that extent. But yet, through the whole time he kept advancing.

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And at that point is when I felt more threatened than I did before and confused. Okay. So I drew my weapon...

*Aguilar, TR 264-265.*

Grievant later testified that, “I drew the weapon to stop their forward motion.” *Aguilar, TR 279*. He stated that at the time he drew, Lt. Duenich was, “...three to four feet from my position.” *Aguilar, TR 280*.

There are multiple problems with this testimony. First, the Grievant never articulated how the lieutenants’ advance reasonably caused him to perceive a threat. These undisputed facts jump to the fore:

- The Grievant knew who the men were.
- The Grievant knew the men were unarmed.
- The men knew Grievant was armed.
- The Grievant had had no dispute or conflict with the men before the contact.
- The men were Grievant’s superior officers and supervisors, acting on-duty.
- The Grievant had worked routinely with the men daily for over 10 years.
- The Grievant was in radio contact and was able to call for backup at any time.
- The Grievant stood next to a source of egress and a means of escape in the form of vehicle.
- The context of the entire meeting was routine and within the experience of all involved.

In light of these facts, the Grievant’s difficulty in articulating how he reasonably perceived a threat – and not just any threat, but a threat of severe injury or death – is understandable. When asked about his years of acquaintance with the men, Grievant stated:

I don’t know the man.

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I worked with him. I don't know him. I worked with him.

For him. But I do not know him.

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I see [the Lt.] at muster every morning...does that mean I know the individual? I know what his intentions are? A battered wife doesn't know her husband, you know, she knows her husband quite well, but she's still being battered.

*Aguilar, TR 281-282.*

The Grievant is seen to struggle with an explanation of how the “advancing” of an individual known so well to him, and acting in a routine workplace context, became a threat to his life. There is no evidence to show either lieutenant spoke threatening words; even Grievant stated that Lt. Duenich did no yelling of any kind during the contact. *Aguilar, TR 282.* There is no evidence either lieutenant took a fighting stance or an aggressive posture of any kind at any point during the contact. By the Grievant's own testimony, at most they simply moved toward him during the conversation.<sup>5</sup> How a threat was reasonably perceived under such circumstances is indeed inexplicable.

In addressing his failure to simply disengage, Grievant had no answer at all:

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<sup>5</sup> For their part, the lieutenants deny moving toward Grievant, at least as of the point he drew the gun on them. Interestingly, even Grievant states that when he drew the gun, Duenich reacted by, “kind of rais(ing) his hands about waist high and he goes, Whoa, whoa, what are you doing, put that weapon away.” *Aguilar, TR 267.* It is difficult to reconcile this testimony with an unarmed man continuing a steady advance in the face of a loaded weapon; it would appear far more likely that, as Grievant seemed to describe, Duenich stopped dead in his tracks.



Q. [Delay-Brown] But I am asking why you didn't back up,  
get in the car and drive away?

A. [Grievant] And –

Q. Because he didn't have a weapon –

A. – I don't know.

Q. – he couldn't have shot at you.

A. I don't know. I can't answer that. I really can't.

TR 285.

In sum, Grievant was unable to offer a reasonable basis for his fear of imminent great bodily harm or the loss of his life at the hands of the lieutenants on March 6, 2007. The arbitrator finds it clearly and convincingly proven that Grievant did in fact engage in misconduct by applying lethal force contrary to his training and in violation of reasonable and well known published policies requiring a legitimate threat of great bodily harm or death to justify use of lethal force.<sup>6</sup>

***A comment on use of experts and Grievant's actual reason for use of lethal force***

The Union rightly pointed out the Employer offered no expert testimony on use-of-force decision-making by law enforcement officers. The Arbitrator acknowledges that this area is more commonly highly complex, and filled with nuance. The Arbitrator takes notice that use-of-force decisions in the line of law enforcement duty are indeed

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<sup>6</sup> For self-evident reasons, this finding equally establishes that Grievant also is clearly and convincingly proven to have violated the other related policies listed in his termination letter. To wit, items 1(A); 2; 3; 4 on pages 3 and 4 of the termination letter. *E #1*.

commonly made in split-seconds, using only the information available to the officer at those moments. Review may require forensic evidence as well as detailed scenario re-enactments. Psychological and other mental science issues, as well as bio-mechanical questions, may be present and equally require expert testimony. On top of this all, the Arbitrator is acutely aware of the limits of his own knowledge in the field of law enforcement, and equally aware that consideration of use-of-force issues in the cool and calm environs of a hearing room bears little relation to what an officer faces in the heat of a moment that only later comes under a well-detached arbitral microscope. The Union is correct: Arbitrators should indeed be rightly reluctant to second-guess the decisions of officers from the safety of a conference room.

Were there present here any issues of nuance or complexity with regard to any of the areas noted above, the lack of relevant experts could well have been decisive. It was only the combination of agreed-upon material facts, and decidedly patent decision-making circumstances, that allowed for a clear and convincing presentation without resort to expert testimony. In other words, based on undisputed facts, including the candid testimony of the Grievant, a standard “test of reasonableness” of the type referenced *supra* by arbitrator Block was applied and satisfies the standards of due process and just cause. Indeed, the Arbitrator is convinced (and these words are rarely found in arbitration decisions) that it is beyond reasonable doubt that Grievant had no reasonable basis on which to declare a threat of great bodily harm or death at the hands of his lieutenants. Were the considerations and facts any less clear, the lack of experts may have played a role; in the event, such lack was not a factor.

Reviewing Grievant's testimony, one finds a likely reason for this clarity. Deep into his cross-examination, Grievant acknowledged that he drew his weapon not to protect himself from violence, but instead, simply to obtain compliance with his order. *Aguilar, TR 277-279*. Grievant at this point denied any intent to use lethal force:

Just because you draw a weapon does not mean you are going to raise and shoot somebody.

*Aguilar, TR 278*.

The key question followed, when Grievant was asked if that meant he only drew his weapon to gain "compliance" and to this, the Grievant responded: "Exactly." *Aguilar TR 279*.

Cases confirm that at least in some instances law enforcement officers have been allowed to use lethal force in such a manner. *Town of Cranston and International Brotherhood of Police Officers*, 101 LA 388 (Stewart, 1993) considered a suspension for an officer who admitted to drawing his sidearm to enforce a traffic instruction on an unruly construction site. On finding that the officer had drawn his weapon in such compliance situations some 12 times annually, and that the practice was widespread in the department, the arbitrator overturned the discipline. *Id* at 389-390. At the same time, the arbitrator referenced this evidence of "compliance" use of lethal force showed a "substantial and potentially problematic" training problem for the department. *Id*. In the instant matter, there is no such practice – and no such problem – as the testimony to the contrary was overwhelmingly persuasive. Officers as AHCC are trained that drawing a

weapon is tantamount to use. *Byrnes, TR 160-161*. Seeking compliance in a non-threatening situation via force of deadly arms is prohibited. *Id.*

Again, this is noted to illustrate that even the Grievant, at least at a point, was willing to confirm that his use of weapon on March 6, 2007 was for a purpose other than responding to threat of great bodily harm or death. Thus, one sees that the Arbitrator's own determination of the matter is not cast into doubt by virtue of a lack of expert testimony.

### **Insubordination Analysis**

The discharge notice to Grievant does make clear that insubordination was a charge mentioned against him, although it was not listed as a "violation" of any of the included rules and policies. ("I believe you were insubordinate towards Lt. Duenich when you refused, at least two times, to holster your gun.") *E #1* at pp.4.

The Union correctly asserts that in the majority view, the most common form of insubordination charges include two key required elements: a proper and clear order, with knowledge in the employee of the consequences of a failure to comply. See generally, Brand, *Discipline and Discharge in Arbitration*, at 157 (1998) and cases cited therein.

Here, there is no dispute over whether there was a clear order. The Grievant confirms the lieutenants' testimony that he was ordered to holster his weapon more than once before he complied. *Aguilar, TR 267-268*. Grievant even confirms the lieutenants defined for Grievant that "this is insubordination" as he was refusing their orders to holster the sidearm. *Id.*

The Union argues that Grievant was not told of the consequences of his insubordination. There is in fact nothing in the record purporting to show that either lieutenant articulated to Grievant in detail what the precise consequences would be for his continued refusal to put the gun away. Grievant was, by all accounts, told firmly and in a fashion that effectively communicated the depth of the matter. As Lt. Mayfield testified, "...finally I said, Jim, this is a bad situation, put that gun away." *Mayfield, TR 45*. (The transcript does not reflect tone and volume, but the Arbitrator recalls witness Mayfield clearly emphasizing the words "bad situation" as he related his statement.)

On the basis of the repeated commands, and the Grievant's own description of his clear awareness of them at multiple points, the Arbitrator rejects the argument that the Grievant was not given sufficient time to comply with the order. *Aguilar, TR 268*. As for the notice of consequences, the question is closer. But, it is significant that the Grievant has not at any point offered a lack of notice as a defense.

The cases where an employee has stated that "had I known the consequences I would have complied" – or even where this can be imputed -- are the cases where the notice of consequences stands as a major impediment to an employer's insubordination charge. Here, far from that extent, the Grievant flatly states that even in full hindsight, and while acknowledging his repeated refusals, he does not believe he was insubordinate. *Aguilar, TR 289*. In such a case it is difficult to imagine any difference being made by any further detail to Grievant from the lieutenants about "how much trouble he was in."

Present too is the factor of heat-of-the-moment and threat-of-death that was so definitely extant that it has been emphasized, in various contexts and for varying

purposes, by both sides. The Arbitrator is unable to find a case where an order has been given, and disregarded, literally at gunpoint. To expect a supervisor under such pressure to articulate a case-perfect insubordination warning is asking more than can rightfully be expected.

This point equally illustrates that this analysis is somewhat distant from the heart of the case. The refused order to “drop the gun” may be insubordination, but the more pressing matter is the fact that the gun is raised in the first place. This is a common occurrence in the perhaps less deadly, but still serious, workplace event of a brawl. In such cases, notice can be taken that supervisors may shout “let that man go!” only to see the fight continue. There, the charge of insubordination may lie, but it is rarely raised since the act of the fight is the overarching issue. Furthermore, in such cases, as here, the underlying conduct is so blatantly prohibited that it is difficult to argue that the involved employee is unaware of the severity of the consequences if the conduct is not ceased.

Were the charge of insubordination necessary to support the level of discipline imposed, the issue would require a clear determination. As will be seen, *infra*, it is not in fact necessary. Accordingly, with the charge in the nature of a “lesser included offense,” rather than create risk of creating harmful precedent from such a unique set of facts in a disciplinary category that is more often raised as the central matter in itself (instead of merely tangentially) the Arbitrator will declare the issue moot and irrelevant to his determination on the issue of just cause. The Grievant need not be found to have committed insubordination to answer the issue presented by the parties.

### **Propriety of Penalty**

The Union correctly posits that for discipline to meet the just cause standard, it must be proportionate. The two foundational considerations in this determination are the seriousness of the misconduct, and any mitigating factors that may be present. A disciplinary decision will satisfy just cause only when these two considerations have been proportionately balanced and the penalty is found to be reasonable under all the circumstances. See generally, Brand, *supra*, at 165, et seq. The Union offers three mitigating factors, each of which must be addressed.

### **Contributory Fault As a Mitigating Factor**

The role of Lt. Duenich figures primarily in the presentation in this regard. The Union holds that the DOC acted unreasonably in determining Grievant was entirely to blame for this incident, and that by disregarding the lieutenant's fault, the penalty considerations were unreasonable and disproportionate. Each of the Union's citations of fault will be considered.

It is indeed undisputed that neither lieutenant contacted the tower or master control before they moved onto the perimeter road. However, there is much to dispute the posit that had they done so "the incident would never have occurred." *Union Brief at pp. 20*. The most telling indicators here come from Grievant himself.

As noted, Grievant testified in explicit fashion that at the point he met with the lieutenants he was not in fear and had no suspicions of any coming misadventure by or with the lieutenants. The subsequent situation was not due to anything that preceded the contact.

Still, it is worth noting that even the questions the Grievant went on to ask would not have been answered by prior notice to the tower. The notice, if it took place, would simply have indicated that the lieutenants intended to move to the perimeter. There is nothing in the record to indicate that an officer's report to the tower would ever include more than the bare fact of anticipated presence. Even in the Union's submissions, there is no claim that a lieutenant was ever required to explain to tower the purpose of their movement onto the perimeter.

Of course, as has already been discussed, the Arbitrator is convinced that there was no practice of prior tower or master control notice by lieutenants before they began their monthly perimeter walks. Hence, even if somehow a prior notice would have avoided the event, because it was not required and was not the common practice there is still no possibility of finding the lack of notice as a contributory fault on the lieutenant's part.<sup>7</sup>

Next the Union alleges as fault the lieutenants' decision not to respond immediately to Grievant's question about their purpose on the perimeter in the manner Grievant would have liked. Here, according to at least part of Grievant's testimony, if the men had only stated their business he would not have identified any threat from them. Accepting this assertion at face value *arguendo*, the question becomes whether the lieutenants violated a duty in not answering Grievant as he desired. The Arbitrator is convinced they did not.

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<sup>7</sup> As a related matter, the Union also asserts the lieutenants' decision not to affirmatively respond to Grievant's radioed questions was also fault. For the reasons just noted, this claim too is without impact



As sergeant Greenwalt made clear, there is no reasonable basis for a junior CO to expect to find out more than the need-to-know level of information from a superior officer in a paramilitary organization. *Greenwalt, TR 183*. It was not Grievant's duty to determine the lieutenants' purposes and intents on the perimeter. His charge was to identify individuals found there, and once he identified his lieutenants in such a routine situation, his duty was to respond to them. This is what he described doing in all such occasions before, and this is what perimeter patrol officer Downey described as well. When the Grievant unreasonably acted beyond the scope of his duty, and contrary to fundamental workplace structure, it is inappropriate to charge the lieutenants with a "failure" when they chose to act according to practice, duty and standard paramilitary order.

It is true that superintendent Miller-Stout stated that she might well have chosen to answer the Grievant's questions. *Miller-Stout, TR 236*. Her answer was, of course, hypothetical, as is the entire exercise in this regard.<sup>8</sup> There is no assurance that Grievant would have disengaged had he received response he deemed satisfactory. There are no grounds to accept the matter with the finality suggested by the Union. Even if the Miller-Stout choice had been followed it is not possible to determine clearly and convincingly that the Grievant would have ended the contact. This is especially true in light of the lieutenants' persuasive and uniform testimony that Grievant displayed great upset and agitation from the very opening moment of the contact. In the end, it is enough to

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<sup>8</sup> It is certainly unclear the contact would have gone any differently: Miller-Stout also stated her reaction would "probably" have included the statement to Grievant, "What the fuck are you doing?!" *Miller-Stout, TR 238*.

conclude that the lieutenants were not under a duty to respond to Grievant after he identified them simply doing their jobs. Their chosen response was not misconduct and there are no grounds upon which to find they either caused the incident or wrongly failed to defuse it.

The “port arms” statement is next offered as an insufficiently-considered act of contributory fault by the lieutenants. The Union submits that Lt. Duenich gave the Grievant a “direction” to go to port arms. *Union Brief at pp.21*. First, the record does not show this to be the case.

Based on the testimony of all involved, it is clear that the “port arms” reference came up as only one of several descriptions of things the Grievant (or any perimeter patrol officer) would have done if they truly encountered a threat on the perimeter. *Mayfield, TR 93-94; Duenich, TR 120*. The Arbitrator finds the lieutenants’ testimony persuasive in this regard. *Id.* Once Grievant made clear he considered them a threat, they made a concerted effort to convince him that he really did not think so. Indeed, they tried to show him that as a well-trained veteran officer his entire posture confirmed this. He had approached too closely; he had failed to radio for assistance; and, yes, he had exited the vehicle without being at port arms. *Id.* The men tried to flatter Grievant with his veteran knowledge as a way to get through to him that he in fact knew the truth of the situation perfectly well. Such a persuasive attempt is not unreasonable. It is perfectly understandable. It is not misconduct.

Nor, of course, was it contributory fault, by even the Grievant’s own estimation. While the statement presented an attractive item for persuasive effort by Grievant’s

skilled counsel, Grievant hamstrung this effort when he admitted that had he been able to reach his OC spray he would have chosen that instead of his sidearm. *Aguilar, TR 279*. As discussed above, no matter what one concludes about the context of the “port arms” statement, that testimony nails the coffin shut on its efficacy as an explanation for Grievant’s choice to draw his sidearm.

Finally, it is submitted that the lieutenants were at fault by moving toward the Grievant during the contact. The Arbitrator is not prepared to agree that an unarmed supervisor simply moving toward his armed subordinate employee is at fault in any way.

To repeat, there is no claim, even by Grievant, that the lieutenants yelled, postured or in any way suggested an intent to do violence. Rather, by Grievant’s account, they simply moved toward him from their respective positions when he pulled up to them and began to speak. Further, the Arbitrator is not persuaded that the men continued to advance once Grievant pulled the loaded weapon. Rather, the Grievant’s testimony that his gun draw was met by raised hands and the statement “whoa, whoa” convinces that any “advancing” completely ceased at that point. The Arbitrator accepts the lieutenants’ testimony as to their shock, dismay and even terror when confronted with the loaded weapon. This honest feeling is not compatible with continued advancement, aggressive or otherwise.

#### **Lack of Ill-Intent as Mitigating Factor**

The next mitigating factor offered on Grievant's behalf is Grievant's lack of malice or bad intent. The Grievant was, according to the Union, just trying to do his duty, and a “terrible miscommunication” caused it to end badly. *Union Brief at pp.22*.

These facts separate this case from most other incidents involving use of force and alleged insubordination.

The Arbitrator is unable to accept this as a mitigating factor to any material extent. The lack of malice may well be an important distinction in criminal reviews of such conduct, but in terms of impact on the workplace review it is of far less significance. Lack of malice does not change the fact that lethal force rules were violated. Good intentions do not reduce the impact on Grievant's fellow employees from his unreasonable decision that they presented a threat to him. A confused mind but pure heart does not make the entire situation any less dangerous – and it certainly does not make it any more understandable.<sup>9</sup> Moreover, there is nothing in the record – notably including the detailed termination letter – to indicate that superintendent Miller-Stout based her disciplinary decision on any conviction that Grievant was acting with ill-intent or malice. *E #1*. Accordingly, the suggestion that Grievant's lack of malice is an overlooked mitigating factor is not accepted.

### **Grievant's Employment Record as a Mitigating Factor**

The final mitigating factor concerns Grievant's prior record. Here lies the matter of greatest concern to the Arbitrator. In the same way an employer invariably will point out an employee's short tenure or poor record in defending a disciplinary decision, so too must an employee's long tenure of good service be considered.

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<sup>9</sup> To be sure, the situation was so hard to understand for those facing the weapon that their first reaction afterward was to inquire if Grievant had been drinking, and to have him tested for intoxication (which turned out negative). *Aguilar, TR 268-269*.

The Grievant had spent over 23 years as a corrections officer as of March 6, 2007. While he was by all accounts an average officer in terms of his day-to-day performance, this tenure – with only a few corrective actions in memory and no formal discipline – is extremely impressive. The Grievant was committed to his career and quite obviously dedicated to his duties.

Tenure of this magnitude militates strongly against summary discharge for any so-situated employee. Where an employee has dedicated so many misconduct-free years to a career, few acts of misconduct may justly terminate that service without prior warning. It is not too much to say that in the far majority of single-incident misconduct cases, service of such measure demands an employer make every reasonable effort to rehabilitate the employee with corrective action short of severance.

In order for summary discharge to pass just cause muster as a reasonable and proportionate penalty in such a case, the misconduct involved must be extremely serious and the chances of rehabilitation demonstrably minimal. Hence, this becomes the final area of analysis.

#### **The Severity of the Offense and Grievant's View of his Conduct**

The DOC in this case did in fact consider the Grievant's tenure and prior record of service, and did weigh same against the severity of his misconduct, including considering whether there was any reasonable expectation of rehabilitation.

A measure of the severity of Grievant's conduct is that it was wrong on so many levels. First, the Grievant declared a threat of great bodily harm, or death, on a wholly

unreasonable basis, resulting in the root misapplication of the Use of Lethal Force Policy, 410.230 II (A).

In so doing, he failed to exercise the good judgment required so plainly in the multiple policies under which he had been trained, notably including 410.230 I (A) and 410.200 I (A). *E #1*.

Further, the source of his misjudgment came from a clear failure to remain calm, communicate effectively and act professionally in emergent situations, as required by policy in the “essential functions” portions of the applicable DOC position description. *E #1*.

As superintendent Miller-Stout pointed out in both her testimony and the notice of termination, if there truly had been a threat presented to Grievant, his actions were contrary to policy and training even so. He failed to call for backup, maintained an improper distance and left his vehicle without appropriate equipment. *E #1; Miller-Stout, TR 214*.

But the still greater measure of the severity of Grievant's misconduct is that these were not mistakes in any low-consequence area of a CO's duties. These were mistakes involving use of a deadly weapon, mistakes, as Miller-Stout stated, “relative to the safety and security of the institution.” *Miller-Stout, TR 218*. The superintendent went on to conclude:

Ultimately, I discarded all the options except termination, because I can find – I can hardly think of any behavior that is more egregious than an improper use of lethal force. In

this particular case, it was lethal force directed toward two people that were known. If the use of lethal force in that situation is wrong, from a safety standpoint, I can't imagine, I can't – it's unsafe to even guess what sort of choices would be made if it wasn't people he knew.

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I am hard pressed to think of anything that I'd consider to be a more egregious act on the part of a correctional professional...the fact of the matter is we train and expect people to behave professionally, responsibly and consistent with both the law and policy under situations of duress. And the decision making and the process and the actions taken by Mr. Aguilar were absolutely contrary to what is expected.

*Miller-Stout, TR 218; 220.*

Even so, the Union's argument that it is unjust to judge Grievant by only a few moments in a 23-year career has resonance with the Arbitrator. Were there a chance for rehabilitation, it should rightly be considered under just cause principles. But, here again the Grievant's own testimony resolves this issue.

True to what he had told superintendent Miller-Stout during the investigation phase, the Grievant right up to the point of arbitration remained unable to recognize his misconduct.

Grievant testified:

Q. [Delay-Brown] [By drawing your weapon] You think you were in compliance with Department of Corrections Policy and Procedure?

A. [Grievant] Yes, ma'am.

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Q. And my question to you again, sorry to keep repeating it is, did you believe when you used lethal force, in other words, drew your weapon, that it was to prevent potential loss of life or great bodily harm?

A. I believe the threat was there, yes. Or could have been there.

*TR 272; 291.*

And on the emergency situation calm communication issue:

Q. [Delay-Brown] Do you think in this situation you effectively communicated with the lieutenants?

A. [Grievant] Yes, I believe I did.

*TR 296.*

And finally on the insubordination question:

Q. [Delay-Brown] Do you believe you were insubordinate with regards to not following Lieutenant Duenich's orders?



A. [Grievant] No, not really. I don't believe I was.

*TR 289.*

Accordingly, Superintendent Miller-Stout recalled :

(T)wo months after the accident...he didn't give me any indication whatsoever that drawing the weapon wasn't something he wouldn't do again.

If you believe you did it right, and that you were justified in doing what you did, I don't believe that can be trained out of somebody.

*Miller-Stout, TR 220-221.*

The Arbitrator takes notice that the Grievant at the point of hearing was over two years from the date of the incident. He had lost his job because of it. He had heard and read the statements of the lieutenants many times, and had multiple meetings with DOC investigators and the superintendent in which the rules at issue had been discussed at length. He had been convicted of a crime for his conduct. *E #4*. For a period of months he had lost his right to carry a weapon as part of his sentence, and for a period of years had been prohibited from coming in contact with the lieutenants such that during the hearing he had to hear their testimony by speaker in a distant room. *Id.* And yet, the Grievant remained unable to recognize that his conduct was in error in any significant way.

In such a case, the judgment of superintendent Miller-Stout about the utility of retraining the Grievant is not unreasonable.

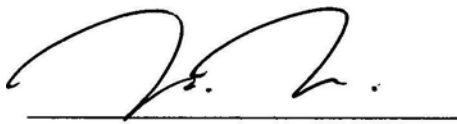
Despite the Grievant's long record of service, in light of the severity of his misconduct, a lack of mitigating factors, and his demonstrated inability to recognize the fact of his misconduct, summary discharge was a reasonable penalty.

Accordingly, the Arbitrator makes the following Decision and Award.

### **VIII. ARBITRATOR'S DECISION AND AWARD**

After thorough review of the CBA, the record and the arguments of the parties, and for the reasons set forth in the foregoing Discussion and Analysis, the Union's grievance on behalf of the Grievant, Jim Aguilar, is denied. The termination was for just cause as required by the CBA. Per the CBA, the expenses of the arbitration shall be divided equally.

So found and so ordered, this 16 day of October, 2009:

A handwritten signature in black ink, appearing to read "M. G. Merrill", is written above a solid horizontal line.

Michael G. Merrill  
ARBITRATOR