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. (Drew Wood Discharge Grievance)	ARBITRATOR'S DECISION AND AWARD FMCS No. 190506-06868

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I. INTRODUCTION

Prior to his discharge in 2018, Grievant Drew Wood had been employed by the Department of Corrections ("DOC") for 28 years. On July 16, 2018, he served as a Classification Counselor 3 ("CC3") in the Twin Rivers Unit ("TRU") of the State's Monroe Correctional Complex ("MCC"), duties that are performed within the secure perimeter of the facility. In order to prevent the introduction of contraband into TRU, DOC had instituted random search

procedures, effective December 1, 2016, that required employees entering the secured area to be screened, including x-rays of hand-carried items, metal detector scans, and pat searches. *See*, Exh. J-4, Attachment 49. In summary, those procedures directed an employee entering TRU's secured perimeter to push a button programmed to randomly light either green or red. If green, the employee is allowed to enter the facility without a search, although hand-carried items must go through the x-ray machine. If the light turns red, however, the employee is required to clear the metal detector and to stand for a pat search.

Grievant Wood had long objected to these search procedures as a violation of his constitutional rights to privacy under the Fourth Amendment to the US Constitution and the Washington Constitution, rights that are also enshrined in the collective bargaining agreement itself in Article 4.2 (at least as to off-duty conduct).[1] On the morning of July 16, 2018 Grievant appeared for work at approximately 0600. The scanner was manned that morning by CO Kimberly Metzger who was on a light duty assignment because of an arm injury. Grievant pushed the randomizer button, and it came up red. Because of his continuing opposition to the procedure, he had developed a routine in which he stated his belief that the DOC search process violated his constitutional rights and the CBA, but he nevertheless would ready himself to stand for a pat search. He followed that routine on the morning of July 16. Metzger, however, had been given written instructions that required employees to clear the scanner in addition to being pat searched. She showed Grievant her instructions, but he repeatedly objected to clearing the scanner on the ground that his metal glasses and bracelet (which he made no effort to take off) would set off the alarm. More importantly, perhaps, he noted that he had never before been

[1] For reasons that will appear later, I firmly believe that Grievant is mistaken about the constitutionality of the Department's search procedures, but I have no doubt that his belief that they violate the Fourth Amendment is sincerely held.

required to clear the scanner after he hit red, but only to stand for the pat search.[2] CO Lomarda, responding to a call from Master Control, emerged from the secure area and patted him down. Grievant then asked, "Am I good to go?" and Lomarda, believing Grievant had already cleared the scanner, said yes. Master Control opened the door and Grievant proceeded to his work area. CO Metzger notified shift commander Lt. Larry Conner that Mr. Wood had not cleared the scanner, however, and Conner directed everyone involved to write incident reports.[3] He also asked that CO Metzger call him if there were any additional issues with Grievant and the search procedures.

Later that morning, at a time many employees treat as a break because the offenders are confined to their cells for a count, Grievant had left the secure area in search of food or a beverage. When he returned to the scanner area just before 1100 hours, he hit red a second time. Once again, Grievant refused to clear the scanner despite multiple requests from CO Metzger. In addition, although Metzger told him he was not to leave the immediate area (part of the written instructions she had shown earlier that day to Mr. Wood),[4] he disregarded her instruction and walked down a short hallway to Records to use a phone to call his supervisor to explain that he was not being re-admitted to the secure facility. When he returned to the scanner area,[5] Lt.

[2] Testimony from the DOC's own witnesses tended to support Grievant's contention that prior to July 16, 2018 employees had not always been required to submit both to a search and to clear the scanner.

[3] DOC faults the "accuracy" of Grievant's initial incident report because he did not indicate that he had objected to clearing the scanner and, in fact, had entered the secure area without doing so.

[4] The "do not leave the area" portion of the procedures, as I understand it, is to prevent an employee who is knowingly carrying contraband from disposing of the outlawed objects before a search can be conducted. That strikes me as necessary and entirely appropriate, i.e. it closes a potential loophole that could enable employees attempting to bring contraband into the facility to escape detection.

[5] There is a dispute about precisely how long Grievant was gone. He testified it was only about three minutes. DOC says it was more like 15-20 minutes, and the evidence supports DOC's position as I will describe later. The difference, however, is immaterial in most respects. Even if Grievant had left only for a short period, it was long enough, while out of sight of CO Metzger, to have discarded any contraband he might have been carrying, and thus to defeat a key element of DOC's efforts to keep contraband out of TRU.

Conner had arrived on the scene after being called by CO Metzger. Grievant and Lt. Conner then got into a profanity-laced shouting match, witnessed by CO Metzger and several other employees. That incident lies at the heart of this discharge matter.

Grievant admits that he was profane and disrespectful in his exchange with Lt. Conner, but the Union has ably argued several mitigating factors in his defense. For example, the Union contends on Mr. Wood's behalf that he was "provoked" by Lt. Conner and that the investigation failed to adequately explore that provocation. Moreover, says the Union, the discipline given Grievant was disproportional to the severity of his misconduct, and adds that he was improperly disciplined more harshly than other DOC employees who had committed similar offenses. The Department counters that Grievant's misconduct was not the first time he had engaged in angry exchanges with management representatives on the job and contends that his conduct was so egregious that termination was appropriate. In support of its decision to terminate Mr. Wood, DOC points to his "aggression" and "threatening demeanor," as well as his "lack of remorse" and "refusal to accept responsibility for his actions."

At a hearing held at the MCC administrative offices on December 16-17, 2019, the parties had full opportunity to present evidence and argument, including the right to cross examine witnesses. The proceedings were transcribed by a certified court reporter, and I have carefully examined the transcript in the course of my evaluation of the evidence and the parties' arguments. Counsel chose to file written closing statements, and I received their simultaneous electronic submissions on April 3, 2020.[6] With my receipt of the briefs, the record closed. Having now considered the evidence and argument in its entirety, I am prepared to render the following Decision and Award.

[6] During the hearing itself, I also received, and have carefully reviewed, a written statement by Grievant himself, prepared in his own defense and submitted independently. *See*, Exh. U-37.

II. STATEMENT OF THE ISSUE

At the outset of the hearing, the parties stipulated to the following issue statement:

> Has the Employer violated the just cause provision of the contract by terminating Mr. Wood? If so, what is the remedy?

Tr. at 8-9.

III. FACTS

The central facts are as set forth in the Introduction. Obviously, however, a close examination of the evidence and testimony with respect to the two incidents on July 16, 2018 will be required. But rather than set forth those facts in a separate section, I will develop them in conjunction with, and as the basis for, my determinations on the merits.

IV. THE MERITS

A. Mr. Wood's Constitutional and Legal Beliefs

I begin with a short evaluation of the merits of Grievant's legal contentions. If his constitutional arguments were correct, I would have to consider the extent to which, if any, Article 4.2 of the CBA afforded some protection for his conduct in resisting the DOC search procedures.[7] But despite the sincerity of Mr. Wood's beliefs on that score, which I do not question, I think he fundamentally misunderstands the application of principles of "unreasonable search and seizure" in this context, i.e. an administrative search associated with the entry of employees into the secure portion of a correctional facility. I find that the Department has important interests in maintaining safety and security within TRU that make its search procedures "reasonable" under the circumstances, and thus not unconstitutional.

[7] Ordinarily, an arbitrator has limited authority, perhaps no authority at all, to interpret external law, whether statutes or constitutional provisions. When the parties have expressly incorporated external law into their Agreement, however, as the parties have done here in Article 4.2, "arbitrators generally agree that they are obligated to interpret an agreement in light of the law." St. Antoine, ed. *The Common Law of the Workplace* § 2.15 at 82 (2d. Ed., NAA, 2005).

In explaining how I reached that conclusion, I first note the results of a simple Internet search I conducted for "prison employee helps inmates escape." My search immediately yielded recent examples from New York, South Carolina, and Wisconsin in which prison employees had intentionally furnished items to inmates, including tools, that facilitated their escape from custody. In other words, even though it is thankfully a rare occurrence, it is simply not unheard of for corrections employees to be a source of contraband in correctional facilities, and DOC has every right, in my view, to take reasonable steps to prevent that from happening at TRU. To be clear, I am not suggesting that Grievant was knowingly attempting to bring prohibited items into TRU,[8] but DOC's procedures must take account of the possibility that a small number of employees might attempt to do so for whatever reason. In addition, contraband may be introduced into the secure area inadvertently—e.g. a personal cell phone an employee has forgotten to remove from his or her person.[9] The DOC procedures appropriately guard against these inadvertent introductions of contraband into TRU as well.

The reasonableness of DOC's approach, negotiated with the Union,[10] is enhanced by the randomizer which provides a deterrent effect without requiring that *every* employee be searched upon entry *every time*. In other words, DOC (and the Union) have taken steps to limit the intrusiveness of the search procedures in reasonable ways without undermining their

[8] Although given the "out of control" nature of his resistance to clearing the scanner, at least one of the witnesses to the events feared he possessed contraband, possibly a weapon, which might explain his "aggressive" and "hostile" reactions to being asked to clear the metal detector. *See*, e.g. Tr. at 341 (Fenrich).

[9] CO Metzger, in her interview summary, recounted that in her short time at the scanner post, she "stopped headphones, a metal spoon, newspaper, magazines, and personal diaries" from improperly entering TRU. Exh. J-4, Attachment No. 42 at 2. It strikes me that several of those prohibited items, if not all, were likely inadvertently carried by employees into the random search process.

[10] A recurrent subtext here is Mr. Wood's apparent belief that the Union wrongfully refuses to support his protests against violations of his "rights," e.g. by negotiating the search procedures to which he objects. Because I find those agreed procedures to be lawful and reasonable, however, I cannot fault the Union for taking that position.

effectiveness. Moreover, the means DOC employs at TRU, i.e. x-ray machine, metal detector scanner, and pat search, are consistent with the methods applied universally to *everyone* who wishes to fly on a commercial airline—in fact, with the advent of full-body scanners several years ago, TSA's procedures are more intrusive than those utilized by DOC. Yet, I am not aware of any court that has held TSA's screening process unconstitutional.[11] In my view, anyone who wishes to utilize commercial aviation must acquiesce to TSA's security procedures. In the same vein, anyone who wishes to work within the secure perimeter at TRU must acquiesce to DOC's random search procedures.

Nor do I understand how RCW 42.40 (whistleblower protections) applies given my finding that the random search procedures at TRU comply with the law and the Constitution. Nor do I understand the relevance of RCW 72.09.650, cited by Mr. Wood, to the situation here. That statute gives certain rights to use force to detain persons who "enter or remain without permission within a correctional facility" or who "possesses contraband within a correctional facility or institutional grounds." But those circumstances are not present here.

In sum, I find that none of the legal arguments raised by Mr. Wood have merit. Nevertheless, he is entitled to his beliefs, however mistaken they might be, and there is nothing wrong, in my view, with his succinctly and respectfully stating his views when asked to undergo additional screening because the randomizer button has turned red. I do not understand DOC to argue otherwise. Instead, the Employer contends that Mr. Wood displayed unreasonably aggressive, belligerent, disrespectful, and profane behavior in resisting requests from CO

[11] In fact, in the one case that showed up in my admittedly limited legal research on the issue, the United States Court of Appeals for the D.C. Circuit upheld the constitutionality of TSA's use of full-body scanners. *See, Electronic Privacy Information Center v. Dept. of Homeland Security*, https://www.cadc.uscourts.gov/internet/opinions.nsf/B3100471112A40DE852578CE004FE42C/$file/10-1157-1318805.pdf (D.C. Cir., 2011).

Metzger and direction from Lt. Conner, actions that resulted in emotional trauma for several co-employees who witnessed the incident, as well as undermining respect for supervisory authority generally. I will deal with those issues next.

B. Incidents on July 16, 2018

1. Mr. Wood's Arrival at Work

Grievant arrived for work about 0600 and approached the scanner station managed by CO Metzger. He proceeded to press the randomizer button which turned red. Metzger then told him he needed to clear the scanner, but Mr. Wood resisted, claiming he had never had to clear the scanner previously on the red button, so what had changed? Grievant concedes that Metzger showed him her written instructions that required both clearing the scanner *and* standing for a pat search. Tr. at 490, 496. At that point, it appears while they were still discussing the issue, CO Lomarda emerged from the secure area (in response to a radio transmission from Master Control) and asked, "Who needs to be searched?" Grievant raised his hand and Lomarda searched him. As he finished the search, the two of them were standing by the door to Master Control, which opened for Lomarda to return to the secure area. Grievant asked "Am I good to go?" and Lomarda said yes, so Grievant re-entered the secure area without ever clearing the scanner.

DOC argues that these facts establish that Mr. Wood intentionally avoided clearing the scanner even though he was well aware that hitting red required him to do so. Brief at 22-23. It seems to me that the conclusion is not as clear cut as the Department suggests, however. It is true that Grievant saw Metzger's instructions, which included a requirement to both clear the scanner and stand for a pat search. It is also true that CO Lomarda, for his part, understood that *both* were required of Mr. Wood. Tr. at 86-87. That is, Lomarda only told Grievant he was "good to go" because he assumed Mr. Wood had *already* cleared the scanner. Had he known otherwise, he

testified, he would have "probably wait[ed] for him to clear the scan, then gave him the pat search." Tr. at 87. If Lomarda knew that was the required process, should not Mr. Wood have known as well?

Perhaps, but DOC's evidence does not clearly negate Mr. Wood's contention that he had never been required to clear the scanner before, and thus he was simply asking what had changed. I agree that he should not have resisted multiple requests that he clear the scanner, and I agree that he was a little too eager to take advantage of CO Lomarda's lack of awareness that he had not done so. DOC Brief at 23. I also agree that if Mr. Wood believed he had been given an improper security directive by CO Metzger—pursuant to written instructions she had received and had shared with him—he should have complied with the directive and raised the issue later through the grievance process or through some other administrative avenue. Alternatively, he could have asked for a supervisor, e.g. Lt. Conner, to be summoned to discuss whether clearing the scanner was now required, even though it had not been in the past.

On the other hand, there is no clear evidence that CO Metzger responded "no" when Mr. Wood asked, "Am I good to go?" after Lomarda competed the pat search. There is ambiguity under these circumstances about what was required of Grievant upon hitting red. That is, previously, the posted instructions had referred to clearing the scanner "and/or" standing for a pat search.[12] Similarly, the evidence does not clearly establish that CO Metzger voiced any objection when Grievant asked if the was "good to go." Thus, Mr. Wood's entry into the secure area at around 0600 on July 16 without clearing the scanner, while in my mind reflective of an improper level of "passive-aggressive" resistance to the search procedures, does not amount to a significant offense by itself.

[12] *See*, e.g. Exh. J-4, Attachment 49 at 1.

2. Grievant's Interactions With Lt. Conner

After Grievant entered the facility, CO Metzger immediately advised Lt. Conner that Mr. Wood had had not cleared the scanner, and Conner asked that all participants and witnesses prepare incident reports. He also asked that CO Metzger call him right away if there were any further issues with Grievant and the security procedures. Later that morning, Mr. Wood left the secure area for a few minutes to get a drink or some food. When he returned at approximately 1055 hours, he hit red on the randomizer a second time, and CO Metzger told him again that he would need to clear the scanner and be pat searched. Metzger testified that Wood responded, "Fuck you guys." Tr. at 38; Exh. J-4, Attachment No. 42.[13] Grievant stated that he could not clear the scanner because of metal glasses and a bracelet he was wearing. Tr. at 38.[14] He started to leave the area, but Metzger told him the procedure required that he remain until the security process had been completed. *Id*. Grievant ignored her and left anyway (he testified he went to a phone in Records so he could call his supervisor, Custody Unit Supervisor Collins).

Metzger immediately called Lt. Conner, as he had requested, and the Lieutenant promptly made his way to the scanner area (arriving within about three minutes). Tr. at 39. Lt. Conner then went to search nearby for Grievant, but he returned to the scanner area after not finding him.[15]

[13] This testimony from CO Metzger, which I find entirely credible, is inconsistent with Mr. Wood's claim that he only used profanity in response to Lt. Conner's swearing, and even then, that he only directed that profanity at Lt. Conner. *See*, e.g. Exh. U-37 at 2-3 ("I only directed these comments to the Lt . . . I never swore at any other person whatsoever"). I find, instead, that Grievant was the first to use profanity, and that he directed it, at least in part, toward CO Metzger ("Fuck *you guys*") simply because she, as he knew or should have known from their prior encounter that morning, was simply following her written instructions.

[14] Mr. Wood did not explain why he could not simply take off the metal items that he felt would prevent him from clearing the scanner. He just said he would not do it. Nor did he provide any satisfactory explanation in his testimony at the hearing.

[15] It is unclear whether Lt. Conner looked in Records, where Grievant testified he had gone to use the phone.

According to Metzger, 15-20 minutes later, Grievant came back to the scanner area. Tr at 40.[16]

When he did return, CO Metzger described the events this way:

> Lieutenant Conner told him to clear the scanner, and Mr. Wood said that he couldn't clear it with his glasses and bracelet on. And Lieutenant Conner then told him to take it off, take those items off, and Drew walked up to him and got right up in his face and was screaming and hollering at him and he told him that he was not going to clear the scanner, that he wasn't going to do it, and Lieutenant Conner said, "Yes, you are, just like everybody else." And then Mr. Wood said, "You want me to clear that fucking scanner?" And Lieutenant Conner said, "Yes, I do," at which point Drew took his shirt off, pulled his belt off, pulled his boots off, threw his boots against the main control wall, threw his shirt and his belt at Lieutenant Conner's feet, started grabbing at the top button of his pants indicating that he was going to, indeed, clear that scanner. And Lieutenant Conner told him that if you undress, he said, "I will call the police."[17]

Tr. at 40-41.[18] A shouting match ensued, with Grievant and Lt. Conner each using profanity at times. Grievant testified that Lt. Conner initiated the profane exchange between the two of them by stating—before Mr. Wood could say anything—"You're going to come over here and go through the scanner come hell or high water and I'm tired of you fucking with my staff." Tr. at

[16] Mr. Wood testified that he was only gone about three minutes, just long enough to call his supervisor and tell her security was not letting him back in the secure area. The evidence supports a conclusion that he was gone longer than that. As noted, Metzger credibly testified that it would take Lt. Conner approximately three minutes to get from the Lieutenants' office to the scanner, and thus if Mr. Wood had returned within three minutes as he claims, they would have arrived roughly simultaneously. Instead, however, Lt. Conner went to look for Grievant and returned after not being able to locate him, and Grievant only returned some time after that. A witness in Master Control, CO Thomas, noted in his interview that he heard a disturbance in the scanner area at 1110 hours, 15 minutes after the 1055 onset of the second scanner incident noted in Metzger's report. Therefore, I conclude that the time elapsed was closer to the 15-20 minutes estimated by CO Metzger, than the three minutes Grievant estimated in his testimony.

[17] More than one witness observed that it appeared Mr. Wood was about to undress, which is apparently why Lt. Conner threatened to call the Sheriff. In any event, Mr. Wood's responses, under the circumstances, were unacceptable. For example, he said to Lt. Conner "You're going to have me arrested for your illegal search?" Similarly, as he removed his belt, he said to his shift commander "the buckle is fucking metal, you dumbass." These disrespectful comments to his supervisor, which Mr. Wood knew or should have known would be witnessed and overhead by co-workers, constituted a highly inappropriate challenge to the authority of his chain of command in a paramilitary organization such as TRU.

[18] CO Metzger's account is consistent with the statements and testimony of others in almost every respect. Her observation that Grievant "threw" a boot at the Master Control window, however, while supported by some other witnesses, was not uniformly supported. Some described the motion as overhand, "like a baseball," some "sidearm," and others, including Lt. Conner, said Mr. Wood "kicked off" his boots, one of which rose up and struck the window/wall between the scanner and Master Control. As a result of these discrepancies, I do not find that DOC has convincingly established that Grievant intentionally threw a boot at Master Control.

505. Similarly, Mr. Wood testified that it was Lt. Conner, not he, who "closed the distance" between them. Tr. at 506. Both CO Metzger and Lt. Conner testified that it was the other way around on both counts, however, and others supported their version. *See*, e.g. Tr. at 340 (Fenrich); *see also*, Exh. J-4, Attachment No. 48 (CO Shelton, Master Control). Consequently, I find that the clear weight of the evidence supports a finding that Grievant initiated the "close encounter" during their shouting match, and I also credit CO Metzger's testimony that it was Mr. Wood who first used profanity.

In any event, the interactions continued in this vein as Mr. Wood made three attempts to clear the scanner, finally succeeding on the third try (after realizing he had neglected to remove a key from a pocket). All the while, however, Grievant complained that he was being treated "like an inmate." After clearing the scanner, CO Gomez pat searched him and Lt. Conner told him he could return to the secure area. While still in the process of gathering his things and dressing, however, Mr. Wood grabbed his crotch and asked Lt. Conner if he wanted to "look under [his] nut sack" or do a "cavity search." CO Gomez also quoted Mr. Wood as saying, "Fuck you, Larry, you want to strip search me?" Tr. at 160. In another highly inappropriate comment, Mr. Wood said to employees waiting nearby to clear security[19] "Be careful, you might have to get a strip search." Tr. at 287.

In his testimony, Lt. Conner conceded that he could have handled the situation better, and I agree. My sense was that in raising his voice to match the level Mr. Wood was using, and with respect at least to some of the profanity he used, he seemed to be trying to impress upon Grievant the necessity of complying with his directives.[20] Under these circumstances, however, that

[19] In order to "isolate" the disturbance, Master Control had closed traffic in and out of TRU.

[20] *See*, e.g. Tr. at 286. I have heard this approach labeled the "command voice" technique in several law enforcement and corrections cases I have heard over the years.

approach did not de-fuse the situation, but rather inflamed it.[21] For example, when Mr. Wood complained about the alleged violation of his Fourth Amendment rights, Lt. Conner concedes that he responded with something like "I don't give a fuck about your Fourth Amendment rights, I just need you to clear the scanner." Tr. at 288.[22]

In any event, while I recognize that Lt. Conner could have handled the situation with more finesse, that does not excuse Mr. Wood's unconvincing attempts to downplay his own level fault in this incident. Despite Grievant's claims to the contrary, several witnesses described him as the aggressor, said he was out of control, and that they believed he presented a threat to their safety and to the safety of Lt. Conner. For example, CO Metzger believed Lt. Conner was in physical danger, and despite her injury, she was prepared to "protect and defend" him. Tr. at 46. In a workplace violence report, CO Metzger noted:

> On 7/16/18 I felt threatened and unsafe during my course of my duties at work. CCO Drew Wood's actions made me feel unsecure. I feared for Lieutenant Conner's safety as well as my own . . safety as well. CC3 Wood's behavior was threatening in his stance and demeanor. I thought CC3 Wood was going to physically attack my shift commander.

Tr. at 46. The seriousness of Mr. Wood's misconduct, as described by Metzger, is confirmed by the fact that the traumatic after effects of the incident were still weighing on CO Metzger as of the date of the hearing—including trouble sleeping, trouble eating, and feeling upset all the time. The effects were severe enough that she had to seek medical help and counseling, and she was still receiving counseling as of the time of her testimony, approximately a year-and-a-half later.

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[21] To be fair, however, Lt. Conner testified that if an inmate had acted the same way Mr. Wood did on July 16, 2018, he would have "taken him down." Tr. at 277. That is consistent with the testimony of others that Mr. Wood was "out of control."

[22] I understand Lt. Conner's frustration with Mr. Wood's obstinate resistance to complying with reasonable security procedures, but he knew or should have known that profanely dismissing Grievant's constitutional concerns would be highly unlikely to result in a de-escalation.

Tr. at 49-50. When asked how she would feel if Mr. Wood were returned to work, she testified that she would be concerned that he would be unable to control his frustration and his anger if he hit the red button again. Thus, the "safety" of whoever was manning the scanner (perhaps someone on light duty because of injury or health condition) would be "at risk." Tr. at 51.

Similarly, Psychology Associate Amanda Fenrich,[23] who witnessed the incident while waiting to pass through security while on a lunch break, also suffered significant adverse emotional impacts. She described that she was "actually scared something was going to happen . . . I wasn't sure what . . . [Grievant] was aggressive and he was hostile and he was angry." Tr. at 344. "This is one of the first times I actually felt scared being at work," she testified. *Id*. After the incident, Ms. Fenrich went back to work but "couldn't think clear" and was "really shaken up." Tr. at 345. These emotional reactions were still present as of the hearing ("it's been really difficult like the last month," i.e. in anticipation of the hearing). *Id*. She testified that she filed a workplace violence report because "a workplace is supposed to be safe and you don't expect your co-workers to act in a manner that an offender would behave." Tr. at 345-46. When asked how she would react to a return to work by Mr. Wood, she testified that she would be "apprehensive" and "nervous":

> Well, I would hope nothing would happen, but based on this incident I know what he's capable of . . . and obviously I'm having a really hard time, so it would be difficult for me to walk into one of these facilities knowing that I possibly could run into him . . . It might trigger me or make it hard for me to do my job, which I don't think is fair.

Tr. at 346. I have no reason to doubt the testimony of Ms. Fenrich, CO Metzger, and others that Mr. Wood was the aggressor in this incident, nor the sincerity of their descriptions of the

[23] Ms. Fenrich testified that she has a Master's in Forensic Mental Health and has completed course work for a Ph.D. in the study of human behavior. Tr. at 337. Given this background, Ms. Fenrich's evaluations of Grievant's behavior, and the personal reactions to it she described in her testimony, are highly persuasive to me.

lingering emotional effects of having witnessed Mr. Wood's misconduct. Their fear at the time, as well as the continuing psychological scars resulting from being present during Mr. Wood's out of control behavior, each support a finding that this offense was extremely serious because it significantly undermined the sense of safety, security, and emotional well-being in the workplace his co-workers have a right to expect.[24] In addition, his actions undermined respect for the authority of a supervisor, Lt. Conner, and did so in the presence of co-employees—a situation that inherently tends to undermine supervisory authority in general. These are types of misconduct that are worthy of significant discipline.

C. Whether DOC Had Just Cause to Discharge Grievant

But "significant discipline" does not necessarily equate to termination in every case. Rather, I must consider whether discharge is an appropriate penalty under these precise circumstances when evaluated in light of long-accepted principles of contractual just cause.[25] At the outset of my examination of these issues, I want to assure Mr. Wood that I have carefully read and considered his "Notes termination letter" document, in the record as Exh. U-37, in which he tells his side of the story and describes his concerns with the quality of the Union's defense of his conduct. As noted, Mr. Wood is concerned because the Union had agreed to security procedures that he believes violate his constitutional and statutory rights. I find,

[24] That Mr. Wood may not have subjectively *intended* to be "threatening" is beside the point. His actions reasonably caused at least two co-workers to *feel* threatened, resulting in lasting impacts on their sense of well-being that extended at least as far as the hearing in December 2019, and that likely continue to this day.

[25] While the Agreement states clearly that "The Employer will not discipline any permanent employee without just cause," it does not further define the term. Nevertheless, there is a body of arbitral law, developed over decades, that provides common understandings of the applicable concepts, including notice to the employee of the Employer's expectations; an adequate investigation with opportunity for the employee to be heard before discipline is imposed; proof of the allegations (usually requiring something more from the Employer than the barest preponderance of the evidence in a termination case); a disciplinary penalty that is proportionate to the seriousness of the misconduct, as well as consistent with discipline meted out to other employees who have committed similar offenses; consideration of mitigating circumstances such as length and quality of service; provocation or other fault of the Employer; and similar elements of due process and even-handedness.

however, that other than the legal arguments the Union declined to make on his behalf (and which for reasons already set forth, I would not have accepted anyway), the Union has mounted a vigorous defense of Mr. Wood, including arguments: 1) that he did not engage in violent or threatening behavior; 2) that DOC failed to fully investigate mitigating circumstances (such as Lt. Conner's admission that he said "I don't give a fuck about your Fourth Amendment rights"); 3) that others who have engaged in similar misconduct have not been discharged; and 4) that the Department has improperly relied upon Mr. Wood's refusal to abandon his good faith belief that the search procedures violate his rights as justification for discharging him. These themes track much of the content of Mr. Wood's own defense as set forth in Exh. U-37.

1. Potential Mitigating Factors

a. Work history

Mr. Wood has been employed by DOC for nearly three decades with a record of good technical performance. That fact presents one of the most important mitigating factors arbitrators consider in the just cause analysis, and it is obviously in Grievant's favor here. Another aspect of that work history, however, is not in Mr. Wood's favor, i.e. he had received a Letter of Reprimand in November 2017, just seven or eight months prior to these events as a result of an incident that shares some key aspects of the misconduct Mr. Wood displayed here. As in this case, the prior incident also involved a raised voice, profanity and a display of anger during an interaction with a supervisor, Associate Superintendent Michele Wood (apparently a relative by marriage, but someone above him in the chain of command). According to the discipline letter, Grievant not only used profanity in his exchange with Ms. Wood, he also "stormed out of [her] office and slammed the door against the wall, knocking items off the white board." Exh. J-2, Attachment 16.

In other words, the July 16, 2018 incident was not the first angry outburst in Mr. Wood's employment history, and the 2017 Letter of Reprimand had specifically advised him of DOC's expectation going forward that he would not "use profanity or inflammatory remarks," nor engage in "verbal assaults" or "threatening behavior" against staff, offenders, or the public. *Id*. at 4. Despite Mr. Wood's assertions otherwise, I find that he did use unprovoked profanity at the very outset of the second scanner incident on July 16, and his subsequent conduct was understandably viewed by several co-workers, especially Ms. Fenrich and CO Metzger, as "threatening." Mr. Wood knew or should have known that these actions were in direct violation of the expectations set forth for him in the November 2017 Letter of Reprimand. Thus, some aspects of Grievant's work history are in his favor, particularly long tenure and good technical performance, but other aspects demonstrate a repeat of misconduct he had been specifically warned against just a few months earlier.

b. Provocation

Mr. Wood also contends that his use of profanity in his interactions with Lt. Conner on July 16 came *in response to* Lt. Conner's swearing, and thus he was only "defending himself." As noted already, I believe that Lt. Conner erred in using "command voice" techniques, particularly his comment "I don't give a fuck about your Fourth Amendment rights." But the evidence establishes to my satisfaction that Mr. Wood was the first to use the "F word," i.e. he said "Fuck you guys" after Metzger asked him to clear the scanner and *before Lt. Conner arrived on the scene*. Moreover, as I read the evidence, Lt. Conner's unfortunate use of profanity occurred mostly, if not entirely, *after* Mr. Wood deliberately closed the physical distance between the two of them, got in Lt. Conner's face, and angrily declared that he "wasn't going to do it," i.e. go through the scanner. That was the sequence according to the testimony of CO

Metzger, which I credit. Thus, to the extent there was "provocation" here, it seems to have gone both ways.

c. Ambiguity in the Search Procedures

Mr. Wood's best argument, in my view, is that the procedures requiring employees both to clear the scanner *and* stand for a pat search were ambiguous.[26] First, the original posted instructions apparently had used the phrase "and/or," suggesting that one or the other might suffice. More importantly, the evidence in the record does not refute Mr. Wood's testimony that he had on numerous occasions gone through the search process after hitting red on the randomizer but had never before been required to clear the scanner, only to undergo a pat search. I note that Custody Unit Supervisor Susan Collins testified that Lt. Conner had confirmed to her that the process had changed shortly before these incidents, admitting that "he screwed up, it should have been this way all the time." Tr. at 202-03.

On the other hand, while that recent change in the application of the search policy perhaps helps to explain Mr. Wood's reaction when asked to clear the scanner on July 16, it cannot excuse the *manner* in which he resisted complying with an unexpected change in the process. That is, the workplace "is not a debating society" in the words of the venerable arbiter Harry Shulman, quoted in Brand & Biren, eds., *Discipline and Discharge in Arbitration* at 5-3 (3d Ed., ABA, 2015). Generally, an employee who disputes the propriety of a direction from management is required to comply with that directive and later take an appropriate action to challenge it, e.g. by filing a grievance (often referred to as the "work now, grieve later" rule).

[26] One aspect of Mr. Wood's legal arguments that I find curious, however, is that he apparently objects to searches upon entry to the secure area because they involve "another staff putting hands on [him]." Tr. at 479. Yet, he was prepared to undergo a pat search without making a fuss, but adamantly resisted the far less intrusive process of clearing the metal detector.

Even if these circumstances presented a possible exception to that rule (for example, because it would require Grievant to forego what he considered to be a constitutional right, a deprivation that arguably could not be fully remedied after the fact), that still would not excuse his insubordinate and profane defiance of supervisory authority.[27]

In sum, Grievant's confusion about exactly what the search procedures required of him presents something of a mitigating circumstance, but that confusion cannot fully excuse his misbehavior.

d. Comparative Discipline

Next, the Union argues on Mr. Wood's behalf that other employees who engaged in similar misconduct were not terminated. I have carefully considered the comparators, but I find none of them persuasive. The important factors here, not present in the other matters, include the fact that Mr. Wood was a supervisor who is expected to model appropriate behavior in the workplace. In this instance, he failed that reasonable expectation spectacularly, and I agree with DOC that he has undermined his ability to model and enforce DOC's reasonable standards of behavior, perhaps irreparably. Moreover, Mr. Wood's conduct was publicly directed at another supervisor, Lt. Conner, which is a form of misconduct that inherently undermines supervisory authority generally. Most importantly, just a few months earlier, Grievant had been disciplined for an angry outburst during a discussion with an Associate Superintendent, and thus his conduct

[27] Mr. Wood argues that he "never refused directives to clear the scanner." Exh. U-37 at 2. The credible testimony of CO Metzger, quoted above, persuasively refutes this claim ("Drew walked up to him and got right up in his face and was screaming and hollering at him and he *told him that he was not going to clear the scanner, that he wasn't going to do it*, and Lieutenant Conner said, 'Yes, you are, just like everybody else.'). Tr. at 40-41 (emphasis supplied). True, he ultimately went through the scanner three times before clearing, but that occurred *after* he "refused" to do so, i.e. said that "he wasn't going to do it." Moreover, his conduct and attitude during the time he was attempting to clear the scanner were indicative of "passive-aggressive resistance" to supervisory authority at the very least. Thus, I find it disingenuous for Grievant to argue that he "never" refused to go through the scanner. It would be more accurate to say that he refused "initially," even though he later "acquiesced."

on July 16 reflected a pattern of continuing and significant anger management issues in his interaction with authority in the chain of command. That pattern appropriately elevated DOC's concern over his behavior during the scanner incidents on July 16. In sum, I do not find that the lesser disciplinary penalties imposed in the other cases, which are quite different in many important respects, are by themselves sufficient to undermine the discharge of Mr. Wood.

2. Application of the Potential Mitigating Factors to the Just Cause Analysis

My task, then, is to put all these considerations together and apply them to determine a level of discipline for Mr. Wood that is consistent with just cause. In evaluating whether an Employer had just cause to terminate an employee, especially one with a long and successful tenure, there are two overarching principles to be applied. The first is that once the misconduct upon which discipline was based has been established by the Employer's evidence, the Arbitrator should not interfere with management's choice of penalty in the absence of evidence of arbitrary, capricious, or discriminatory effect. Rather, so long as the penalty chosen falls within the reasonable range for the established offense, the Arbitrator should not interfere.

The second principle, which often points in the opposite direction, is derived from notions of "progressive discipline," an integral component of just cause: discipline should be "rehabilitative" if at all possible. That principle recognizes that the purpose of discipline in a unionized workplace is not to "punish," but rather to "change employee behavior." Therefore, unless and until it is reasonable for the Employer to conclude that an errant employee cannot or will not change his behavior, "rehabilitation" is still possible and should guide the just cause analysis.

Applying those concepts here, as in all cases, is more a matter of art than science. I agree that Mr. Wood's conduct was totally unacceptable in several respects,[28] and I understand Supt. Jackson's determination that his lack of "remorse" meant that he would continue his defiance of the search procedures, or at least maintain his passive-aggressive resistance to them. Thus, the Superintendent judged that the continued employment of Mr. Wood would be untenable. Supt. Jackson may well have accurately predicted what Grievant will do if reinstated, but in light of the "rehabilitative" nature of discipline under a CBA with a just cause provision, an employee with nearly three decades of good service to DOC deserves one last opportunity to demonstrate that he can meet his Employer's reasonable expectations before termination will be consistent with just cause principles. That is particularly so when Mr. Wood's misconduct was based, in part, on ambiguity in how the search procedures had been applied, and in light of some level of "provocation" in Lt. Conner's admittedly less than ideal response to Grievant's resistance to clearing the scanner.

Although I am concerned about the apparently ongoing emotional impacts of Mr. Wood's misconduct on his co-workers—particularly CO Metzger and Psychology Associate Fenrich—I find that he deserves a final opportunity to demonstrate that he can meet DOC's reasonable expectations. Thus, I will order that Mr. Wood be promptly reinstated without loss of seniority or benefits, but subject to the following conditions:

1. He shall be demoted to the highest non-supervisory Classification Counselor classification;

2. He shall be provided (on paid time and at DOC expense) appropriate anger management counseling/training as agreed by DOC and the Union;

[28] And yet, I believe that there was some provocation, particularly Lt. Conner's comment "I don't give a fuck about your Fourth Amendment rights."

3. He shall receive back pay from the date of termination to the date of reinstatement at the rate of the classification to which he has been demoted as set forth in Paragraph 1, but in light of his highly inappropriate actions on July 16, 2018, that back pay shall be reduced by half.

In my view, Mr. Wood would be wise to treat reinstatement under these conditions as the functional equivalent of a formal "last chance agreement." That is, if he commits any substantial (and substantiated) violations of DOC's reasonable expectations in the foreseeable future, he will likely be immediately discharged, and given this record, an arbitrator is highly likely to find such a discharge to be supported by just cause. That is especially true if there is any continued inappropriate resistance, whether passive-aggressive or otherwise, to the search procedures,[29] or any conduct that might reasonably be considered as "retaliatory" against CO Metzger, Psychology Associate Fenrich, or any other co-worker who has provided information and/or testified in this matter.

V. CONCLUSION

DOC did not have just cause to discharge Mr. Wood, but did have just cause to impose significant discipline. The grievance of Mr. Wood will be granted in part and denied in part, and the matter will be remanded to the parties to implement the specific remedies set forth in the following AWARD.

[29] To be clear, as I have already noted, in my view Mr. Wood is completely within his rights to succinctly and politely state his opposition to the search procedures when the randomizer button turns red. He then must promptly comply, however, without being disruptive or profane, and without engaging in insubordinate behavior.

AWARD

Having carefully considered the evidence and argument in its entirety, I hereby render the following AWARD:

1. The Employer did not have just cause to terminate Mr. Wood, but did have just cause to impose a substantial disciplinary penalty in light of the seriousness of his misconduct; consequently,

2. The grievance must be granted in part and denied in part; the discharge shall be reduced to a demotion to the highest non-supervisory Classification Counselor classification; and

3. Mr. Wood shall be promptly reinstated without loss of seniority or benefits, but subject to the following additional conditions:

4. He shall complete (on paid time and at DOC expense) an appropriate course of anger management counseling/training as agreed by DOC and the Union;

5. He shall receive back pay from the date of termination to the date of reinstatement at the rate of the classification to which he has been demoted as set forth in Paragraph 2, but in light of the severity of his unacceptable actions on July 16, 2018, that back pay shall be reduced by half.

6. The matter is remanded to the parties to implement the remedies awarded; the Arbitrator reserves jurisdiction to resolve any remedial disputes the parties are unable to resolve on their own; either party may invoke this reserved remedial jurisdiction by letter postmarked or email sent (original to the Arbitrator, copy to the other party) within 90 (ninety) days of 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.

7. Consistent with the terms of their Agreement, the parties shall bear the fees and expenses of the Arbitrator in equal proportion.

Dated this 4th day of May, 2020

Michael E. Cavanaugh, J.D.
Neutral Arbitrator