IN ARBITRATION BEFORE
MICHAEL E. CAVANAUGH, J.D.

DEPARTMENT OF CORRECTIONS, State of Washington, Employer, and TEAMSTERS DRIVER, SALES, and WAREHOUSE LOCAL UNION NO. 117, Union. (Johnson, Lyons, Maynard and Young Discipline Grievances)	)	ARBITRATOR'S DECISION AND AWARD FMCS Nos. 120509-02500-6 120509-02501-6 120509-02502-6 120509-02503-6

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I. INTRODUCTION

On January 29, 2011, inmate Byron Scherf murdered Correctional Officer ("CO") Jayme Biendl in the chapel at the Washington State Reformatory Unit ("WSR" or "WSRU"), part of the Monroe Correctional Complex ("MCC").[1] In the chapel, CO Biendl served in a "single officer post," i.e. she was the sole officer assigned to that part of the correctional facility even when a

[1] MCC contains five separate units, but the events at issue in this matter all occurred at WSR.

number of offenders were present for events. During the 2030 (8:30 PM) "recall" on January 29, at which time all offenders are required to proceed immediately to their cells for an inmate count at 2100 (9:00 PM), Offender Scherf managed to return to the chapel instead.[2] He then strangled CO Biendl in the sanctuary with a microphone cord.[3]

When Scherf turned up missing in the 2100 count, officers were dispatched to search for him within the perimeter of the facility, and he was found a few minutes later sitting in the chapel foyer. Offender Scherf claimed that he had fallen asleep and that CO Biendl had "missed him" when she gathered the inmates for recall. The officers who found Scherf were immediately ordered by the shift lieutenant to escort him to the shift office in restraints, and they did so without exhaustively searching the chapel offices or the sanctuary proper. When brought to the shift office, Scherf was questioned briefly by Lt. Briones, but he soon declined to answer further questions without a lawyer present. Lt. Briones then ordered him escorted to the Intensive Management Unit ("IMU").[4] After the 2200 (10:00 PM) general shift change, main control determined that CO Biendl had not turned in her equipment at the end of her shift at 2100.[5]

[2] Scherf, a violent sexual predator serving a term of life without parole, acted as an inmate volunteer in the chapel.

[3] As will be discussed in more detail later, it appears that the attack occurred within a minute or two after recall was called, because two "hot mic" transmissions (at approximately 2032 and 2033) were later identified as having come from the radio assigned to CO Biendl. On these transmissions, her radio was keyed for a second or two, but no audible message was transmitted. It is highly likely that these transmissions took place during a struggle with Scherf.

[4] During questioning at the shift office, Lt. Briones had noticed small blood spatters on Scherf's collar. When asked about them, Scherf falsely claimed that he had been beaten earlier in the evening when he was "jumped" in a stairwell by a group of other offenders.

[5] Although the shift for most officers ended at 2200, Biendl's assignment was considered "off-shift" because it concluded an hour earlier. Not until main control audited the equipment "chits" exchanged at the 2200 shift change did they discover that Biendl's equipment was missing with her chit still on the board. There was apparently no procedure in place for auditing the equipment of off-shift officers at the end of their shifts.

When telephone calls to her home went unanswered, officers proceeded to the chapel to search for her. They discovered her body at 2226.[6]

Several investigations into the incident were conducted in the months following CO Biendl's death, including investigations by the Department of Labor & Industries ("L&I") and by the National Institute of Corrections ("NIC"). The NIC and L&I investigations focused primarily on issues of Departmental systems, equipment, and procedures affecting safety and security within the institution. In addition, the Monroe Police Department ("MPD") conducted a criminal investigation into the murder. Eventually, after allowing the MPD to complete its investigation so as not to contaminate the case against Scherf, the Department conducted "just cause" investigations into seven correctional employees, including the four Grievants in this combined proceeding. In general, the just cause investigations focused on the extent to which staff had complied with (or failed to comply with) the Department's expectations, especially safety/security procedures. In three of the four cases before me, however, additional issues arose during the investigations concerning allegedly "inaccurate and/or false statements" made during their interviews by DOC and MPD.

At the conclusion of the DOC just cause investigations, Superintendent Frakes determined that three of the Grievants—CO's Lyons, Maynard, and Young—should be terminated, and that the Shift Sergeant, Sgt. Johnson, should be demoted for failing to supervise CO Young effectively. The Union filed timely grievances on the employees' behalf, which the parties were unable to resolve during the preliminary steps of their grievance and arbitration procedure. The matters then proceeded to arbitration, and the parties agreed that the four cases should be combined for hearing because of the overlapping evidence. At a hearing held in

[6] I take arbitral notice of the fact that Scherf was recently convicted of the crime and sentenced to death. *See*, http://www.upi.com/Top_News/US/2013/05/15/Washington-state-inmate-sentenced-to-death-for-killing-prison-guard/UPI-73301368654109/

Everett, Washington on January 22, 23, 24, 28, 30, and 31 and February 1, 2013, the parties had full opportunity to present evidence and argument, including the opportunity to cross examine witnesses.[7] Counsel filed simultaneous post-hearing briefs on May 16, 2013, and with my receipt of the briefs, the record closed.[8] Having carefully considered the evidence and argument in its entirety, I am now prepared to render the following Decision and Award in the four cases before me.

II. STATEMENT OF THE ISSUE

The parties agreed that a standard just cause formulation of the issue to be decided is appropriate:

> Did the Department have just cause to terminate CO's Young, Lyons, and Maynard and to demote Sgt. Johnson? If not, what is an appropriate remedy, if any, for each Grievant?

III. FACTS

A. Background

The background facts are generally not in dispute and are succinctly set forth in the following portions of the Department's brief:[9]

> MCC is an adult correctional facility for male offenders. MCC consists of five separate prison units of varying custody levels. WSR is the longest standing of the existing units, established in 1910. Tr. at 14; *see also* Exhibit (Ex.) S-17. WSR is

[7] One potentially key "witness," however, was Byron Scherf himself. The Department offered one of his initial confessions into evidence over the Union's objection that it had no opportunity to cross examine him. While I admitted the exhibit, I also made clear my concerns about the fairness of allowing the Department to make its case based on hearsay evidence that the Union had no opportunity to fully test on cross examination. The Department, however, argues that the portions of the confession relied upon fall within an exception to the hearsay rule, namely, statements against the interest of the declarant. I will consider these issues in the course of the Decision and Award that follows.

[8] In light of the extensive record (approximately 1600 pages of hearing transcript, 180 pages of briefing, and six large notebooks of exhibits) I requested, and the parties graciously granted, sixty days to complete my work on the case instead of the customary thirty days.

[9] I have omitted footnotes and have also undertaken minor edits when it seemed to me that the facts stated were not entirely undisputed. Material in brackets reflects an edit or an addition to the Department's brief. Deletions are indicated by ellipses.

multi-tiered, having four levels within the living units. There are forty cells on a tier, with four units broken down into cell houses one and two, with A and B side and C and D side. Tr. at 14-15; *see also* Ex. S-9. WSR is a medium custody facility housing over 700 offenders. Tr. at 18, 32; Ex. S-17. Inside WSR there is one guard tower, Tower 9. Tr. at 34; Ex. S-9. Tower 9 is the central control point for offender movement within WSR and also controls the access for staff inside WSR. Tr. at 34; *see also* Exs.S-9, S-14. Tower 9 is located outside of the living units and sits between the living units and the yard, fieldhouse/gym, and other program areas. Tr. at 34-35; *see also* Exs. S-9, 10. Tower 9 controls the turnstiles, gates, and doors which lead into the living units, inmate kitchen, the yard, the fieldhouse, and the program areas for both staff and offenders. *Id*.; *see* Ex. S-14. The program areas are past the turnstiles on a walkway, commonly referred to as the breezeway, and include the Program Activities Building (PAB), the chapel (now named the Religious Activities Building), and two education buildings. Tr. at 35-36; *see also* Exs. S-10, 11. Gate 7, which is beyond the chapel and education buildings, is controlled by custody staff; the area past Gate 7 is for different jobs and programs. Tr. at 36; *see also* Exs. S-9, 10, 11.

WSR operates with living unit staff and shift staff. Both unit and shift staff serve in custody positions and are responsible for providing safety and security for offenders and staff within their zones of control. Tr. at 61-62. Living units (cell houses) are where the offenders are housed. Custody staff assigned to a living unit work under the unit Sgt. assigned to their unit. Tr. at 25. Shift staff, which is generally staff not assigned to a living unit, including response and movement officers (R&M), yard and gym officers, and other program staff, work directly for the shift Sgt., or other specially assigned area Sgts. Tr. at 25-26. There are three watches (or shifts) at WSR: Watch I (graveyard) from 9:50pm to 6:20am; Watch II (day shift) from 6:10am to 2:10pm; and Watch III (swing shift) from 2:00pm to 10:00pm. Tr. at 65-66. The number of custody staff needed depends on the Watch. Tr. at 69.

On Watch III, the shift Sgt. at WSR is responsible for supervising five R&Ms, in addition to other shift staff. Tr. at 27. Within the facility there are scheduled time periods throughout the day when offenders are allowed to move from one area of the facility to another, defined as an open movement period. Tr. at 27; Exs. S-6, 7 at 10; S-13. Multiple times during the day, offenders are required to return to their living units for a head count; this movement is referred to as "recall." Tr. at76-77; Ex. S-7. During a movement period, staff is positioned at assigned locations (their zone) in order to provide presence, oversee the movement period, and to control and direct offenders. Tr. at 28.

R&Ms are assigned to various positions inside the facility on a daily rotating basis; the assignments are Zones 1, 2, and 3 and two rover positions. Tr. at 47-48, 72-73; Ex. Y-1, Tab 28 at 272. Each R&M is assigned to a zone, by way of daily assignment sheets. Tr. at 72-73. One of the major requirements for R&Ms is to stand for movement in their assigned zone. Tr. at 80, 406-07, 497. During

movement, R&M's are expected to be posted and standing in their assigned zones providing security. Tr. at 80-81,170, 468, 506; *see also* Exs. S-9, 10, 11, 13. Providing safety through presence is [a major function] of the R&Ms job. Tr. at 468-69.

The two rover R&Ms are not confined to any one zone, but are expected to move into areas where there is a lot of offender activity. Tr. at 47, 68. During movement periods, R&M rovers [often] stand for movement near the base of Tower 9. Tr. at 69. Zone I is everything on the A/B side of the living units, including the third and fourth hospital floors, receiving and release, Gate 1, the clothing and property room, and A/B side dining hall. Tr. at 67-68. Zone 2 is everything on the C/D side of the living units, including the day room, and C/D side dining hall. Tr. at 68. Zone 3 is everything past the turnstiles near the base of Tower 9, on the breezeway, including the PAB, chapel, education, and industries when it is open. Tr. at 68. The education and industries areas are generally not open on Saturdays and neither was open on Saturday, January 29, 2011. Tr. at 68-69, 80.

The reason for rotating the assignments of the R&Ms is so that they do not become complacent; they are able to constantly look at their job differently. Tr . at 73 . It is important for the R&Ms to be continually alert and present where they are assigned, directed, and expected to be. Tr. at 74. When COs become complacent, tragic events [can] occur. Tr. at74. WSR has several watch towers operated by tower officers. The towers l, 1 1/2, 2, 4, 5, 6, and 10, control and monitor the outer perimeter of the WSR. Tr. at 34. Tower 9 is at the inside center of WSR and controls movement of offenders and staff around the interior of WSR. Tr. at 34-35, 50; Ex. S-14. Tower 9 controls the gates and turnstiles that go in and out of the yard, the gym and the program areas, including the PAB and the chapel. Tr. at 34, 50, 497; Ex. S-14. Tower 9 also controls the slider doors on the living units and within the shift hallway. Tr. at 34, 497; Exs. S-11,14. Additionally, Tower 9 is responsible for . . . logging the inmate count numbers for program areas Tr. at 50, 499. After movement closes, the program areas that are open with offenders call Tower 9 and report how many offenders are in those areas. *Id*.; Ex. S-14.

At recall, the Tower 9 officer is responsible for . . . noting in a log book that program areas are clear of offenders. *Id*. Tower 9 is responsible for ensuring that [all staff are clear from behind turnstiles before securing the post for the night]. Ex. S-14. It is important to be . . . accurate in the log book. Tr. at 499.

* * * * * *

Near the end of Watch III, at 2030 hours (8:30pm), there is a final recall when all offenders are expected to return back to their living units for "yard-in" and final count for the evening. Tr. at 50. Tower 9 is the CO who lets staff out of the Zone 3 area, through the turnstiles at the end of final recall. Tr. at 51, 503-05,

> 526 (Tower 9 has to account for staff out in Zone 3, because if the Tower closed and staff is still in Zone 3, they are going to be stuck out there.); *see also* Tr. at 421. Neither the chapel nor PAB officer has keys to open the swing gate or the turnstiles to get out of Zone 3. Tr. at 172, 421. In the winter time, when it gets dark earlier, if the chapel CO does not come outside the fenced area, [from some vantage points] it [may be] very difficult to tell if a person inside the gated area was a CO or an offender. Tr. at 513-14.

Department Brief at 2-5.

B. Events of January 29, 2011

Grievant Christopher Johnson was the Shift Sergeant on January 29, 2011, and on that shift he supervised (among others), Grievant Young (R&M, Zone 3), Grievant Maynard (Yard Officer), and Grievant Lyons (Tower 9 Officer). From all accounts, CO's on the shift thought it had proceeded uneventfully until Offender Scherf was found missing at the 2100 count. Sgt. Johnson dispatched CO Brenda Fredricks, who had worked an overtime shift that evening as the PAB officer, to begin the search for Scherf. After passing through the turnstiles, she encountered CO's Wahleitner and Maynard who were returning from a check of the Extended Family Visit ("EFV") trailers[10] beyond Gate 7 and had already passed the chapel. CO Fredricks told them Scherf was missing and that she was headed to the PAB to check for him. CO Wahleitner said he would go with her,[11] and CO Maynard walked back toward the chapel. To reach the PAB, the officers would have to go through two locked gates on the breezeway, but before they reached the building, CO Maynard called out that he had needed backup. CO's Fredricks and Wahleitner

[10] EFV is sometimes colloquially known as a "conjugal visit." Trailers are available for that purpose beyond Gate 7, and the COs had gone to check the inmates and family present against a list of those authorized to be there. The radio log indicates that they announced they were behind Gate 7 for the EFV count at 2103 (9:03PM). Exh. S-16.

[11] As a matter of officer safety, Department policy generally requires two officers to do a search.

then retraced their steps along the PAB breezeway, locking the gate(s)[12] behind them, and they quickly caught up with Maynard at the chapel.[13]

When they reached the chapel, CO Maynard had opened the gate and stepped inside, at least as far as the chapel grounds just outside the building itself. CO's Wahleitner and Fredricks testified that they found CO Maynard and Offender Scherf each standing inside the fence with the gate open. CO Maynard testified, by contrast, that as he opened the gate, he saw Scherf sitting in the foyer of the chapel and that he entered the foyer himself just as the other officers were arriving.[14] When CO Fredricks arrived at the chapel, she radioed to the shift office that Scherf had been found. Exh. S-16 at 3 (9:17PM). A few seconds later (13 seconds according to the radio log), Lt. Shimogawa directed that Scherf be escorted in restraints to the shift office. CO Fredricks then cuffed the inmate, although she had to borrow Maynard's handcuffs to "double cuff" him because he could not bring his hands close enough together behind his back to use a single pair of handcuffs.[15] COs Fredricks and Wahleitner began to escort Scherf to the shift office, and Maynard joined them after quickly walking through the chapel hallway into the

[12] There is some question whether they had passed both gates or only the first one. CO Fredricks' first said she and Wahleitner had only gone through the initial gate, Exh. M-1, Tab 9 at 105, but later thought they might have gone through both although she could not remember for certain. For reasons that will appear in the course of this Decision and Award, the issue is potentially relevant to how long it took the two officers to catch up with CO Maynard at the chapel.

[13] Exactly how long it took them to reach the chapel is unclear. Realistic estimates varied from 40 seconds to up to two minutes, but in any event, it seems safe to say that the interval was relatively brief.

[14] One of the charges against CO Maynard is that he ignored a Department policy against rushing into an emergency situation, putting himself in unnecessary danger. The Department says an officer should immediately notify the shift office of the nature of the emergency and wait for a careful evaluation from a safe distance before proceeding, both of which Maynard allegedly failed to do. CO Maynard testified, however, that he remembered being trained that it was better for one officer to go in alone initially rather than exposing multiple officers to whatever unknown danger might be present.

[15] CO Maynard testified that the cuffing of Scherf took place in the chapel foyer. Both Wahleitner and Fredricks, however, testified that they never set foot inside the chapel building (although Wahleitner said he may have briefly peeked inside) and that all the events took place just inside the gate to the chapel grounds, but outside the building itself.

library where he turned off the light, then exited the chapel through the same hallway and locked the door behind him, also locking the chapel gate as he left.[16] Maynard then caught up with the escort of Offender Scherf toward the shift office, and CO Fredricks suggested that Maynard take over her position when a picture count was called just as they approached the office. She believed the lieutenant would want to talk to Maynard as the CO who had found the missing inmate. Fredricks then proceeded to the living units to help with the count. Exh. M-1, Tab 3 at 10. The significant events at the shift office have been previously described and need not be repeated here.

During the Department's investigation, the conduct of the other two CO's who are Grievants in this matter came under scrutiny, specifically Tower 9 Officer George Lyons, and Zone 3 R&M David Young.[17] CO Lyons had logged the chapel as clear and secured as of 2045 on the night of January 29 although CO Biendl never called the chapel clear over the radio, nor did CO Lyons observe her leaving the chapel and exiting through the turnstiles.[18] Although CO Lyons initially stated that he thought he had seen Biendl let the inmates out of the chapel area and close the gate, which he described as a usual method for her to indicate the chapel was "clear

[16] In an incident report filed that night, CO Maynard wrote that he "inspected and secured" the chapel. The accuracy of that description of his actions is a major issue in the disciplinary case against him.

[17] CO Young has subsequently changed his name to Nathan Dahl, but because he is referred to in the record as David Young, I will use that name in this Decision and Award.

[18] The Department also notes that although CO Lyons logged the chapel clear at 2045, his description of the events of that evening that led him to believe the chapel was secure, including the calling of the breezeway clear by two R&M's, occurred earlier than 2045. The Union counters that Lyons had always logged areas clear at the time *all* areas had announced they were clear and main control called "yard-in." No one had ever suggested previously that this method of logging was unacceptable.

of inmates," at the conclusion of the investigation, CO Lyons conceded that he could not be "100 percent certain" that he had observed Biendl close the gate.[19]

The Department determined that CO Young was not standing in Zone 3 as required during the 2030 recall.[20] Had he been standing where expected,[21] says the Department, he would have been in a position to see Offender Scherf if he attempted to turn around to return to the chapel after being let out of the gate by CO Biendl.[22] Thus, his absence helped create an "opportunity" for the offender to commit a horrific crime.[23] The Department also alleges that some of Young's statements to investigators were inconsistent or false, including the time he

[19] The Department treated this lack of 100% certainty as the equivalent of an admission that CO Lyons had falsely logged the chapel as clear, while the Union argues that he was simply attempting to be as truthful as possible. I will examine these contentions in detail later.

[20] CO Young does not dispute that he was not in Zone 3 during the 2030 recall. Rather, he testified that he appeared for that movement a minute or two after it was called and stood at the base of Tower 9, as he understood he was authorized to do by his supervisors even though he was not technically in Zone 3.

[21] The witnesses all agreed that the preferred location in Zone 3 during movement would be inside the turnstiles, standing with the back to the recreation yard fence so inmates could not approach from behind, and looking straight down the breezeway toward the PAB. From that location, a CO could see (and be seen by) inmates on the breezeway (much of which is obscured from view from other observation points) as well as those entering or leaving the chapel.

[22] Scherf, in a letter to Department of Corrections management and in his confession to MPD, indicated that he looked to see if anyone was standing in the normal place in Zone 3 before returning to the chapel to take the life of CO Biendl, suggesting that if CO Young had been standing movement in the preferred location, he would not have done so. Again, the Union strenuously objects to my consideration of that evidence because there was no opportunity to cross examine Scherf on these factual assertions that could be vital to the case against CO Young.

[23] The issue of CO Young's absence from Zone 3 during the 2030 recall is also tangentially related to the case against CO Lyons, the Tower 9 Officer. That is so because some of CO Young's fellow R&M's thought he habitually failed to stand movement, and were irritated that they often had to cover for him. For example, during the 1850 recall on January 29, CO Piffath, assigned as a rover on the shift, took it upon himself to stand in Zone 3 because CO Young was not doing so. And during the 2030 recall, both CO French and CO Piffath called the PAB breezeway "clear" over the radio (at 2036 and 2038 respectively). They did so, they said, in order to call attention to the fact that CO Young was not in his assigned position. Unfortunately, calling the breezeway clear tended to indicate to the Tower 9 Officer that the chapel was clear as well, i.e. the breezeway cannot be clear if there are still offenders in the chapel because they would have to cross that area to get to the turnstiles and return to the living units for the count. With hindsight, however, it is tragically clear that Zone 3 was not clear, and the officers conceded that they had made a mistake in judgment the night of January 29 in calling it so.

arrived for the 2030 movement (if at all), and the extent to which he was involved in the escort of Scherf to the shift office.[24]

The Department determined that Sgt. Johnson should be demoted because he failed to ensure that CO Young consistently stood for movement as required, both before and after the murder of Jayme Biendl, and also failed to document concerns about Young's performance as directed by his supervisors. Sgt. Johnson testified that he believed that the complaints about Young were simply "infighting" among the R&Ms and that the times he checked on Young during movement, he was in an appropriate place. Other R&Ms, he said, including those complaining about Young, were just as guilty of failing to stand for movement. He also noted that as Shift Sergeant, he was responsible for a significant volume of paperwork that tended to keep him tied to the shift office. Consequently, he was often not in a position to observe the R&Ms as closely as he would have liked.

These factual issues will be developed and analyzed more closely in the course of the Decision and Award that follows.

IV. DECISIONS ON THE GRIEVANCES

A. Preliminary Issues

1. Evidence Concerning Deficiencies in the Department's Procedures, Policies, and Equipment

The Union argues that the fault, if any, of the Grievants in this matter must be evaluated in light of evidence concerning the extent to which the Department *itself* contributed to a climate in which CO Biendl was endangered—specifically, the Union asks that I consider the results of

[24] Following the 2030 recall, beginning at 2105, COs Young and McAfee were on a "fire watch" beyond Gate 7, checking that buildings were locked, coffee pots were turned off, etc. As they were finishing, CO Young heard radio traffic regarding the inmate found at the chapel, and he hurried in that direction, "falling in behind the escort." The Department found that Young falsely implied he was part of the escort and was inconsistent in reporting how close he came to Offender Scherf during that process. Again, these issues will be examined in detail later.

the WISHA investigation by L&I that resulted in citations to the Department for several safety violations, as well as a report from the National Institute of Corrections ("NIC"), requested by the Governor and the Secretary of the Department, Eldon Vail, shortly after the murder. The NIC report contains a number of suggestions for improving security at the Monroe Correctional Complex ("MCC"). At the hearing, the Department argued that this sort of evidence should not be admitted, contending that its consideration by the Arbitrator would "punish" the Department for taking corrective actions (and implicitly, at least, asserting a policy argument that it would be unwise of me to provide a disincentive for the Department to take such actions in the future out of fear it could potentially undermine its case in an ensuing arbitration).[25]

The argument at the hearing was couched primarily as an analogy to the inadmissibility of evidence of post-accident repairs in a negligence case—which the Union contends presents policy issues very different from the issues here. My reading of the evidence rule itself, however, is that it seems to apply more broadly than in tort cases:

> When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence *or culpable conduct* in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

Washington Rules of Evidence, ER 407 (emphasis supplied). It could certainly be argued that the Union's use of the L&I and NIC evidence is aimed at issues of relative or contributory "culpability," i.e. the extent to which the actions (or inaction) of the Grievants *and* the Department led to the creation of an opportunity for Offender Scherf to attack CO Biendl.

[25] The Department did not vigorously argue this point in its post-hearing brief, but because it was raised several times during the hearing, ultimately resulting in a request for a continuing objection (which I granted), I do not treat the absence of detailed argument in the brief as a waiver of the argument.

Therefore, I find that the Department has asserted a plausible argument under ER 407 that must be addressed in some detail.

In resolving this issue, I note first that formal rules of evidence do not ordinarily apply in labor arbitration. *See*, e.g. May, ed., *Elkouri & Elkouri's How Arbitration Works* at 8-3 *et seq.* (7th ed., BNA, 2012). Rather, arbitrators are accustomed to receiving evidence that would not be admissible in court and evaluating the weight, if any, it should be given under all the circumstances.[26] Therefore, even if this rule would ordinarily prevent admission of the NIC Report or the L&I investigation and citation in court, it does not necessarily require the Arbitrator to reject it outright here. On the other hand, the evidence rule reflects an important policy, i.e. that persons and entities should not be deterred from making changes that will increase safety because of a fear that to do so might be seen as an admission of prior negligence or of culpable conduct.[27] There is a competing public policy at work here as well, however, i.e. the public policy in favor of promoting collective bargaining between the State and its employees, including the enforcement of just cause provisions contained in CBA's such as the one before me. In that context, as the Union points out in its brief at pages 43-44, arbitrators routinely consider the extent to which "Employer fault" might be said to mitigate the misconduct, if any, of an employee. Brand & Biren, eds., *Discipline and Discharge in Arbitration* at 15-80 et seq. (2d Ed., BNA, 2008).

[26] Part of the value of labor arbitration, of course, is that it offers a decidedly less formal—and therefore usually a more expeditious—means of resolving workplace disputes that otherwise could fester, thus impairing efficiency in the workplace. Because that is the case, observation of the technical rules of evidence, which can lengthen a proceeding and increase its cost, are relaxed. Moreover, the purpose of arbitration is to receive a just result, and it has often been observed in that regard that "the more serious danger is not that the arbitrator will hear too much irrelevancy, but rather that he [or she] will not hear enough of the relevant." *Elkouri* at 8-8. These are concepts I must keep in mind in evaluating the applicability of ER 407 under these circumstances.

[27] Even though arbitrators do not strictly apply the evidence rules, they usually recognize that those rules often reflect important considerations—such as reliability, privilege, relevancy, and public policy—that must be taken into account in deciding the weight to be given the evidence once admitted.

Considering the accommodation of these two competing policies in the circumstances of this case, I note first that neither ER 407, nor the policies behind it, justify the exclusion of the L&I investigation and citations. That is so because the evidence in no way reflects voluntary "remedial measures taken" by the Department, but rather *conditions found* by the Department of Labor & Industries. Therefore, even if ER 407 were fully applicable here, it would not call for denying admission into evidence of the L&I investigation and conclusions. The NIC Report is a closer case, but on balance, I think the equities favor my consideration of the evidence. Like the L&I citations, the NIC Report does not itself reflect "remedial measures taken," but rather expert "recommendations" based on an investigation. I think it could fairly be said, however, that the State's laudable decision to *request* such an investigation was a "measure taken" which, had it been taken earlier, might have made the murder of CO Biendl less likely to occur (given a prompt and effective implementation of the recommendations). If that is the case, the situation would seem to fall squarely within the policy reflected in ER 407.

Nevertheless, and without regard to whether ER 407 would permit admission of the evidence in court, I find—as I said at the hearing—that in a case in which the Department is contending that the actions of these Grievants contributed to the creation of an opportunity, which Offender Scherf then took advantage of to murder CO Biendl, it would be highly unfair to the Grievants (and inconsistent with my obligation to uphold the parties' CBA, including the just cause provision), not to consider the *entire matrix* of causes that contributed to the creation of that opportunity. The harm to the State, if any, from this approach appears to me to be more theoretical than real (at least in the labor arbitration context where the sole issue is just cause for discipline), and if the issue were to arise in some other context, the State would remain free to make its argument under ER 407. But here, if the policies and procedures followed by the

Department—and the equipment it did (and did not) provide to its officers—contributed to a workplace that was less safe than it might otherwise have been for CO Biendl, it would be a grossly distorted proceeding in which I limited myself to consideration of the failings, if any, of the Grievants, viewed in isolation. If others, including the Department itself, had opportunities (viewed in hindsight) to affect the ultimate outcome, that directly affects the extent of culpability of the Grievants, and at the very least is a relevant consideration in evaluating the appropriate level of discipline for any proved misconduct.

And in fact, both the NIC and L&I reports identified deficiencies in the Department's systems, procedures, and equipment[28] with respect to the security of the chapel officer. Moreover, several security policies and procedures that *were* in place to assist in accounting for staff were not effectively enforced.[29] These findings are evidence of a problematic complacency that had crept into the institution, and one that was apparently widespread. I do not intend to sound judgmental in that observation. Unfortunately, complacency in corrections is not unusual, nor is it necessarily confined to line staff. The NIC report, for example, tells us that "complacency can exist among corrections staff *at every level* which may lull them into a false sense of security. Recognizing that complacency occurs periodically *in all correctional environments* is important." Exh. U-9 at 3 (emphasis supplied). Similarly, the report noted that despite the inherent danger in a prison, "staff frequently become complacent and too comfortable

[28] For example, for whatever reason, the Department had not acted on CO Biendl's request to add additional security cameras in the chapel, nor did the Department provide a Personal Body Alarm ("PBA") system, which the NIC Report noted is available commercially, that might have enabled the chapel officer to sound an alert identifying her and her location with the push of a single button. Nor, prior to the murder, were officers routinely issued pepper spray. *See*, e.g. Exh. U-9 at 9-13. Moreover, the NIC questioned the appropriateness of Offender Scherf's classification within the corrections system itself, i.e. whether as a life without parole ("LWOP") inmate with a record of extreme sexual violence and self-identified "problems with supervision by female staff," he should have been allowed to volunteer in the chapel where he would at times be supervised by a single female CO. *Id.* at 22-24.

[29] L&I found that the requirement that the chapel officer proceed to assist the PAB officer after securing the chapel was not enforced, nor was the requirement that the chapel officer check out with the shift sergeant at the end of the shift consistently followed. *See*, e.g. Exh. U-10 at 2.

in this volatile environment" and that "while volatility and potential violence always exist, they exist beneath the surface and only become evident when, regrettably, it is often too late." *Id*. at 13. That seems to be an apt description of precisely what happened here.

In sum, the record before me supports the conclusion that "complacency" was far too common throughout the facility prior to the murder of CO Biendl—both among the line corrections staff, and also among their supervisors and managers who failed to implement some policies and procedures that could have improved safety, and who sometimes failed to enforce the appropriate policies that were already on the books. These and similar facts provide a necessary framework for my consideration of the extent to which the individual employees here were culpable.[30]

2. Burden and Quantum of Proof

The Department bears the burden of proving that the Grievants committed the offenses for which they were discharged and that the level of discipline imposed was appropriate in light of all the circumstances.[31] With respect to proof of the offenses charged, I find that the Department should be required to adduce "convincing" proof, not proof beyond a reasonable doubt as argued by the Union. Beyond a reasonable doubt is an evidentiary standard almost exclusively limited to criminal matters in our legal system, and although the consequences to the

[30] As an aside, to the extent the Department's arguments in support of the discipline of these Grievants relies upon allegations of their being so complacent as to be "grossly negligent"(*see*, e.g. Department Brief at 31-32) the judgment reflected in the NIC Report that complacency is not uncommon in penal institutions potentially undermines that argument. That is so because if complacency "exists periodically in all institutions," then it is difficult to say that complacency, in and of itself, goes so far beyond the realm of the merely "negligent" as to constitute "wanton" or "willful" misconduct, the usual definition of "gross negligence."

[31] On that score, I must be guided by the offenses listed in the Grievants' respective discharge letters (or, in the case of Sgt. Johnson, his demotion letter). The Department's brief in some cases attempts to support the discipline by arguing offenses that simply were not cited by the Department at the time. I have not considered those arguments in determining whether the discipline of any Grievant before me is for just cause. *See*, e.g. *Discipline and Discharge in Arbitration* at 48 ("The right to be informed of the charges includes the right to be informed at the time the discipline is imposed, not at some later time"); *see also, Id*. at 50 ("Arbitrators usually decline to uphold discipline based on a ground that the employer failed to rely on at the time of discharge").

Grievants of my sustaining the disciplinary actions against them would be severe, those consequences do not rise to the level of a loss of physical liberty and loss of civic rights (e.g. the ability to vote) often involved in conviction of a crime.

On the other hand, I agree that the potential stigma attaching to the discharge of a corrections employee, particularly a discharge based on alleged dishonesty, justifies a level of proof well beyond the barest preponderance of the evidence. That is, in the law enforcement and corrections context, proven dishonesty can lead not only to the loss of a job, but the loss of a career. Most corrections employers, like the Department, rightly demand "unfailing honesty," and once having been found guilty of dishonesty, a corrections officer stands very little chance of ever being hired by another agency. Consequently, I will look for proof that convinces me that it is substantially more likely than not that a Grievant committed the offense(s) charged.

With these background considerations in mind, I will turn to an examination of the four cases before me. Although the cases have been combined for the purposes of hearing and decision, whether the Department has sustained its burden of proof with respect to each Grievant must be determined independently.

B. Grievant George Lyons

The discharge letter for CO Lyons cites three categories of misconduct for which he is being terminated. First, the Department alleged that he "falsely logged the chapel cleared at 2045 hours," whereas the investigation determined that he did not receive a call from CO Biendl indicating that the chapel was clear, nor did he follow up with her to verify that the chapel was in fact clear and secure before entering it as such in the logbook. Exh. L-5. Second, the Department alleged that CO Lyons provided inconsistent answers to questions during the Department's investigation, e.g. he said that he logged the chapel as clear when he saw CO Biendl close the

gate behind the inmates leaving the chapel, then later "revised" his statement to say that he logged the chapel clear when Zone 3 was called clear over the radio by one of the R&M's. That notification, however, occurred several minutes earlier than the logged time of 2045. *Id.* Furthermore, ultimately CO Lyons conceded that "I am not 100 percent positive that I saw Jayme (Biendl) shut the gate that night. I can't honestly say that she did." *Id.* at 2.

Third, the Department accused CO Lyons of providing inconsistent answers to questions asked by MPD during the murder investigation, noting that he originally told Lt. Shimogawa on January 30 that "to the best of his knowledge" Biendl called in secure on the radio on January 29 because that was her normal routine, then he submitted an incident report in May 2011 that stated he cleared the chapel when he heard a CO radio that Zone 3 was clear, then a few days later told MPD that he wrote down the chapel as clear when he saw Biendl close the gate after letting the inmates out at approximately 2031 which was her "normal" way of clearing the chapel. *Id.* at 3.[32]

1. Logging the Chapel Clear

There can be no doubt that CO Lyons entered information in the logbook the night of January 29, 2011 that was not true. That is, the chapel was not clear of all offenders. Thus, he failed to keep an "accurate" log of the events of that evening. The same observation could fairly be made about the logging of the chapel as clear at the time of 2045 given CO Lyons' clear concession in his statements to investigators, and in his testimony at the hearing, that the events that caused him to erroneously conclude that the chapel was clear actually occurred several minutes earlier than 2045. But in order to sustain a discharge for falsification of business records,

[32] This third allegation of inconsistent statements does not on its face amount to "inconsistent answers provided to external law enforcement" as alleged. That is so because only one statement to MPD is referenced in the discharge letter, but I take it that the Department was alleging that the answer given to MPD was inconsistent with the answers CO Lyons had earlier given to the Department.

most arbitrators require proof of *intentional* falsification, usually accompanied by intent to deceive the Employer or to receive some unwarranted benefit. *See*, e.g., *Discipline and Discharge in Arbitration* at 299; 302-05. But I do not understand the Department to be alleging that kind of "falsification" here, at least with respect to the accuracy of the logbook. Rather, the crux of the allegation is that CO Lyons' "choice to enter information in the Tower 9 logbook, which is a legal document, *based on assumption and not proper verification* is unconscionable and contrary to your responsibilities as a correctional professional." Exh. L-5 at 5 (emphasis supplied). It seems to me this may be alleged "complacency" and/or "negligence," or perhaps even alleged "gross negligence," but it is not an allegation of intentional falsification for some kind of personal benefit. *Id*.

In any event, while I agree that CO Lyons should have been more careful in ensuring that the chapel was clear prior to logging it in the book, that sort of performance shortcoming, unlike intentional dishonesty, is typically addressed through corrective action and progressive discipline, not summary termination. The Department's argument that this case should be treated as a "cardinal offense" appears to be based on the theory that his failings were so "unconscionable" that his actions cannot be excused, nor could his performance in this regard reasonably be expected to improve with corrective action. I disagree that the record before me justifies such a conclusion.

As previously noted, both the NIC and L&I reports identified deficiencies in the Department's systems, procedures, and equipment with respect to the security of the chapel officer. Moreover, several security policies and procedures that *were* in place to assist in accounting for staff were not effectively enforced by supervisors, including the policy about R&M's standing for movement in their assigned zones of control. The record before me, then,

supports the conclusion that the kind of "complacency" exhibited by CO Lyons was widespread throughout the facility prior to the murder of CO Biendl, both among the line corrections staff and their supervisors.[33]

Turning to the specific allegations against CO Lyons with that in mind, the inaccurate times he entered in the logbook on January 29 do not amount to just cause for significant discipline. CO Lyons admits that he entered all areas as clear at 2045, the time of "yard-in," even though the individual areas had earlier cleared progressively over a period beginning shortly after the 2030 recall. While that method of logging was "inaccurate," it is a procedure CO Lyons had learned from others, one that was followed by others,[34] and there is no evidence that the Department had ever told CO Lyons (or any other Tower 9 Officer) that the procedure was inappropriate or insufficiently detailed. Nor is there evidence that any other Tower 9 Officer was disciplined for utilizing a similar logging procedure. Under the circumstances, the situation would at most call for performance counseling or some other form of nondisciplinary corrective action.

The failure of CO Lyons to follow up with CO Biendl to verify that her area was clear of offenders presents a closer question. Without a doubt, one of the major functions of Tower 9 is to monitor the flow of inmate movement and to assist in accounting for staff. I agree with the Department that "if an area was not cleared and secured, Tower 9 should be calling those program areas to confirm." Department Brief at 18. Interestingly, however, the authority the Department cites for this proposition is not the post orders or the post manual, which is the

[33] Thus, to the extent the Department's theory is that CO Lyons and the other discharged CO's failed to follow policy and had they not done so the outcome might well have been different, the same argument can be made about *many other staff*, including the supervisors that failed to enforce policies that were in place and were designed to protect the chapel officer. *See*, e.g. Exh. U-11 at 3-4 (Violation 2). No one was terminated here, however, except these three first line correctional officers.

[34] See, e.g. Exh. L-1, Tab 3.

detailed "bible" for employees on how to perform the duties of their post, but rather the interview of former Lt. Shimogawa by the MPD. Exh. L-2, Tab 2 at 52. While that reference may be sufficient to establish Lt. Shimogawa's expectations for the performance of the duties of the Tower 9 CO, it does not necessarily establish that these expectations were effectively communicated to CO Lyons or the other Tower 9 Officers. The post orders and post manual, in fact, do not specifically direct Tower 9 to call program areas to verify that they are clear and secure,[35] although common sense would surely suggest that if there are any doubts, someone should follow up.

But in one sense, this discussion is beside the point because CO Lyons erroneously believed the chapel *was* secure. That is so because he thought he saw CO Biendl release the inmates and close the gate at 2030,[36] and then heard two other COs call the breezeway (Zone 3) clear at 2036 and 2038. Exh. S-16 at 2.[37] With hindsight, one can legitimately criticize CO Lyons for complacency in failing to monitor CO Biendl's whereabouts after she released the inmates and for failing to be certain that she was safe before mistakenly logging the chapel clear at 2045.

[35] As the Union points out, the post manual directs Tower 9 to make sure that all staff are out from behind the turnstiles before securing the post for the night, Exh. L-1, Tab 5 at 38, but does not specifically address the concept of verifying the whereabouts of staff earlier, such as at the 2030 recall.

[36] I recognize that CO Lyons ultimately stated that he could not be 100% certain that he saw Biendl close the gate, but for reasons I will outline in more detail later, I find that he genuinely believed that is what he saw the night of January 29. He may well have been mistaken—for example, if Biendl closed the gate, my understanding is that it would have locked automatically, and Offender Scherf would not have been able to re-enter the chapel without her knowledge. Or perhaps what he saw was Scherf closing the gate, mistakenly thinking (without the assistance of an R&M posted in Zone 3 who would have been in a better position to observe the events) that it was CO Biendl. In fact, apparently the L&I investigators reached just that conclusion ("returning to the chapel [after releasing the inmates], she found inmate Byron Scherf and ordered him to leave. Scherf reportedly said he would, but allegedly walked out of the chapel, shut the security gate and returned to the chapel." Exh. U-10 at 1. I do not know what evidence L&I had for this factual narrative, but the record before simply does not permit factual findings on these issues one way or the other. On the other hand, it also does not convincingly support a conclusion that CO Lyons logged the chapel clear in bad faith.

[37] Interestingly, the two COs who called the breezeway clear—despite being in no position to do so authoritatively, and who were making the calls only for the purpose of calling attention to the absence of CO Young in Zone 3—were apparently not disciplined. CO Lyons, on the other hand, who relied on their erroneous report, in part, in logging the chapel clear, was summarily terminated.

But, the evidence does not support a finding of total indifference or even wanton or willful disregard of his responsibilities. Under these precise circumstances then, especially when considered in the context of everything else that also could be said to have contributed to the tragic outcome that night, his complacency (standing alone) did not merit summary discharge.[38]

2. Inconsistent Answers During the Investigations

The second aspect of the Department's case against CO Lyons is the allegation that he made inconsistent statements during the investigations by the MPD and the Department. Exh. L-5 at 2-3. While the discharge letter does not expressly allege "dishonesty," by describing his behavior as "deceitful," *Id*. at 6, and by citing the Department's policies on ethics that require "integrity," *Id*. at 4, I must assume that the Department intended to accuse CO Lyons of making intentionally false statements. Specifically, the discharge letter noted that CO Lyons stated in two Department interviews that he logged the chapel clear when he saw CO Biendl close the gate, and then revised his statement to say that he cleared the chapel when he heard another CO call Zone 3 clear. That call, however, occurred approximately 10 minutes before the time noted in the logbook, i.e. 2045. *Id*. at 2. Finally, on June 29, 2011, CO Lyons stated that he could not be 100% certain he saw Biendl close the gate. *Id.*

To the extent these allegations rely upon the discrepancy between the logbook time of 2045 and the time the events actually occurred that caused CO Lyons to conclude that the chapel was clear, (whether the closing of the gate or the calling of the breezeway clear by other officers, or a combination of the two), I have already indicated that the situation does not support a disciplinary response. It may well be that CO Lyons was not keeping a logbook that reflected the detail the Department desired, but he (and other tower operators) had been keeping the log in that

[38] In terms of what might be an appropriate disciplinary penalty under these circumstances for this offense standing alone, I find it instructive that Lt. Briones received a written reprimand for the events of January 29, essentially for signing a report with information provided by Lt. Shimogawa that turned out to be incorrect. *See*, Tr. at 134.

manner without objection from the Department for some time. Reframing the allegation as one of honesty or integrity does not transform the situation into one justifying summary termination.[39]

To the extent the Department relies on CO Lyons' statement on June 29 that he was not 100% positive that he saw Biendl shut the gate that night, that statement must be considered in context. Months after the events, and after a number of interviews by the Department and MPD, and having wracked his brain repeatedly in an attempt to recreate the events of January 29, the Department investigators asked CO Lyons at the conclusion of the interview if there was anything he wanted to add. He then *volunteered*:

> I want to apologize for my bad memory. I am not 100 percent positive and I can't accurately say that I saw Jayme (Biendl) shut the gate that night. I can't honestly say that she did.

Exh. L-2, Tab 6 at 97. We all recognize that human perception and memory are frail, however, and few among us, months after an event—even an event of great significance—could state with absolute certainty that our memories of what happened are totally accurate in every detail. That CO Lyons recognized the difficulty of being absolutely certain, however, is not inconsistent with his statement that *to the best of his recollection*, he saw CO Biendl close the gate. *See*, e.g. *Id*. at 94-96. Moreover, the fact that he *volunteered* the observation about his lack of absolute certainty is evidence to me of an attempt to be as truthful as possible, not evidence of intentional falsehood.

[39] Nor do I find the differences in his statements particularly significant, i.e. whether he concluded the chapel was clear when he saw the gate shut or when an officer subsequently called the breezeway clear. In either case, he was apparently referring to the observed event (or combination of events) that caused him to check off the chapel as clear in his mind. In the absence of any compelling reason to believe that CO Lyons had a motive for attempting to falsify his description of that event that evening (the Department has not identified one), I find it substantially more likely that the discrepancy was due to confusion, lack of precision in his recollection, or plain misspeaking, rather than the kind of intentional dishonesty for which a corrections officer would justly face summary discharge.

With respect to the allegation that CO Lyons made inconsistent statements to MPD, a similar analysis leads to the same result. First, the Department's allegations in this regard appear to once again invoke the discrepancies between the logged time of 2045 and the event(s) that led CO Lyons to believe the chapel was clear. For the reasons already described, these allegations are insufficient to establish dishonesty. The Department also appears to contend, however, that CO Lyons' statements to MPD were inconsistent with a prior conversation he had with Lt. Shimogawa—specifically, that the day after the murder, he told Shimogawa that "to the best of his knowledge" Biendl had called in clear over the radio on January 29, whereas by the time CO Lyons was interviewed by MPD, he said he cleared the chapel when he saw Biendl release the inmates and close the gate. Exh. L-5 at 3.

This allegation, too, falls short of establishing intentional dishonesty in responding to an investigation. First, Lt. Shimogawa was not "investigating" anything. Rather, as he testified at the hearing, he was making the rounds of employees after a traumatic event, checking to see how they were doing. The context of this sort of personal and informal conversation gives CO Lyons' statement less significance than it might have had it occurred during a formal investigation into the events of January 29. Second, and more importantly, CO Young had little motive at the time of his conversation with Lt. Shimogawa to falsely claim that Biendl had radioed that the chapel was clear, and it would have been foolish to lie on that issue given the ease of disproving such a claim by consulting the recordings of the radio calls on January 29. *See*, e.g. Exh. S-16. Finally, it is significant to me that in the allegation *itself*, the Department says that Lt. Shimogawa quoted CO Lyons as saying that *to the best of his knowledge* Biendl had radioed clear. In other words, CO Lyons was not making an unequivocal assertion that she had done so.

As noted, allegations of dishonesty in corrections, at least when cited as justification for summary discharge, must be established with the clearest of proof, but the Department's proof against CO Lyons fails to rise to the required level here. It simply is not clear enough to convince me that CO Lyons was intentionally dishonest. For that reason, the termination cannot stand.[40]

3. Discipline of CO Lyons

For the reasons set forth above, the discharge of CO Lyons must be rescinded. Given his failure to follow up with CO Biendl to ensure that the chapel was actually clear when he logged it clear at 2045, I find that CO Lyons should receive a disciplinary penalty like that meted out to Lt. Briones for a similar failure to meet the Department's standards of accuracy in documentation of important matters. Thus, the discharge of CO George Lyons shall be reduced to a written reprimand, and I will order that he be reinstated without loss of seniority and be made whole for lost wages and benefits.

C. Grievant Charles Maynard

In support of its decision to discharge CO Maynard, the Department contends that he improperly failed to fully inspect and secure the chapel after finding Offender Scherf, that he nevertheless falsely certified that he had done so in a written incident report filed the night of the murder, that he violated Department policies by failing to notify the shift office immediately upon finding Scherf (and also by confronting the inmate alone), and that he failed to answer questions honestly in both the DOC and MPD investigations. Exh. M-4 at 1-2.

[40] With respect to the Department's alternative argument, I would add that even if the Department is correct that "gross negligence" is sometimes sufficient to support summary discharge (Brief at 31-32)—a matter I do not decide—for reasons already outlined, I could not find on this record "such a gross want of care and regard for the rights of others as to justify the presumption of willfulness and wantonness." *Black's Law Dictionary* at 1185 (Rev'd 4th Ed., West, 1968); *see also*, *Discipline and Discharge in Arbitration*, *supra*, at 183 ("reckless or wanton disregard of the consequences").

1. Failing to Search and Secure the Chapel; False Incident Report

CO Maynard's incident report, prepared before he went home the night of January 29, said that "CO Fredricks placed I/M Scherf in cuffs while I inspected and secured the chapel." Exh. M-1, Tab 2. The discharge letter, Exh. M-4, alleges that "had you conducted a proper search of the building Officer Biendl would have been found over an hour sooner." *Id*. at 1. Further, the discharge letter asserts that in a Department interview on June 29, 2011, "you admitted you did not inspect the chapel as you indicated in your [incident report]." Id. at 2. Rather, CO Maynard allegedly stated "I wrote down what was expected of me, not what I did." *Id*.

At the outset, I note that the Department was unable to produce any document of which CO Maynard would have been aware that defined the key terms at issue, i.e. "inspect" and "secure." The discharge letter's usage, at least with respect to "inspect," seems to be synonymous with "search," i.e. the letter repeatedly refers to CO Maynard's alleged failure to "search and inspect" the chapel. And, indeed, the *Department* appears to have used those words essentially interchangeably in at least one context, i.e. "living unit" security inspections. *See*, Exh. M-13.[41] But the record does not establish that CO Maynard intended or understood the term "inspect" to be the equivalent of "search."[42] Nor does the discharge letter cite any policy or procedure that *required* CO Maynard to search the chapel building under these circumstances.

I understand the Department to argue, however, that an experienced and reasonable CO, having discovered an offender in an improper area, and one who potentially had unsupervised access to rooms within a building (especially rooms with computers that might have enabled him

[41] As the Union points out, Exh. M-13 is not a formal policy or procedure, but rather is an excerpt from training materials utilized in 2006. There is no evidence, however, that CO Maynard ever saw it.

[42] Rather, CO Maynard testified that "inspect" meant something more casual to him, like an "inspection" of the troops in the military, i.e. a walk-by to see if anything looked out of order.

to communicate outside the facility), would have thoroughly searched the building. And that is particularly so, the Department seems to be saying, in the early stages of investigating an escape attempt, e.g. before a picture count of inmates has been completed and thus before it is clear that all other inmates have been accounted for. I have no problem with that assertion as a general matter, but in this particular context, it strikes me as unfair to CO Maynard for several reasons.

First, it is undisputed that immediately upon being notified that Scherf had been located, Lt. Shimogawa ordered that the offender be escorted to the shift office in restraints. Exh. S-16 at 3 (13 seconds after CO Fredricks radioed to the Shift Sergeant that Scherf had been found). The evidence established that it takes at least two officers to escort an offender safely in restraints (one on each arm), and that another officer may be useful to provide assistance if the inmate attempts to escape or if it is necessary to unlock and open gates so that the hands-on officers do not need to let go of the prisoner to pass through. This fact is significant to me for two reasons. First, there is no dispute that officers receiving an order from a Lieutenant to do something are expected to comply forthwith, and a CO under those circumstances might reasonably believe that all three officers were needed to comply with the order. Former Superintendent Frakes testified, by contrast, that a Lieutenant would not be expected to criticize an officer for delaying compliance with the order long enough to do at least a cursory search of the building where the inmate was found, and I have no reason to doubt his testimony. But to an officer on the front lines of this unusual occurrence, with no particular reason at that time to know that a murder had occurred in the sanctuary,[43] I am not certain it would be so clear that a search was in order and

[43] It strikes me that there is a strong element of hindsight in the criticism of CO Maynard for failing to thoroughly search the chapel building, i.e. we all know that CO Biendl's body was located just steps away and could have been discovered an hour earlier than it was. But CO's Maynard, Fredricks, and Wahleitner had no way of knowing that when they apprehended Scherf on January 29.

should take precedence over immediate compliance with an order to escort the apprehended prisoner to the shift office.

Second, there are practical difficulties, it seems to me, with the Department's theory that CO Maynard should have searched the chapel. I believe it is undisputed that as a matter of officer safety, searches generally require two officers. But Officers Fredricks and Wahleitner were already occupied with the restraint and escort of Scherf to the shift office, and it was not unreasonable to think they could use Maynard's assistance in accomplishing that task. Moreover, because CO Maynard was the officer who found Scherf, it was reasonable to think that the Lieutenant might want to speak with him. Thus, I do not find it unreasonable that CO Maynard would be eager to join his co-workers in escorting Scherf to the shift office. Moreover, by "searching" the chapel more exhaustively, instead of just taking a quick look to see if anything seemed out of place, CO Maynard might have violated Department policy in other respects. For example, because there was ample reason at that time to suspect Scherf of the crime of "attempted escape," Policy DOC 420.320 comes into play, i.e. when an offender is suspected of a "new crime," "only the Superintendent/designee will authorize appropriate searches, unless immediate action is necessary." Exh. S-5 at 3.[44] To be sure, there is an escape clause in the policy, i.e. "unless immediate action is necessary." But once again, it is only with hindsight that CO Maynard could have known that a search would have uncovered CO Biendl's body, the apparent reason the Department believes "immediate action" was appropriate.

For these reasons, I cannot find that the Department had just cause to discipline CO Maynard for failing to search the chapel thoroughly. It is a separate question, of course, whether just cause existed to discipline him for *reporting* that he had "inspected and secured" the chapel

[44] I assume this policy is designed to ensure that searches are conducted according to proper procedures so that any evidence discovered will be admissible in a subsequent criminal trial against the offender. That is not a policy to be lightly disregarded.

even if no policy *required* him to do so. Because, however, there is insufficient evidence that CO Maynard understood the terms "inspect" and "secure" to be the equivalent of a full-blown search, as the Department apparently argues they should be understood, I cannot find that he falsely documented having inspected and secured the chapel. The Department's best argument to the contrary is his subsequent statement that he "wrote down what was expected of [him], not what [he] did." Exh. M-1, Tab 8 at 95.

To put that statement in context, however, the investigator told CO Maynard, months after the event, that the video did not show anything that looked like checking or inspecting the doors in the hallway as he had noted in his Incident Report. According to the investigators' summary (edited and condensed from investigation notes into question and answer format after the fact—a process I will examine in more detail later) he explained that he was in a hurry to submit his report before the end of his shift and

> I wrote down what was expected of me, not what I did. I wasn't sure what they wanted from me and things were really busy that night.

Id. The Department treated this alleged statement as an admission that he had not actually done what he reported doing, and while that is one possible reading, it strikes me as not the only one.

I had the distinct impression at the hearing that written communications skills are not CO Maynard's strong point (e.g. he testified without contradiction that he often had to re-do his reports several times before the Shift Sergeant and Lieutenant were satisfied with them), and another possible reading of his alleged statement is that he reported what he had done using a shorthand, conclusory, or boilerplate description ("inspected and secured the chapel") rather than the details of *exactly what he did* in that regard. For example, when asked a follow-up question about whether he checked or inspected any doors, CO Maynard replied "I shut the lights off in the library. I don't believe I checked any doors except maybe the library door. I think I closed the

library door behind me after I shut off the lights, but I can't remember now." *Id*. Once again, the Department apparently views this follow-up statement as the equivalent of an admission that his earlier answer was knowingly false, changed only because they had told him about the video evidence, but it seems just as likely to me to reflect amplification of an earlier answer upon being asked for clarification.

Be that as it may, the critical element that is missing from the Department's theory on this issue, frankly, is *why* CO Maynard would have had any motive to misrepresent his actions on January 29 in an incident report apparently completed at 10:02PM, more than twenty minutes *before* CO Biendl's body was found in the chapel. Tr. at 1517-18. As the *Discipline and Discharge in Arbitration* treatise notes, motive—or lack thereof—is often an important factor "in determining whether the alleged falsification has taken place." *Id*. at 304. In the absence of convincing evidence that an employee stood to gain in some way from providing inaccurate information, explanations such as honest mistake, sloppiness, or lack of attention to detail become just as likely as dishonesty, and perhaps even more so.[45]

2. Confronting Offender Scherf Alone

The Department next alleges that CO Maynard violated Department policies by confronting Scherf in the chapel without first notifying the shift office and waiting for backup. CO Maynard testified that he waited until COs Fredricks and Wahleitner were "arriving" on scene before unlocking the chapel gate. At that point, he said, he saw Offender Scherf for the first time sitting in the foyer. He proceeded to the chapel door, then as he was reaching for his radio to notify the shift office, he heard CO Fredricks calling in that Scherf had been located.

[45] The Department's argument is also hampered here because, as I will discuss in greater detail later, no verbatim transcript exists of the questions and answers for any of these Grievants, so the Arbitrator has been deprived of a key piece of evidence he might have found useful in drawing his own conclusions about the honesty of CO Maynard in this exchange.

Thus, according to CO Maynard, he did not begin to confront Scherf until back-up had arrived, and he did not radio the shift office only because CO Fredricks beat him to it.

COs Fredricks and Wahleitner each indicated, however, that when they arrived at the chapel, Scherf and CO Maynard were already standing outside the chapel just inside the gate. Exh. M-1, Tab 9 at 107; *Id*., Tab 10 at 113. Moreover, CO Maynard confirmed in his testimony, as outlined above, that he unlocked the chapel gate and went inside the chapel grounds even after noticing Offender Scherf sitting in the foyer—although again, I think it would be fair to characterize his testimony as that he proceeded inside the gate as COs Fredricks and Wahleitner "were arriving" on scene. Tr. at 1507-08 (shortly after stepping inside the gate and moving to the chapel door, he reached for his radio to make the call but heard CO Fredricks "right behind him" make the call before he could do so).[46]

According to CO Maynard, he had been trained at some point by DOC that one officer should proceed alone into a potentially dangerous situation to determine if it is safe for other officers to enter the situation as well. *Id*. There is no evidence in the record of such a policy or procedure, however, and to the contrary, the Yard Officer Post Orders clearly provide that in an emergency a CO should not "rush into crowds, through doors or into cells/rooms." Exh. M-12 at 2. Similarly, CO's are admonished "Do not become actively engaged in the problem/incident until notification has been made and assistance has arrived." Id. (emphasis in original). CO Maynard's own testimony establishes that he violated these admonitions. That is, he concedes that he opened the gate and proceeded to walk to the doorway of the chapel before *any*

[46] As an aside, I note that the Department has not argued that CO Maynard provided false information by saying that all three officers were in the foyer of the chapel at the time the offender was patted down and cuffed, whereas Fredricks and Wahleitner both described these events as occurring just inside the gate, but outside the chapel building itself. I must assume, then, that the Department viewed the discrepancy as within the normal range of good faith differences in recollection of officers responding to an emergency. That discrepancy seems to me, however, to be much sharper than some of the discrepancies relied upon by the Department to accuse the Grievants of dishonesty, including some of the allegations against CO Maynard I will analyze in the next section.

notification had been given to the shift office, let alone the kind of information required by the "Notification" section of the post orders.[47]

Thankfully, CO Maynard's failure to follow the prescribed procedures as to notification in an emergency did not result in harm to anyone, but the rules are obviously designed to afford maximum protection to officers who may not know exactly what dangers they are facing. As the Department points out, for example, the potential danger here was high given that Scherf had murdered CO Biendl. Department Brief at 72. That danger, of course, would only have been knowable to CO Maynard with hindsight—but in this case, that is exactly the point. Because the precise nature of the potential danger to an officer in any given situation cannot always be fully understood in advance, it is important in every situation—as the post orders expressly provide—to detect, notify, isolate, and contain, then seek direction from the chain of command about what steps to take next. CO Maynard failed to meet those expectations here.

3. Failure to Answer Questions Honestly During the Investigations

The Department also contends that CO Maynard lied to the MPD in an interview two days after the murder. Specifically, says the Department, he falsely told the police that he had "inspected" the chapel "checked" the doors and the library area. In carefully reading the transcript of the interview, however, I do not see that CO Maynard used the term "inspect." Rather, he said "I went through the unlocked part of the chapel and I checked it over. There was noth . . . nothing unusual in the chapel. I turned off the lights. I went out the door. Secured the chapel and followed them back to the shift office." Exh. M-1, Tab 5 at 27. The investigator then asks "Were any doors open that should have been opened or . .?" CO Maynard replied "No."

[47] The "information needed" includes name, location and call sign, the location and nature of the incident, the number of offenders, staff or citizens involved, if there are any injuries to anyone, type of weapons involved, if any, and the type of assistance needed. *Id*. Moreover, the post orders clearly provide that a CO should "seek direction from your chain of command for what specific steps to take next." *Id*. ("Evaluate and Document"). CO Maynard failed to follow these procedures.

They were all locked." *Id.* Similarly, CO Maynard told the Department's investigators on June 29, 2011 that he "checked" the office doors in the hallway and all of them were "secure." Exh. M-1, Tab 8 at 94. When asked if he pushed on the doors or tried the door handles, he replied "Yes, they were all locked." *Id*. Then when told that the surveillance video did not show him physically checking any doors, he said "I don't believe I checked any doors except maybe the library door." *Id*. at 95.[48] He also told the Department that he had not "checked" the sanctuary door, but he had told MPD during their investigation that the sanctuary door was locked.

Again, for me to sustain an allegation that a correctional officer has lied—particularly under oath—requires the clearest of proof. But while I agree that there are some troubling aspects of CO Maynard's statements, I cannot find that the record contains sufficient evidence to meet the high standards of proof the Department must meet, particularly in light of the known limits of human perception and memory, and especially when many months have passed between an event and a witness's attempt to recall that event. Starting with the last issue, CO Maynard explained that he *assumed* the chapel door was locked because he overheard heard a conversation between COs Fredricks and Wahleitner about their keys not working in the sanctuary door. It may be that CO Maynard should not have made such an assumption and can be fairly criticized for having done so. That is not the charge against him, however. Rather, the Department alleges that he knowingly *lied* about having physically checked the sanctuary door. A careful reading of the record, however, establishes that CO Maynard never told the MPD that he had *physically* checked the sanctuary door (*see*, Exh. M-1, Tab 5 at 27), and thus his statement to the MPD (the door was locked) and his statement to the DOC (that he had *not* physically checked the door) are simply not inconsistent.

[48] At the hearing, CO Maynard testified that he visually inspected the doors in the hallway to be certain they were closed and assumed they were locked because the doors have "slam locks."

At one point, CO Maynard *did* tell the DOC that he had physically checked at least some doors. Exh. M-1, Tab 8 at 94. The Department notes, however, that he promptly altered his account moments later when told that the surveillance video did not show him "checking" or "inspecting" any of the doors. *Id*. at 95. In evaluating this allegation, I note that this interview occurred five months after the murder, and while I agree this sequence of events raises a legitimate question about whether CO Maynard was entirely accurate in his description of what he did on January 29, it does not necessarily rise to the level of convincing proof of an intentional falsehood. Anyone familiar with testimony given by law enforcement personnel has frequently experienced answers to questions that are given primarily from the written report the officer had prepared at the time of the event, not from present memory. Here, for example, CO Maynard could not recall for certain whether he had closed the library door, *Id*. at 95, although the video clearly shows that he did so. In any event, getting one minor detail wrong—as many other COs also did in their interviews[49]—does not amount to the convincing proof of dishonesty necessary to support a finding that a CO should forfeit his career.[50]

[49] For example, CO Fredricks said unequivocally that none of the COs responding to the chapel entered the building proper, *see*, Exh. M-1, Tab 7 at 71; *Id*., Tab 9 at 108, but although her statements in that regard were false (as we know from the video), no one has suggested that she intentionally lied.

[50] To the extent the Department relies on CO Maynard's statement "I only wrote what was expected of me, not what I did," I have already disposed of that contention above. Nor am I persuaded that his belated changing of his May 25 DOC interview summary by crossing out the language stating that he had "inspected all the interior doors"— writing in "statement was an error" instead—is sufficient to establish dishonesty. As CO Maynard explained on cross examination, he was asked to read his interview summary and make changes if he saw something "wrong." He thought that "'checking' might have indicated to someone that they, you know, I'm physically doing it, and that was an incorrect statement." Tr. at 1526-27. I recognize the Department's reasons for skepticism, but it seems to me the purpose of presenting a statement to a witness for verification is to provide an opportunity to correct any information that is incorrect for whatever reason—whether a misunderstanding of the note taker or an answer that, upon reflection, is incomplete or misleading. And given the absence of a verbatim transcript or recording (to which the Union apparently objected), there are many opportunities for misunderstandings and inaccuracies. If an officer were to be accused of dishonesty every time he or she made a change to a summary to correct an inaccuracy, however, I suspect that interview summaries would be far less valuable to the process because they would likely become more inaccurate, not less.

4. Discipline of CO Maynard

For the reasons set forth above, I find that the Department has failed to establish by the requisite quantum of proof that CO Maynard was dishonest in his incident report or in his statements to investigators. I also find that the Department has failed to prove convincingly that CO Maynard had a clearly understood obligation to thoroughly search the chapel building the night of January 29, 2011 when he and CO's Fredricks and Wahleitner apprehended Offender Scherf. I do find, however, that CO Maynard failed to meet the expectations of a Yard Officer who detects an emergency or unusual incident, i.e. to notify, isolate, contain, and to seek direction from the chain of command as to how to proceed. While that failing could have resulted in severe danger to himself and perhaps to his fellow CO's who were on their way to assist him (in light of the fact that Scherf had already murdered one officer that night), that fact was unknown to CO Maynard at the time. It is fair to consider the situation from the perspective of a reasonable officer suddenly thrown into an emergent situation, and balancing that against the very real danger that was in fact present, CO Maynard's failure to live up to the Department's clearly expressed expectations deserves some level of discipline, i.e. more than nondisciplinary corrective action is warranted. I find that the Department had just cause to issue CO Maynard a written reprimand.

I will order that CO Maynard's discharge be reduced to a written reprimand and that he be promptly reinstated without loss of seniority and made whole for lost wages and benefits.

D. Grievant David Young (Nathan Dahl)

1. Not Standing Movement in Zone 3 on January 29, 2011

The Department contends that CO Young's failure to stand in Zone 3 during the 2030 recall on January 29, 2011[51] provided an opportunity for Offender Scherf to re-enter the chapel undetected and to murder CO Biendl. Exh. Y-4 at 2; Department Brief at 41. That, of course, is what Offender Scherf claimed in his confession, but as noted, the Union strenuously argues that I should disregard this evidence because of the lack of cross examination. Union Brief at 52-55. The Department contends, by contrast, that Scherf's confession is a statement against interest within the meaning of Rule ER 804(b)(2), and thus is admissible without being subject to cross.[52] The Union counters that the portion of Scherf's confession the Department relies upon—specifically his claim that he looked to see if a CO was posted in Zone 3 at the customary location, and when he saw no one there, he turned around and re-entered the chapel—is actually an attempt by Scherf to deflect at least part of the blame for CO Biendl's murder onto someone else.

These are interesting legal questions, but I do not find it necessary to resolve them. The more important inquiry, at least under these circumstances, is not whether the confession was properly admitted into evidence, but rather, first, how much weight, if any, that confession should be given. Second, getting to the heart of the matter, the real issue is whether the totality of

[51] There is no dispute that CO Young failed to stand in Zone 3 during the recall. Rather, he testified that he was approximately two minutes late for the 2030 movement, and stood at the base of Tower 9, which is not in Zone 3. He was there for a few minutes doing random pat searches and talking to the Yard Officers who were standing nearby at the Yard turnstiles.

[52] This exception to the hearsay rule only applies, however, if the declarant is "unavailable," and it is not necessarily clear to me that Scherf could not have testified via video conference while in custody. On the other hand, he may not have been willing to do so given that he had apparently retracted his confession and was awaiting trial for the murder at that time. In any event, as noted earlier, formal rules of evidence are not necessarily applicable in labor arbitration, although the policies behind the rules may well be taken into account by the Arbitrator in determining the weight to be given any evidence that is admitted into the record.

the evidence, including Scherf's confession, establishes convincingly that CO Young engaged in misconduct so serious that it was properly punishable by summary termination rather than corrective action or progressive discipline.[53] I find that it does not, and thus whether or not the confession should have been admitted into evidence is immaterial. While there can be no doubt that the Department had clear *written* rules that required the Zone 3 R&M to be posted in Zone 3,[54] and that the preferred location was to stand near the PAB breezeway during movement (a location from which the officer would be in a position to observe both the breezeway and the chapel gate),[55] these rules were insufficiently enforced to be genuine "rules" applicable at all times. That is, for discipline purposes (and particularly for summary discharge) the "rules" are not necessarily what is written down, but rather what supervisors consistently allow employees to "get away with."

The evidence before me establishes that prior to January 29, 2011, movements often took place without R&M's standing in every zone[56] despite the fact that the formal rules of the

[53] As noted, the Department's theory is that if CO Young had been in his proper position during the 2030 recall, Offender Scherf would have seen him and would not have attempted to re-enter the chapel (or at least CO Young would have observed any attempt to do so and would have been in a position to aid and protect CO Biendl). As the Union points out, that theory is somewhat inconsistent with the Department's public pronouncements that the policy violations by staff members, including the Grievants here, "did not directly contribute to Biendl's death." Union Brief at 53; Exh. U-19 (DOC News Release dated July 22, 2011).

[54] For CO Young, these expectations were not only contained in the post orders and daily assignment sheet for R&Ms, but also were expressly cited as expectations in his Performance Development Plan ("PDP") as given to him by Sgt. Crabtree. Exh. Y-1, Tab 6 at 25. The evidence established that Sgt. Crabtree, on the two shifts per week he worked with CO Young, consistently enforced an expectation that R&M's be posted not later than one minute prior to movement (leading CO Young to grouse that Sgt. Crabtree "micromanaged" the R&M's), but as I will discuss later, it appears that Sgt. Johnson—who supervised CO Young the other three nights of the week—did not consistently enforce the rule that R&M's had to be posted in their zones of control prior to movement.

[55] It seems to me to be beyond question that, had CO Young been standing in the appointed spot in Zone 3 during 2030 recall, it is much more likely that he would have been able to observe any out of the ordinary activity in the chapel area—whether an offender closing the gate from the inside, an offender returning to the chapel after having been dismissed by CO Biendl, or whatever happened that night. *See*, e.g. Tr. at 1473 (Sgt. Christopher Johnson). Standing at the base of Tower 9, however, where he actually stood, he was much less likely to be in a position to observe any of these unusual occurrences.

[56] According to CO Robert Witherell, a two day per week Tower 9 Officer, R&M's were often late in Zones 1 and 2, and often did not appear *at all* in Zone 3. Tr. at 551.

institution required that Main Control verify with Tower 9 that officers were in place before calling movement. That procedure had not been routinely followed, however, for several months prior to January 29. Tr. at 1296-98 (Lyons).[57] CO Lyons also testified that the Sgt. and the R&M's got upset with him when he previously *had* followed the rule. *Id*. In addition, there was some suggestion, in the testimony of CO Maynard, that delays in calling movements had upset inmates because they only had so much time to get to their scheduled programming. Inmates who are unhappy, I presume, make the staff's lives more difficult. In any event, and for whatever reason, shortly after the institution went from close custody to medium custody, the procedure of having Tower 9 verify to Main Control that adequate staff was in place was no longer generally followed. *Id*.[58]

In addition, even when the rule requiring Main Control to call to Tower 9 prior to movement was still enforced, the standards for determining whether "adequate staff" were in fact in place were apparently relaxed. For example, CO Witherell testified that precisely what constituted adequate staff was "a gray area," but Main Control specifically told him that "as long as [he] had two officers at the base of Tower 9, that was enough staff to run movement." Tr. at 521; 546. Similarly, Sgt. Johnson testified that he had never given a "firm directive" about precisely *where* R&Ms were to stand during movement, although he indicated that he had told people to "bring up the rear," i.e. to follow the last of the offenders out of the area, which he contended implied, at least, that an officer would have to be in the assigned zone of control

[57] A Sick Relief Sergeant, Sgt. Jimmy Fletcher, testified that when covering for an absent shift sergeant, it was his practice to call Tower 9 to verify that R&Ms were in position when movement was about to begin. Tr. at 352-53. But as a sick relief, Sgt. Fletcher obviously worked less frequently than Sgt. Johnson or Sgt. Crabtree, the RDO ("regular days off") Sergeant. Therefore, for more than half of the Watch III workweek, no one was consistently verifying that R&M's were in place before movement was called.

[58] There is no evidence, for example, that there was a call to Tower 9 on January 29 verifying that adequate staff were in place for movement at 2030. *See*, e.g. Exh. S-16 (radio log).

(although, I would note, not necessarily prior to the beginning of movement). Tr. at 1456. In any event, many of the witnesses at the hearing testified that it was often a problem to get R&M's in place for movement, *see*, Union Brief at 9-12 (summarizing testimony), and Sgt. Johnson testified that he did not believe the problem was limited to CO Young.[59] Johnson testified, in fact, that he had as much to be concerned about with many of the other R&Ms (including several of those who were complaining about CO Young) as with Young himself[60] and "did not have an R&M that was sterling and 100 percent reliable." Tr. at 1462.[61]

Against this tide, Sgt. Crabtree and several others who saw the need for proper posting during movement fought what appears to have been a somewhat lonely battle against this complacency in ensuring proper observation of offenders by CO's during movement.[62] In fact, as previously noted, complacency appears to have been widespread in WSR as judged by the NIC Report and the L&I citations. While the consequences of that complacency are painfully

[59] CO Witherell agreed with Sgt. Johnson's assessment. Tr. at 537.

[60] The Department suggests that CO Young was worse in this respect than the others, while the Union counters that the evidence does not support that conclusion, especially in light of post-January 29 complaints that may have been motivated by the dislike of CO Young by at least one officer who held him responsible for the Biendl murder. Union Brief at 12. While my impression was that perhaps CO Young presented a greater problem than others, I could not say that the record definitively proves that is so. There is simply too much back and forth between the R&M's for me to tell, i.e. what Sgt. Johnson in his testimony called "infighting."

[61] Although this testimony suggests that Sgt. Johnson was aware of a problem in consistently getting R&Ms to stand in their zones, it is unclear to me precisely what he was doing to address that issue.

[62] For example, while Sgt. Crabtree placed specific expectations in the PDP's of the R&M's for which he was the formal supervisor—and took steps to enforce those expectations, such as physically checking the posts to ensure that the CO's were in place and on time—he only supervised CO Young two shifts per week. Sgt. Johnson, however, who supervised Young the other three shifts, apparently felt he had limited responsibility to enforce Sgt. Crabtree's expectations. *See*, Tr. at 1481-82. Rather, Sgt. Johnson expected R&M's to be adults and to post themselves appropriately. As the five-day per week shift sergeant, however, he said that unlike Sgt. Crabtree, he had volumes of paperwork that kept him in the office and not in a position to monitor the R&M's closely. Thus, while Sgt. Johnson conceded that he was expected to be "vigilant" about R&M's standing in their zones, he noted "that was one of the many things I had to be ever-busy with," essentially suggesting that the volume of his responsibilities interfered with his ability to monitor the R&M's during movements. Tr. 1466. At least one CO, however, observed that sergeants and lieutenants appeared at times not to enforce CO Young's obligation to stand for movement, perhaps unrelated to the volume of work. *See*, e.g. Tr. at 233-34 (CO McAfee describing an incident when movement was called while he observed CO Young sitting in Sgt. Johnson's office; McAfee left and stood for movement, and when he returned to the shift office, Sgt. Johnson and CO Young had not moved).

clear in retrospect, the fact that it was widespread *before* the murder cautions strongly against singling out one complacent front-line officer for substantially more significant discipline than others when something goes wrong, as it did here.

In sum, Main Control thought two officers at the base of Tower 9 were sufficient to run movement—and later abandoned altogether the process of checking to see if adequate staff were available before calling movement. At the same time, Sgt. Johnson failed to enforce Sgt. Crabtree's expectation that the R&Ms he supervised, including CO Young, appear in their assigned zones one minute prior to movement (whether because Sgt. Johnson was overwhelmed with paperwork or did not want to be involved in a "micromanaging" approach to supervision). In addition, the evidence suggests that prior to the Biendl murder, a number of R&M's, not just CO Young, often failed to stand for movement in their zones (or when assigned as rovers, failed to take the initiative to fill in when they saw a zone empty), but they were never counseled or disciplined. Given that background, it is far too harsh, and it is inconsistent with just cause, to proceed immediately to summary termination against a single CO who just happens to have been assigned to a critical location on the night the awful significance of this generalized complacency became apparent.

I note a significant irony here, however. Had the Biendl murder occurred on a shift personally supervised by Sgt. Crabtree, my analysis of the propriety of the discharge of CO Young might well be different. That is so because Sgt. Crabtree had made his expectations crystal clear to CO Young and had taken substantial and repeated steps to enforce them.[63] But there was in effect a different "rule" on the shifts supervised by Sgt. Johnson. Specifically, in an

[63] Several witnesses, including Sgt. Johnson and CO Young, termed his efforts "micromanaging," which suggests to me that Sgt. Crabtree's efforts were consistent and effective in conveying his expectations. CO Young, in fact, confirmed that to be the case and noted that he behaved differently on shifts under Sgt. Crabtree's direct supervision. Tr. at 1393.

interview by DOC investigators on May 25, 2011, Sgt. Johnson stated "Prior to January 29th, it was not a firm requirement for R&Ms to stand movement. Prior to January 29th, it was not a firm expectation for response and movement officers to stand in a *specific position* during movement. Exh. J-1, Tab 11 at 76 (emphasis in original). Unless and until employees working under Sgt. Johnson had been clearly notified that he expected more of them in terms of standing for movement, those are the rules under which the propriety of the discharge of CO Young must be evaluated.

I find that the Department did not have just cause to discipline CO Young for failing to stand for movement in Zone 3 during the 2030 recall on January 29, 2011.

2. Conflicting Statements and Dishonest Answers to Questions

The Department also supported the discharge of CO Young on the basis that he gave conflicting and dishonest answers during the investigations. Four such offenses were specified in the discharge letter. Exh. Y-4 at 2. First, the Department notes that CO Young told the DOC investigator that he was at the base of Tower 9 during the 2030 recall, but COs Maynard and Wahleitner "did not recall" him as being there. *Id*. But as the Union correctly points out, saying that one "does not recall" something is not the same thing as saying affirmatively that it did not happen. For example, when asked if he saw CO Young at any of the movements on January 29, including the 2030 recall, CO Wahleitner specifically told the DOC investigator "I just don't recall. He may have been there, he might not have been there." Exh. Y-1, Tab 15 at 158. CO Maynard gave an almost identical answer to that question: "I don't recall. He might have been there; he might not have been there. It's been too long to say for sure." *Id*., Tab 16 at 168. Moreover, CO Swan, who had no reason to testify falsely on the issue because he appears to blame CO Young for the Biendl murder, testified that he observed CO Young at the base of

Tower 9 during all of the January 29 movements *except* for the one at 1850. Tr. at 268. In sum, the evidence does not convincingly establish that CO Young was not at the base of Tower 9 *at all* during the 2030 recall, which appears to be the Department's theory behind this allegation.

Second, the Department alleged inconsistent and dishonest statements in that CO Young told the DOC that he was at the base of Tower 9 during the 2030 recall, whereas he told MPD that he was in the office working on an email at 2030 and arrived at the base of Tower 9 at 2032. I do not see the alleged inconsistency, i.e. if CO Young arrived (albeit late) for the 2030 recall, he was present for *at least a portion* of the 2030 recall which lasts until Yard-In at 2045. The evidence does not convincingly establish the alleged dishonesty.[64]

Next, the Department alleged that CO Young falsely claimed to be involved in the escort of Offender Scherf after he was found in the chapel. Exh. Y-4 at 2. The Department's Brief does not address this allegation in any detail. In any event, however, for the reasons succinctly summarized in the Union's Brief at page 60, I could not find the evidence sufficient to support a conclusion of deception or dishonesty in the specific statements made by CO Young. They are too ambiguous to convincingly establish the dishonesty alleged, and there are plausible ways in which the statements can be reconciled so as not to be genuinely conflicting.[65]

Finally, the Department alleged that CO Young made a substantial number of significant changes to his interview summaries that did not reflect his actual answers given during the

[64] To the extent the Department relies on CO Young's statement that it was "likely" he was on the computer in the shift office from 2030 to 2043 when he sent the email, I do not find the argument sufficiently convincing. First, at least one fellow CO (Swan) testified that CO Young was at the base of Tower 9 during the 2030 recall, i.e. there is evidence that, no matter what he might have said during the investigation, he was in fact not in the shift office the entire time between 2030 and 2043. Second, CO Young made changes to his interview summary to say just that (more on that later), i.e. that he stood for movement at the base of Tower 9, arriving at 2032. Exh. Y-1 at 136.

[65] Specifically, CO Young said that he "fell in behind others" who were escorting Scherf (so if others said they did not see him, perhaps it was because he was behind them), and he gave two different estimations of how close he got to the offender during the escort (although I agree with the Union that it appears the distance estimates were in response to questions concerning different points in time, i.e. the distance when he first observed Offender Scherf– 20 feet—and how close he got during the entire incident—3 feet.

interviews, i.e. he allegedly added things he had *not* said and without explanation crossed out things he *had* said. Exh. Y-4 at 2. I previously discussed a similar issue with respect to CO Maynard, but I will go into greater detail here. As background, the DOC investigators took notes of their interviews and then later prepared typewritten summaries that were submitted to the witnesses to review for the purpose of noting "any additions, deletions, and/or changes." *See*, e.g. Exh. Y-1, Tab 14 at 153. The interviews of bargaining unit members were not tape recorded and thus no verbatim transcripts could be prepared.[66] Moreover, the investigators' original notes were not preserved (it is unclear to me whether they were lost or intentionally destroyed here), so it is impossible for the witnesses, the Union, or the Arbitrator to compare them to the summaries. In any event, when the summaries were submitted to the witnesses, they were asked to make edits as noted above, and then to "attest that the above statements are true and accurate to the best of my knowledge." *See*, e.g. Exh. Y-1 at 139.

These procedures make claims of inconsistent statements difficult for the Department to prove convincingly in this context. First, there is no way to test whether the summaries accurately track the notes of the interviews, let alone whether the notes *themselves* accurately reflect what was actually said.[67] Second, the Department apparently believes that when it submits the summaries to the witnesses, they are being asked to confirm that the summaries *accurately*

[66] The evidence established that the Union routinely advised its members not to agree to tape recording of their interviews. Michelle Woodrow, the Union's Director of the Law Enforcement and Corrections Division, testified that the Union advised members not to allow recording because the Department had established a previous practice of refusing to provide the Union a copy of the tape or an official transcript. Tr. at 1579-80. In the Union's view, this put the witness at a disadvantage, e.g. the Department could "cherry-pick" (Woodrow's term) testimony that suited its purposes, whereas the Union would not have access to an accurate record of the entire context for those statements. I make no finding as to the merits of the Union's claim.

[67] In my experience, interviewers often record what they understood the witness to *mean*, rather than precisely what was *said*. But because the English language is not precise, *see*, e.g. *Elkouri* at 9-13 ("The language of mathematics is precise. The English language is not"), and because "meaning" is often derived, at least in part, from tone and body language (which may be misconstrued), misconceptions are not uncommon—in fact, they are to be expected. These issues are difficult enough to sort out with a verbatim transcript, but that task is even more difficult when the precise words of the questions and answers have not been preserved in some way.

record the questions and answers during the interview.[68] The Department acknowledges, however, that "in some instances, witnesses make edits and state what they wished they had said during the interview, versus what was actually said." *Id*. But given that witnesses are told that they may make changes, additions, and deletions to the summaries, and then are asked at the end of the process to attest that the statements made are "true and accurate to the best of my knowledge," that should hardly be surprising. Under the circumstances, the fact that such edits—even substantial ones—have been made to a summary cannot, in and of itself, be proof of dishonesty or deceit.

In this case, CO Young did make substantial edits, of course, and he failed to respond to the Department's request for an explanation as to whether he contended his edits more accurately reflected what he had said during the interviews, or whether they were designed to alter the summary to say what he *wished he had said* (or perhaps, from his point of view, to be more accurate and complete). But assuming it is the second, from my review of the edits, they appear to me to be mostly different in phrasing and tone, or they provide additional information about context that is clearly intended to be at least partially exculpatory of CO Young. I understand why that approach made the Department skeptical of CO Young's forthrightness, but justified skepticism is just that, i.e. it does not necessarily prove that the revised information was untrue, deceptive, or dishonest—nor even that the revised statements were "inconsistent" with the answers purportedly given during the interview (assuming the draft summaries provided to CO Young accurately reflected those answers). In any event, neither the discharge letter nor the Department's brief explicitly specifies in what ways CO Young's edits taken together—or any of

[68] *See*, e.g. the email Investigator Piukkula sent to CO Young on June 30, 2011: "You have made substantial edits to [two summaries] that do not reflect our notes. *With these changes, you are representing your version of what was asked and answered during the interviews*." Exh. Y-1 at 140 (emphasis supplied). On the other hand, the signature blocks for the summaries themselves do not explicitly state that is what witnesses are being asked to verify. Rather, as I will address in a moment, witnesses are asked to attest that the *statements* in the summary are true and accurate.

them analyzed individually—amounted to dishonesty or deception, and without that kind of proof, I cannot find that the Department has met its burden to convincingly establish the alleged misconduct.

3. Discipline of CO Young

The Department has failed to meet its burden of proof with respect to the allegations against CO Young set forth in the discharge letter. I have not considered additional allegations against him contained in the Department's brief, e.g. that CO Young should have investigated lights he said he observed in the chapel as he headed past Gate 7 for fire watch that evening, that being two minutes late to stand movement for recall at 2030 was a major failing because he was already too late to notice Scherf returning to the chapel, that he improperly assumed that all the inmates were out of the chapel area as he saw a group pass through the turnstiles, or that he failed, even after the murder, to alter his pattern of performance. Department Brief at 47. I agree that some of these allegations, if convincingly established, would call into question the adequacy of CO Young's performance and might justify significant discipline. But these allegations were not relied upon at the time of discharge and thus cannot fairly be relied upon at this late date.

I do share Superintendent Frakes' disappointment, however, that CO Young was reluctant to take ownership of his own role in these unfortunate events. *See*, e.g. Exh Y-4 at 4. I note, on the other hand, that he did not totally deny that he had been complacent (rather, he repeatedly attempted to place himself as one, *among many*, who had been complacent). From someone who found himself near the center of a calamity of this magnitude, I would have preferred greater self-awareness and a greater acceptance of his own responsibility, perhaps even a dash of humility.[69] But in the absence of proven dishonesty, and even though CO Young's

[69] I saw no humility, and insufficient acceptance of personal responsibility. For example, even as late as the hearing, CO Young continued to deny the reasonableness of Sgt. Crabtree's expectations with respect to standing for

conduct and attitude were far from exemplary, there is insufficient reason for me to conclude that he is incapable of improved performance. I believe that he may well be if given clear notice of the Department's expectations—and not just in writing, but in the consistent day-to-day administration of his shift. I find support for this conclusion in the fact, as noted above, that CO Young, while a "challenge" to supervise, generally met expectations on shifts supervised by Sgt. Crabtree.[70] Under these precise circumstances, some form of nondisciplinary corrective action is appropriate, but not discipline.[71]

The Department did not have just cause to discharge CO David Young. I will order that he be promptly reinstated without loss of seniority and be made whole for lost wages and benefits.

E. Grievant Christopher Johnson

The Department demoted Sgt. Johnson to CO based on his alleged failure to take action (and to properly document it) with respect to CO Young's being "habitually out of his assigned zone of control . . . during offender movement." Exh. J-3 at 1. According to the Department,

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movement. *See*, e.g. Tr. at 1389-92. I find the attitudes he expressed consistent with Sgt. Crabtree's observation that "[Young] is kind of a challenge. He kind of wants to do things his way, and he didn't take direction very well." Tr. 562. In at least one very important respect, however, the facts strongly suggest that Sgt. Crabtree was far closer to a thorough understanding of what was appropriate professional conduct than was CO Young. Similarly, while CO Young conceded on cross examination that officer "presence" is an important deterrent to offender misconduct, Tr. at 1381, he then immediately interjected that "99 percent of the time . . . they're looking to do something incredibly petty, you know, pass a . . piece of candy to another inmate, which is against the rules, do some gambling, things of that nature." *Id*. That may well be true, but I was frankly surprised to hear this kind of "defense" in a proceeding about the remaining "one percent," i.e. the murder of a fellow correctional officer. For the reasons that follow, I will order that CO Young be reinstated, but without a change in his attitude, I would expect that reinstatement will be highly unlikely to lead to a satisfactory conclusion for either the Department or CO Young.

[70] Therefore, because the testimony suggested that procedures are much more rigorously enforced now, I would expect CO Young's performance to improve.

[71] I recognize that the Department will face a challenge in integrating CO Young effectively back into the workforce given the belief by several his co-workers that he could have prevented the murder of CO Biendl by taking his responsibilities more seriously. But just cause for discipline cannot be established by a vote of a Grievant's co-workers, even if their views were unanimous (which they do not appear to be here). Although this is a difficult situation, it is my hope that CO Young will meet the challenge of regaining the confidence of his co-workers and that all staff, with appropriate guidance from the administration, will recognize the necessity of working together as a cohesive and supportive team in this dangerous workplace.

these deficiencies in Sgt. Johnson's performance occurred both before and after the murder of CO Biendl, with the latter being especially troublesome. Moreover, says the Department, Sgt. Johnson was specifically directed by Lts. Shimogawa and Hellman to address CO Young's reported deficiencies in security practices and to document that he had done so, but Sgt. Johnson failed to follow through completely. The Union counters that Sgt. Johnson had a good record with no prior discipline, and that in the absence of dishonesty or some other cardinal offense, he was entitled to receive progressive discipline prior to the harsh penalty of demotion. Moreover, says the Union, Sgt. Johnson accepted responsibility for failing to document Young's performance issues,[72] even though he traced much of the problem to being overwhelmed with paperwork in his position as Shift Sergeant, a contributing factor recognized in the NIC report. Exh. U-9 at 22.

Prior to the murder, CO Swan complained several times to Sgt. Johnson that CO Young was not standing movement in his zone, or that he might stand for six minutes or so and then leave. After Swan would report the situation to Sgt. Johnson, Young would be better for a day, and then things would go back to normal. Exh. J-1, Tab 2 at 15. CO Witherell also complained once or twice. Exh. J-1 at 74. Johnson said he went out to check on Young one time, and Young was there, so "he never confirmed their story to their degree." *Id*. Sgt. Johnson then "let it go" and chalked it up to "infighting" and "lack of teamwork." *Id*. In addition, because of the crush of paperwork, Sgt. Johnson did not get out of the office as much as he would have liked to directly supervise the R&Ms during movement.

[72] Sgt. Johnson said he had spoken with Young, but because he failed to document it, "it looks like I've done nothing."

Sick Leave Sgt. Jimmy Fletcher[73] also testified that he had told Sgt. Johnson about problems with CO Young, but Sgt. Johnson replied "don't tell me how to run my shift or supervise my staff." Similarly, Lt. Hellman, prior to January 29, had told Sgt. Johnson to "set expectations" with CO Young and "go from there," but Sgt. Johnson told the investigators "I never found him missing, so it couldn't be problematic." Exh. J-1, Tab 11 at 76.[74] Nor did Sgt. Johnson inform Sgt. Crabtree of the issues with Young, because "I just didn't have the facts" and "didn't want to go off trash talk." *Id*.

Following the murder, Sgt. Johnson conceded that he continued to receive many complaints about CO Young, including complaints from Lt. Shimogawa and Sgt. Fletcher on which he did not document his follow up with CO Young. On February 11, 2011, Lt. Fletcher noted CO Young outside his zone for an extended period and his failure to appear at mainline (meal service in the offender lunchroom).[75] Similarly, in early April 2011, Lt. Shimogawa sent an email to Lt. Hellman advising that CO Young had been observed sitting at a table during mainline. In the email, Lt. Shimogawa noted that he had told CO Young not to be sitting down during mainline and there were no further incidents. *Id*., Tab 14. Shimogawa continued by saying that he had talked to Sgt. Johnson and advised him to start documenting concerns that have been addressed with Young "as this seems to be a pattern," but that Sgt. Johnson "decided to have a un-documented verbal counseling" instead. *Id*. In response to the email, Lt. Hellman asked to be forwarded "any and all documentation that you have with these concerns of officer Young's professional and security practices," with a reminder to "use the Supervisory Conference form

[73] A Sick Leave Sergeant fills in for others absent because of illness.

[74] Sgt. Johnson also noted that none of the complaints from other COs were put in writing. If they were truly serious, he suggests, one or more of CO Young's fellow employees would have initiated a formal disciplinary process by filing a written complaint.

[75] The Union notes, however, that Sgt. Fletcher said he would be following up with CO Young and addressing the matter with him, so there was no need for Sgt. Johnson to do so. Exh. J-1, Tab 15.

that I gave you along with the expectations and updated interim eval [evaluation]."[76] Sgt. Johnson concedes that he failed to follow up on Lt. Hellman's directive. Tr. at 1468.[77]

All of these facts, taken together, caused Supt. Frakes to say "I have lost faith in your ability to effectively perform supervisory duties and adequately manage staff under your direct supervision." Exh. J-3 at 4. Similarly, he observed:

> As a Correctional Sergeant, you are responsible to serve as a role model and follow institution and department policy. Other staff should look to you for leadership and direction. Rather than setting an example of diligence and trustworthiness, you neglected your responsibilities as a supervisor and failed to progressively address and document Officer Young's inappropriate behavior.

Id. at 3. Therefore, Supt. Frakes determined that Sgt. Johnson should be demoted to Correctional Officer.

In evaluating the propriety of this discipline, I agree with the Union that Sgt. Johnson's shortcomings were matters of performance rather than violations of rules of conduct. Even the failure to document CO Young's performance, which Sgt. Johnson had been directed to undertake, does not appear to me to have been a deliberate and insubordinate refusal to comply with a directive, but rather a failure of follow through by a Shift Sergeant who felt overwhelmed by paperwork and by the difficult task of managing a staff that did not get along. Similarly, the lack of direct supervisory observation of the R&M's and where they were posting themselves during the shift (particularly at movement times), seems to have resulted primarily from an

[76] Sgt. Crabtree, CO Young's formal supervisor, was not included in this email chain, despite the fact that he would be responsible for preparing Young's PDP. Sgt. Johnson, in fact, contends essentially that Crabtree should have been handling these issues, and that any of the other sergeants or lieutenants also had authority to step in and undertake counseling, documentation, and corrective action if they believed (as apparently Sgt. Johnson did not) that CO Young was "habitually failing to stand for movement in his zone of control." As an aside, it appears to me that the supervisory structure at WSR may have unwittingly interfered with effective supervision, i.e. if all supervisors are responsible for ensuring proper performance and documentation of performance issues, problems may slip through the cracks because of the assumption that someone else will (or should) handle it—or already has (as in the case with Sgt. Fletcher). The divided responsibilities between Sgts. Crabtree and Johnson with respect to CO Young are a case in point.

[77] At the same time, Sgt. Johnson noted that he had no "documentation" to forward to Lt. Hellman, but it seems to me he should have made that clear in a response to Lt. Hellman.

inability to accomplish all of the paperwork required of his position and at the same time get out of the office to observe movements first hand. And to the extent Sgt. Johnson contends that he had no proof of the extent of CO Young's failure to stand for movement in an appropriate place within the zone as assigned—and whether he was more deficient in that area than his co-workers—that same difficulty in finding time for direct observation hampered his ability to gather proof one way or the other.

I also note, however, that Sgt. Johnson seems to have had an unwarranted faith that the R&M's would do what they were expected to do because they are adults, despite ample evidence—and his own conclusion—that there was a decided lack of teamwork among his staff, including accusations flying back and forth about who was not pulling their fair share of the load ("infighting"). And if lack of teamwork was the problem, as Sgt. Johnson believed, it is entirely unclear to me what he was doing to address that problem, both before and after the murder of Officer Biendl.[78] Had he addressed that problem more effectively, it is possible—although by no means certain—that the events of January 29, 2011 could have occurred differently.

I totally agree with Supt. Frakes that these are not the hallmarks of an effective Correctional Sergeant. But neither are they forms of actual misconduct. Rather, they reflect a level of substandard performance, as well as part of a pattern of *institutional* complacency that unfortunately had developed at WSR over time, in which the absence of overt violence against staff tended to obscure the ever-present *potential* of such violence, and thus the necessity of strict adherence to the practices and procedures designed to prevent it. As the Union notes, however, arbitrators often require (at least in the absence of serious misconduct) that performance issues such as these be addressed through corrective action –or through additional training, if

[78] At the hearing, Sgt. Johnson spoke vaguely about "team building," but did not provide details of exactly what he had done, if anything, in that regard.

necessary—prior to moving to a significant disciplinary penalty (which demotion clearly is). *See*, e.g. Brand & Biren, eds., *Discipline and Discharge in Arbitration* at 186-87.[79] That is so because, as the Brand & Biren treatise notes, just cause requires that employees be clearly informed as to what their Employer expects of them, and then be given a fair opportunity to demonstrate that they can meet those performance expectations. Instead, the Department here moved immediately to demotion of an employee with no prior discipline or formal counseling on his record. Under these circumstances, at least, I agree that the Department did not have just cause to summarily demote Sgt. Johnson.

Taking all these circumstances together, I do find that the Department had just cause to issue Sgt. Johnson a written reprimand for his failure to address the questions about CO Young's security practices effectively, including appropriate documentation. These were serious issues of the upmost importance—as events eventually demonstrated—but Sgt. Johnson did not give them the level of attention they deserved, even after the murder of CO Biendl. Summarily demoting him prior to offering him an opportunity to demonstrate improved performance after clear notice of what the Department saw as the deficiencies in his supervision of CO Young, however, was inconsistent with just cause.

V. CONCLUSION

For the reasons set forth above, I find that the Department did not have just cause to discharge COs Young, Maynard, and Lyons, nor did the Department have just cause to demote Sgt. Johnson. The Department did have just cause, however, to issue written reprimands to COs

[79] At least that is the case unless the employee can be shown to be unable to meet the requirements of the position at "even a minimum level of acceptability." *Id*. at 171-72. But there is no evidence that prior to these events, Sgt. Johnson's performance was thought to be at such a low level, nor is it clear that his performance as Shift Sergeant could not improve—for example, if WSR were to accept the NIC's recommendation to "lighten the supervisors' paperwork and allow management by walk around (MBWA) to field staff questions, train and support them as they manage their routine duties and help make those operational changes necessary." Exh. U-9 at 22.

Lyons and Maynard, and to Sgt. Johnson.[80] The discharged employees shall be promptly reinstated without loss of seniority and shall be made whole for lost wages and benefits, and Sgt. Johnson shall be reinstated to the position of Correctional Sergeant and shall also be made whole. The Union's request that back pay be awarded with interest, Union Brief at 96, will be denied. Given the time value of money, I recognize the logic of awarding interest on back pay as part of a "make whole remedy," but despite that logic, "in the absence of an express contract provision to the contrary, arbitrators traditionally do not award interest on back pay or other monetary awards." St. Antoine, ed., *The Common Law of the Workplace* at 393 (2. Ed., NAA, 2005). Whether that "tradition" makes sense or not, it has guided most arbitrators—and most labor relations professionals who negotiate labor agreements—for many years. Therefore, in the absence of a contractual provision (or statute) providing otherwise, I believe it would improperly undermine widely shared understandings and expectations that shape collective bargaining if I were to make general awards of interest on back pay.[81]

[80] As an aside, I note that this level of discipline is consistent with the discipline imposed by the Department on correctional employees above the level of sergeant who also failed to meet the Department's expectations in similar ways in connection with the events of January 29, 2011.

[81] There are exceptions to the rule, of course. In cases of bad faith, arbitrary action, unjustified delay in complying with an arbitrator's remedial award, or similar situations in which the process of collective bargaining itself is being undermined by a party's conduct, an award of interest may well be justified. The record before me does not support the application of any such exception here, however.

AWARD

Having carefully considered the evidence and argument in its entirety, I hereby render the following AWARD in the four grievances before me;

1. The Department did not have just cause to discharge Grievant George Lyons, but did have just cause to issue him a written reprimand; therefore, the discharge is hereby reduced to a written reprimand;

2. The Department did not have just cause to discharge Grievant Charles Maynard, but did have just cause to issue him a written reprimand; therefore, the discharge is hereby reduced to a written reprimand;

3. The Department did not have just cause to discharge Grievant David Young (Nathan Dahl);

4. The Department did not have just cause to demote Grievant Christopher Johnson, but did have just cause to issue him a written reprimand; therefore, the demotion is hereby reduced to a written reprimand; consequently,

5. The grievance of David Young (Nathan Dahl) will be sustained; and

6. The grievances of George Lyons, Charles Maynard, and Christopher Johnson will be sustained in part and denied in part; therefore,

7. Grievants George Lyons, Charles Maynard, and David Young (Nathan Dahl) shall each be promptly reinstated without loss of seniority and shall each be made whole for lost wages and benefits; interest on back pay is not awarded;

8. Grievant Christopher Johnson shall be promptly reinstated to the position of Correctional Sergeant without loss of seniority and shall be promptly made whole for lost wages and benefits; interest on back pay is not awarded; and

9. The Arbitrator will retain jurisdiction to resolve any disputes over remedy that the parties are unable to resolve on their own; either party may invoke this reserved remedial jurisdiction by fax or email sent, or letter postmarked (original to the Arbitrator, copy to the other party), not later than ninety (90) days from the date of this Award or within such reasonable extensions as the parties may mutually agree

(with prompt notice to the Arbitrator) or that the Arbitrator may order for good cause shown; and

10. Consistent with Article 9.6 of their Agreement, the parties shall bear the fees and expenses of the Arbitrator in equal proportion.

Dated this 7th day of July, 2013

Michael E. Cavanaugh, J.D.
Arbitrator