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LABOR & PERSONNEL DIVISION

In the Matter of the Federal Mediation and Conciliation Service
Arbitration Between

WASHINGTON STATE DEPARTMENT OF)	
CORRECTIONS)	
Employer,)	
and)	FMCS 110826-03855-6
TEAMSTERS LOCAL UNION NO. 117)	
Union.)	ARBITRATION DECISION
)	AND AWARD
)	

BEFORE: Lawrence E. Little
Arbitrator
7790 NW Wildcat Lake Road
Bremerton, WA 98312

REPRESENTING THE UNION: Spencer Nathan Thal
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HEARING HELD: Kennewick, WA
February 23, 2012

Introduction

In regard to arbitrability, the parties stipulated that this grievance is properly before the undersigned arbitrator for a final and binding decision.

The hearing was transcribed and a transcript was timely received by this arbitrator. The parties further stipulated to exhibits and the issue, as will be noted below. They also stipulated to the submission of post-hearing briefs--which were both timely received and the hearing record closed on May 14, 2012--and to the retention of jurisdiction for 60 days to aid in the implementation of any remedy, should that be necessary.

Issue

Did the employer have just cause to demote Sean Dack? If not, what is the appropriate remedy?

Relevant Contract Provisions

The parties stipulated that Joint Exhibit 1 is the applicable collective Bargaining Agreement (CBA) effective July 1, 2011 through June 30, 2013. Relevant sections are as follows:

Article 3 – Management Rights – paragraph 3.1:

It is understood and agreed that the Employer possesses the sole right and authority to operate the institutions/offices and to direct all employees, subject to the provisions of this Agreement and federal and state law. These rights include, but are not limited to the right to:(F) Discipline or discharge

for just cause; ... (J) Determine reasonable performance requirements, including quality and quantity of work; (K) Determine training needs and methods of training and train employees....

Article 8 - Discipline

8.1 Just Cause

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

8.2 Forms of Discipline

Discipline includes oral and written reprimands, reductions in pay, suspensions, demotions and discharges.

8.3 Investigation Process

A. The Employer has the authority to determine the method of conducting investigations, subject to the just cause standard.

B. When the Department (or a consultant hired by the Department) interviews an employee and documents the conversation, the employee will review his or her statement and submit corrections (if any) to the investigator. The employee will sign the statement to acknowledge its accuracy when no corrections are necessary or when the investigator revises the statement and accepts the employee's corrections....

Article 9 - Grievance Procedure

9.5 Authority of the Arbitrator

The arbitrator will have the authority to interpret the provisions of this agreement the extent necessary to render a decision in the case being heard. The arbitrator will have no authority to add to, subtract from, or modify any provisions of this agreement, nor will the arbitrator make any decision that would result in a violation of this Agreement. The arbitrator will be limited in his/her decision to the grievance issue(s) set forth in the original grievance unless the parties agree to modify it. The arbitrator will not have the authority to make any award that provides an employee with compensation greater than would have resulted had there been no violation of the

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

Background

This demotion grievance concerns the actions of the grievant related to the use of force in an incident at the Coyote Ridge Correctional Center (CRCC). The grievant, Sean Dack, was then a Corrections Sergeant at CRCC located in Connell, WA. CRCC is the largest prison in Washington State with about 2,600 prisoners. CRCC has seven regular living units. In addition it has one "Segregation Unit" of a hundred beds.

The grievant began with the Washington State Department of Corrections (DOC) as a correctional officer in March of 2005 at a correctional center in Shelton, Washington, was promoted to acting sergeant and thereafter accepted a position as sergeant at CRCC in November of 2008. The following assertion by him at the hearing was not contradicted:

Q. Prior to this incident, had you received discipline?

A. No, never. (Transcript, Page 217 (TR. 217))

The incident that gave rise to the demotion occurred on October 21, 2010. The grievant was apparently the only individual to receive discipline for the incident. (TR. 47) He was at that time assigned to the Segregation Unit at CRCC. When he was in the center part of the CRCC complex, an area called the "mainline," during the dinner meal, he was notified of an incident when an inmate in a segregation cell had thrown an eating utensil at a correctional officer, together with threats made to that officer. The grievant was instructed by the shift lieutenant, Lt. Douglas, to go to the segregation unit. Once there he found the inmate agitated, and the inmate covered his

cell door window with paper. A camera was placed facing the cell door. A videotape (Employer Exhibit 4) (E-4) from that camera captured the events thereafter which occurred within camera range. The grievant was then acting under telephone orders from the senior officer (shift lieutenant) then present, Lt. Douglas, to set up the camera and begin a "dialog." (TR.88)

As shown on the video, the grievant conducted a "dialog," conversing with the inmate; a conversation conducted through the closed, and for part of the time, covered cell door, in an attempt to persuade him to strip, and "cuff up." (TR.222)

While the testimony appeared clear that some form of pre-planned use of force to extract the inmate from his cell was contemplated at some point in time, testimony was unclear as to the directions given concerning who should perform the extraction. Testimony was also inconsistent as to whether Lt Douglas implicitly told the grievant to handle the situation by saying "...get a team ready," (TR.220) or that he (Lt. Douglas) was sending in others to handle the situation by saying that he "...was going to send in a team." (TR.59)

Testimony established that it was likely that unclear and incomplete verbal communications between the grievant and Lt. Douglas were a major factor in the incident. In his testimony, Lt. Douglas immediately followed his above-noted comment about saying to the grievant that "he was going to send in a team," by an explanation in his testimony at the hearing, "What I mean by that is additional staff to help him out." (TR.59) However, there was some agreement that there was an operating "directive" or "rule" that segregation staff should handle incidents that occurred in segregation.

Testimony was relatively clear that at that moment Lt Douglas, who then went to check on the inmate's medical records, was planning for a "preplanned use of force." Testimony was also clear that Lt Douglas sent additional correctional officers, and the grievant, who was then attempting to dialog with the inmate, did not utilize the team sent. (TR. 222-223)

Testimony sharply contrasted as to the appropriateness of the dialog conducted by the grievant, who repeated his request for inmate compliance many times. However, the inmate finally agreed to be cuffed. Testimony disagreed as to whether Lt. Douglas heard a radioed transmission from the grievant confirming the compliance of the inmate to the order to "cuff up." (For example, see TR.42 and 227, in contrast to TR. 89.)

The cell to which the grievant intended to move the inmate had not been cleared. In the process of moving the inmate he spit on one of the correctional officers. (TR. 25, 207) At that point the consistent testimony was that the grievant said, "Dump him." While testimony disagreed as to whether by the use of that term one can rightly infer that there was "a malicious intent to engage in corporal punishment..." (TR. 134) or "That doesn't mean to hurt him," (TR. 159) the end result was that the inmate was moved to the floor and then placed in a restraint chair.

Testimony was inconsistent as to whether Lt Douglas authorized the grievant to use the restraint chair by radio prior to his arrival on the scene, or authorized its use upon his arrival. However there was another occurrence during the overall incident, when in order to reapply the improperly applied handcuffs, the inmate took another advantage of a momentary opportunity and kicked a correctional officer in the face.

In the viewing of the video during the testimony of Lt. Douglas, it was noted that the grievant was carrying OC (Oleoresin capsicum, commonly known as pepper spray). No allegation was made that the grievant used OC, only that he was carrying it. Testimony established that the mere carrying of OC, vice its use, did not require prior authorization. TR. 115; E-4, p. 41-41.

Position of the Parties

Union

The union argues that the employer has not demonstrated the required just cause, has failed to meet its burden of clear and convincing evidence to establish that the grievant committed the offense, and that the degree of discipline is not reasonably related to the seriousness of the offense. They further argue that as this discipline is imposed upon the grievant who had a prior "unblemished work record." They also note that due to his type of work, discipline of him can carry a "reputational impact," and because of that they argue that a higher standard of proof applies. They further argue that the employer's investigation was flawed for failure to interview key witnesses

and to allow review of some of the statements taken. They argue that tactical decisions in a crisis should not be second guessed unless irrational.

They argue that the grievant's dialog with the inmate was calm and professional. They further argue that the carrying of OC was not prohibited, that the grievant was left in the impossible situation of being in charge of an incident without clear directions, and that the phrase, "dump him," was not maliciously intended. They conclude that the incident does not justify such discipline, that the demotion is too severe, the actions don't suggest inability to supervise, and that reversal and award of back pay is appropriate.

Employer

The DOC argues that the use of force was poorly executed, that the case is about the assumption of responsibility by the grievant who in turn over-focused on one element (the dialog), moved too swiftly without verifying directions, and failed as a leader to adequately plan and address such questions as: should the dialog be continued and by whom, should plans be made for use of OC or other special treatment, were there medical factors, where should the inmate be taken, should a team be assembled for a use of force.

They also argue that the grievant's use of the term, "dump him," was a form of corporal punishment, and that the overall incident was an out-of-control preventable mess, having an adverse effect on other staff.

Discussion

CRCC Superintendent Jeffrey Uttecht has over thirty years of experience working in corrections, has previously worked in five prisons in Nebraska for 23 years, and then prior to serving at CRCC served as superintendent at the Washington State

Penitentiary, an institution with higher level inmates than at CRCC.

His testimony expressing serious concerns about the actions of the grievant appear grounded in his extensive experience with the use of force in correctional facilities.

In light of his experience, his testimony is critical to both the employer's four charging allegations and the context in which this grievance arises.

In his direct testimony he was asked to review the elements noted in his notice of demotion letter to the grievant:

1. On October 21, 2010, you acted in an inappropriate manner by antagonizing Offender...
2. On October 21, 2010, you violated DOC Policy 410.200, *Use of Force*, when you carried OC spray on your person contrary to policy.
3. On October 21, 2010, you violated DOC Policy 410.200 *Use of Force* when you ordered Correctional Officers to suit up for a use of force. To include failure to ensure the responding officers were properly suited.
4. On October 21, 2010, you used inappropriate force on Offender...when you ordered other officers to, "Dump him. He spit dump him!"

(E-7, p. 1 of 3)

As to the first allegation, concerning the dialog, Superintendent Uttecht noted in his direct testimony that he watched the video of the incident many times and he counted the number of times a demand was repeated. He noted that the grievant told the inmate to "cuff up" 16 times, and to "strip out" 11 times. (TR.121) He testified that:

A. Well, I didn't believe that it was constructive dialogue. I believed that it was more to inflame. At least that was the effect. It really did not settle him down...it was more provocative than anything else." (TR.121)

Later on cross examination he further noted that:

A. I believe that his repeated questioning, his attitude, his behavior, his demeanor was provocative and that it was inappropriate. (TR.128)

On cross examination he agreed that the grievant seemed calm in the dialog and his voice was not raised. (TR. 128)

Superintendent Uttecht's testimony on the dialog issue disagreed with the conclusion of other testimony that the dialog was successful and resulted in the inmate agreeing to cuff up, beginning the process to exit the cell. Moreover, Superintendent Uttecht offered no other explanation for the inmate's ultimate compliance. (TR.129-130)

As to the second allegation, the use of OC, Superintendent Uttecht appeared to agree that the policy in effect at the time of the incident required prior authorization for its use, not simply for carrying it. (TR.130)

As to the third allegation, while he was concerned about the proper equipment not being worn for a pre-planned use of force, his testimony was that once the inmate cuffed up, a suiting-up for a pre-planned use of force for a cell extraction "would not make any sense." (TR.133)

As to the fourth allegation, use of the term "dump him," Superintendent Uttecht noted that he had never heard the term before. (TR.133) He agreed that moving an inmate to the floor has value:

Q. It adds control and a greater degree of safety for staff and the inmate, correct?

A. Correct. (TR.134)

Superintendent Uttecht expressed in his testimony that:

Q. I want to be clear that you are ascribing to Sergeant Dack a malicious intent to engage in corporal punishment, as opposed to an honest and sincere belief that moving him to the floor was safer and more secure for staff and the inmate. That's your testimony?

A. And that's why - Yes, it is. (TR.134)

And later:

Q. You felt that Sergeant Dack's actions were somehow malicious?

A. I do. (TR.142)

Other testimony on behalf of the employer was instructive.

The testimony of Sgt. Robert Long--a response movement officer at CRCC who responded to the shift commander, Lt Douglas, to report to segregation at the time of the incident--was helpful in several respects.

First, he noted that when he arrived in the segregation unit the grievant said:

A. ...he didn't need all the personnel that were arriving because of the rules in place by the unit CUS for any incidents that happen within segregation. He wanted it handled by segregation staff. (TR.16)

Sgt. Long's testimony in this regard points to seemingly inconsistent policies as to which team would take the lead in incidents in the segregation unit. That implicit confusion was again illustrated in Sgt. Long's testimony concerning when he was helping in the movement of the inmate, and a door unexpectedly opened:

A..At that same time, the segregation staff were trying to gain control of the offender because of the fact of the previous instruction of segregation staff handling the situation.... (TR.25)

Another apparent confusion point existed when they were pinning the inmate against the door which briefly opened. According to Sgt. Long, although the grievant was then, in his estimation, in charge, there was confusion as to who authorized the substitution of personnel. (TR.26; TR.30)

Second, Sgt. Long implied that the dialog between the inmate and the grievant seemingly resulted in a compromise: the inmate agreed to cuff up but not to a strip search. He noted that the grievant had been trying to get the inmate:

A....to comply to a strip search, and he did not want to comply. And eventually it was determined the offender agreed to cuff up, or be restrained, without the strip search. (TR.19)

Later on cross examination Sgt. Long noted that:

Q. So would you agree with me that Sergeant Dack was acting properly in dialoguing with the inmate?

A. Yes. (TR.37)

Third, St. Long seemingly supported the decision to move the inmate to the floor, albeit he didn't mention in direct

examination the grievant using the term, "dump him." He testified:

A. It's easier to control an offender when he's down on the ground than when he's on his feet. And we were going to have to remove his clothing anyway, so it's more logical to place him on the ground. (TR.27)

Later he testified that the grievant used the term "dump him" and that it was a commonly used term for placing the inmate on the ground. (Tr. P. 44)

A. We placed him on the ground in a controlled fashion. (TR. 45)

Fourth, Sgt. Long gave a helpful perspective when he noted:

A....every use of force is different. Every situation is different. You can arm-chair quarterback every single one and find out all the things you did wrong. We talked about this one afterwards and, you know, there's some things that we needed to do differently...there's always Mr. Murphy involved when it comes to use of force. (TR.31)

Fifth, Sgt. Long's overall conclusion is particularly helpful:

Q. Having been involved in this, do you place the blame for things going wrong on Sergeant Dack to any degree?

A. Sure, yeah. I mean obviously there's got to be some blame somewhere. Do I feel it's all his fault? No, but... (TR. 32)

After noting that to his knowledge no one else was disciplined for the incident, he later noted:

A....Basically all I wanted to say was that anytime that you're in charge of an incident and things go wrong, you're responsible. How much of it was his fault—I mean ultimately some of it is because he's in charge of the incident, but do I blame him for everything that happened? No. (TR.51)

The testimony of Lt Michael Douglas, the shift lieutenant who instructs on the use of force for the DOC and who from 4PM until 10PM is the highest ranking person at CRCC, was also helpful in several regards.

During his testimony the video of the incident was played and he provided responses to questions.

He noted that when he arrived at the scene of the incident he didn't assume command of the situation. (TR.73) He said that he did so because there was no one else who could have replaced him at the facility at the time:

A...Instead, I stayed off camera, in the background, and the only times I said anything was when I felt there was a threat of injury to a staff member based on either their actions or lack of actions. That's why. (TR.73-74)

Later in cross examination referring to the entire incident when he was present he noted:

Q. ...you share some responsibility for that [the incident], correct?

A. Absolutely

Q...And can we agree that you, yourself did not receive any discipline related to the incident?

A... Right. (TR.103)

And later:

Q...You agree with me that you were prepared to insert yourself if you saw something going wrong that you were concerned would cause injury, correct?

A. Yes.

Q. And we can agree, can't we, because we saw the video, that you did not do that at any point, correct?

A. Correct. (TR.104)

Lt. Douglas' testimonial answer to the question, "did anything go wrong during this whole evolution," was particularly helpful:

A...We had the time to plan. We had the time to put staff in appropriate equipment...We had the time to even walk through the extraction process prior to even going to the offender's cell...I believe that if I'm engaged in dialogue with an offender and I seem to be having a reaction to that offender, or causing the offender to react by my mere presence or the things that I'm saying to him, I'm going to remove myself from that situation so that someone else can take over that dialogue...I believe it was just--that could have been slowed down and there could have been clearer

communication between myself and the supervisor of that area. Things could have been done a lot differently. (TR. 77-78)

Lt Douglas further noted that he has a rule of thumb:

A...When it comes to actually removing that offender from that cell, my rule is twice. I only give the offender two verbal directives, with the belief system that the first time he may not have heard me due to something on my head, or where he's located physically. The second one would be a verbatim repeat of the first directive, at which point an alternative method will be employed. (TR.78-79)

He was asked about DOC 410.200 Use of Force policy, E-4. Page 37 of 132 of that policy states in part:

C. Passive Resistance Response

1. In a non-emergent situation where an offender displays passive resistance, any of the following may be used:

a. Staff at the incident site, including Crisis Negotiators, attempt to reason with the offender or order the offender to comply with specific directions.

Lt. Douglas noted that he printed out a checklist for dialoging in a preplanned use of force situation. (TR.63-64; E-4, pages 131-132) Later Lt. Douglas noted in cross examination that his two times rule was not DOC policy. (TR.94)

Lt. Douglas' testimony concerning some of the specifics of his communication with the grievant during the extraction and moving of the inmate are in conflict with other witness testimony. Lt Douglas noted that while he couldn't recall, he "should have" [been] on a radio channel termed, "all-call" that night. (TR.85) In his testimony he noted that he didn't hear the grievant inform him over the radio that the inmate had complied. (TR.89)

Later he noted that:

Q...and so you agree with me that when the inmate became compliant, that changed the equation?

A...Yeah. (TR.106)

However, Lt. Douglas strongly noted that he disagreed with the grievant's actions in taking the inmate to the ground after the spitting:

A...Once the offender spat, the staff reacted to that and they pinned the offender's head, shoulders and upper torso against the tier door. At that point they'd regained control of the offender. The action of putting the offender on his face didn't make any logical sense... (TR.110)

Thus, while Lt Douglas argued that after the inmate spit the actions were not a justifiable use of force (also see TR. 95-96), he noted that the placing of the inmate on the ground was an easier way to control him, (TR.98) and referring to his incident report (U-6), he agreed that he had then noted that the incident was "accomplished with minimal force..." (TR.96)

As to the carrying of OC, Lt. Douglas further clarified that under the policy in effect at the time of the incident the mere carrying of OC did not require prior authorization. He also noted that newer policy now even requires the carrying of OC. (TR.92 and 116)

The union witness testimony began with correctional officer Brady Hinds.

Officer Hinds had been involved as a correctional officer in several prior uses of force and at the time of the incident was serving as part of the segregation unit staff. He noted that he has seen officers injured in forced cell extractions and inmates always get hurt. (TR.155)

Officer Hinds noted that he heard the grievant say over the radio, "we have the offender in restraints." He testified that he didn't hear any response from Lt Douglas. (TR.155-156)

He further testified that while he didn't hear the grievant use the term, "dump him" it was a commonly used term, "that doesn't mean to hurt him." (TR.159)

Officer Hinds raised the issue of being interviewed by the investigator for this incident, but not being asked to review his statement, which after his review he found inaccurate. (TR.161-162). However, on cross examination he noted the inaccuracies and they did not focus on the incident. (TR.162-163)

The testimony of Sergeant Jason Laws, then an acting sergeant in a living unit at CRCC, began with his conversation

with Lt Douglas. Sgt. Laws testified that Lt. Douglas as part of assembling a team noted that the team was going to "pull one out." (TR.168) Sgt. Laws noted that on the way back from the segregation area he overheard the grievant say that the inmate was compliant and submitting to restraints. (TR.170) He further testified that:

A...then we heard a request for authorization to use the restraint chair by Sergeant Dack, and then we heard Lieutenant Douglas acknowledge the emergent use of force and authorize the restraint chair. (TR.170)

He testified that he was not interviewed by the investigator.

The union next called correctional officer Justin Lettau of the segregation unit. He testified regarding an e-mail he sent to the investigator. (TR.180; U-1) He noted that after the incident Lt Douglas:

A. ...informed us that the only thing that he would have changed during the use of force was how we escorted the offender from the cell. (TR.181)

Lt. Douglas did not deny conducting a debriefing after the camera was turned off, and he noted that he may "possibly" have said that the only thing that he would have changed in the incident was when the inmate was removed from the cell. (TR.105)

Regarding the carrying and use of OC he noted that:

A...As far as I know, there's no authorization necessary just to get it. If we have time, there's authorization necessary to use it.... (TR.185)

Sergeant Micah Turner, a living unit third shift (2 to 10PM) sergeant testified that he was asked by Lt Douglas to report with two of his response movement officers to the scene, and he took over operating the camera. (TR.190) He testified as to what the grievant said in his dialog with the inmate, noting that he had previous been involved in dialog, and in this incident nothing that the grievant said was something he felt was antagonizing, that the grievant was not trying to spin up the inmate, nor was the repetition improper. (TR.190-191)

Sgt. Turner testified that he heard the grievant use the words "dump him," words that he had heard before and that he knew it to mean:

A... Place the offender on the ground.

Q. Does it carry with it some hostility or some maliciousness in your mind?

A. No. (TR.193-4)

Correctional Officer Robert Scott testified that he previously worked at a correctional facility with a heavy percentage of disabled offenders. He was not interviewed by the investigator. He testified that when he arrived in segregation the inmate had his cell door window covered. He testified as to the manner of the grievant's dialog, and noted that there was nothing that he viewed as unprofessional or problematic.

A. Sergeant Dack was very quiet...And Sergeant Dack stayed calm and kept asking him, are you going to cuff up, I don't know, fourteen, fifteen times, and finally he said yes. (TR.203)

Officer Scott further testified that he was one of the escorting officers and noted that in the course of moving the inmate, the grievant and the inmate were in what he termed, "more of a conversation," (TR.207) He also testified that the grievant used the term, "dump him," and that he had heard the term before and it meant to place him on the ground. (TR.207-208)

The grievant testified that he was hired by DOC in 2005 at the Washington Corrections Center in Shelton.

He testified to his desire for a career path, and that he had been now blocked in his attempts to move to another facility from CRCC. (TR.215). He noted that he had not received prior discipline. (TR. 217)

He testified that at the beginning of the incident, he was briefed by the officer who had been threatened by the inmate. She said that:

A...he was going to kill her, beat her up, kill her...(TR.218)

The grievant testified that he then told Lt Douglas in person what had happened with the inmate throwing the utensil at Officer Durlock. He said he was instructed to, "find out what's going on and report back." (TR.218)

He further testified that after noting the inmate's behavior as "escalating, deescalating," he got the camera going

and called Lt. Douglas. (TR.219). He noted that Lt. Douglas gave him the number to medical and to get a team ready. (TR.220)

Later he noted that while Lt Douglas testified that he said to the grievant that he was going to send some people, that he heard him direct "get a team ready." (TR.221) He testified that he then went back to dialoguing and noted:

Q. Why did you repeat the same direction over and over and over again? That's been characterized as trying to antagonize him.

A. Offender Moore has mental health issues. I believe that's what his record said. (TR.224)

The grievant testified that after the inmate complied he made a radio call to Lt Douglas and received a response of simply received, or 'received. I'm on route.' (TR.227)

As to the "dump him" moment, the grievant testified that:

A...They don't teach us in the correctional academy to place an offender on the wall. That is nowhere in the use of force policy or is it taught in in-service training during defensive tactics...I have been told 'dump him' several times, meaning place an offender on the ground, being in a controlled manner, start to own the situation...I made a radio call to Lieutenant saying: I have an emergent use of force...Lt. Douglas came back and said: Received (TR.229-231)

The grievant later noted that he could have had someone else "go talk with the offender differently, but I got the desired outcome for the offender to cuff up without any use of force." (TR.236) Later he noted that:

A. I believe that had a trained CNT, which is a crisis negotiation team, member been there, yes, I probably would have used them... (TR.243)

Opinion

The employer properly argues that this case is about responsibility.

They argue that the grievant assumed the leadership role over the incident from Lt Douglas at the moment the grievant rejected the officers Lt Douglas sent him. They further argue that he failed to plan for who best could do the dialog, where should the inmate be taken, and should a team be assembled.

However, the weight of the testimony established that Lt Douglas was most likely in touch virtually throughout the incident. He likely either authorized, and definitely ratified, all of the actions from the assembly of the team to the use of the restraint chair; or gave insufficient direction so as to leave the grievant in a position where he had to exercise his own judgment. Furthermore, it was clear that the grievant did not violate any order given by Lt Douglas.

The series of events comprising the incident seem a mixture of mistakes often made due to haste and poor communications, mixed with unfortunate circumstances, examples of "Mr. Murphy" in action.

This arbitrator has a great deal of respect for the responsibility of the Superintendent in this situation to maintain good order. However, throughout the hearing it became clear to this arbitrator that lines of authority to handle such a situation were not evident or not well communicated, and the extent of coordination training for such incidents was not made clear.

While the grievant as the incident commander shares some responsibility, Lt Douglas, who as a practical matter the grievant was reporting to during the incident, was largely in charge, albeit maintaining his presence mainly in the background.

Furthermore on two of the critical allegations, the weight of the evidence at hearing does not support the level of discipline.

First, there was no collaboration of the opinion that there was malice in the grievant's use of the term "dump him." Second, there was only limited collaboration of the opinion that there was any provocative action by the grievant in his dialogue.

This arbitrator viewed the video again after the hearing and agrees with the near-consistent testimony that the grievant appeared to maintain an even and moderate tone in his dialog, and no evidence of malicious intent appeared to influence the "dump him" moment. The action to move the inmate to the ground appeared to be a spontaneous reaction to the spitting by the inmate; an appropriate, albeit debatable, emergent use of force.

Both of those actions, being the core of the allegations, were in hindsight likely not the best practice, especially for a supervisor who has had extensive training and even taught parts of the use of force training sessions. However, in the absence of sufficient proof of best practice and extensive testimony concerning pertinent regulations and procedures, the proof of misconduct was clearly not sufficient to justify the level of discipline imposed.

As to the other two allegations, the handling of the OC was not a violation since he never used it, and the assembly and suiting of the team was in part the result of a communication gap during a fluid evolution. In affect it seemed as Lt Douglas began to formulate in his mind that a preplanned use of force was needed, the grievant was at that moment using an emergent use of force after the inmate agreed to cuff up. They never really communicated.

Perhaps it really was Mr. Murphy in action.

Article 8.1 of the parties' negotiated agreement requires just cause for discipline.

Most especially where the parties' agreement requires just cause, the employer bears the burden in a discipline case, "to show by reliable and material evidence that charged misconduct occurred, that penalty assessed by employer was commensurate with seriousness of offense, and that due process elements were observed in the taking of discipline." Chevron Phillips Chem. Co., 121 LA 1386 (Eisenmenger 2005).

In our situation the evidence did show to a limited extent that the grievant bears some shared responsibility for mistakes, specifically as to two or perhaps three of the four allegations contained in the demotion letter. He didn't wait for a cleared cell. He didn't wait for further instructions when he knew or should have known that Lt Douglas was involved. The impact of his actions contributed to the resulting lack of preparation which may have contributed to the opportunity for the inmate to spit and later kick.

The next question is whether this shared and limited responsibility rose to the level of the penalty assessed.

It has often been noted that the penalty must flow from an analysis of "both the misconduct and the individual employee...." Clow Water Systems Co., 102 LA 377 (Dworkin 1994); cited in Merchants Fast Motor Lines, 103 LA 396 (Shieber 1994).

Part of analyzing the mitigating or aggravating factors that might exist in the work record of the employee is the reputational impact on the line of work the employee is engaged in. Kroger Co., 25 LA 906 (Smith, 1955).

In our situation, there doesn't appear to have been any attempt to significantly examine mitigating and aggregating factors personal to the grievant's record, nor to examine whether an alternative penalty might accomplish the employer's goal while also not improperly affecting the future work of the grievant.

In this regard, it is key to this grievance that this is the first discipline imposed on the grievant.

In the recent decision of Franklin County Sherriff's Office, 127 LA 283 (Felice, 2010) an "unblemished record of a deputy was one factor considered in reducing" a severe disciplinary action.

The pattern of conduct is important to assess whether the penalty is appropriate and whether the grievant is able to perform his duties.

"Although some form of discipline is appropriate, the penalty of demotion is not. There does not exist a pattern which includes the Grievant's employment record, course of conduct or profile that demonstrates that he is unable to perform the duties..." City of Key West, 106 LA 652,654 (Wolfson, 1996)

"It is well established that corrective discipline implies the application of successively severe penalties..." State of Montana, Department of Environmental Quality, 121 LA 1194,1199-1200 (Calhoun, 2005)

"The grievants who have outstanding work records, and have, for the first time made a mistake in the course of their jobs are the type of employees who will benefit from progressive discipline. Likewise, the City will benefit from the future services of these two officers who Chief---concluded will be

unlikely to commit such an act again." City of Portland, 77 LA 820, 828 (Axon, 1981)

Furthermore, judgment call decisions in a dangerous and rapidly evolving situation require that some latitude be granted to the propriety of the action.

"The proper test is whether the grievant's actions can be considered reasonable given the exigencies of the situation with which he was confronted." City of Fort Lauderdale, 00-2 ARB at 6742 (Sergent, 2000)

In a somewhat similar case, a police officer was suspended for failing to rapidly respond to a radio call from a superior. The arbitrator found that the officer had engaged in misconduct but not willful neglect or dereliction of duty and thus reduced the suspension to a standing letter of reprimand. City of New Brighton, 06-1 ARB 3499 (Bognanno, 2006)

Furthermore, as it's a severe penalty, "...demotion must be related to an employee's ability to perform the work on a continuing basis in terms of competence and qualifications..." Duquesne Light Co., 48 LA 1108, 1111-1112 (McDermott, 1967).

The union raises a due process issue, that due to the investigator not interviewing two witnesses and providing others the right to review their statements, a faulty investigation was conducted and thus on this additional ground, the employer cannot thus show just cause. A fair investigation requires management to keep an open mind regarding the guilt or innocence of the employee. In re City of Sandy Ore., 129 LA 669, 679 (Calhoun, 2011). A full and fair investigation requires a good faith effort to interview all key witnesses. Vancouver Police Officers Guild, 2005 WL 1659628 (Landau, 2005)

The conclusions of the investigator (in a memorandum entered as E-4) provide some insight:

"The first allegation was that Sgt. Dack antagonized Offender Moore when he spoke with him on 10/21/10. Sgt. Dack admitted that he could have done a better job speaking with Offender Moore after I allowed him to view video of the conversation.

The second allegation was Sgt. Jack carried O/C during this incident and that it was inappropriate use of OC. After I reviewed the use of force policy concerning use an authorization to use O/C Sgt. Dack stated that he agreed

that he needed authorization to retrieve and carry O/C during this incident.

The third allocation was Sgt. Dack ordered Segregation staff to suit up for a spontaneous use of force. Sgt. Dack admitted that he directed C/O's Barajas, Owens, Lettau and Hinds to put on protective clothing in preparation for a possible cell extraction. Sgt. Dack stated he believed he was authorized to do this by Lt. Douglas. Lt. Douglas does not confirm this statement.

The fourth allocation was that Sgt. Dack inappropriately told staff to 'Dump him, he spit, dump him.' Sgt. Dack stated he did not recall what he said during this event but that if it was on tape he must have said it. During interviews with C/O Barajas, C/O Owens, Sgt. Trembley and Sgt. Turner indicated that Sgt. Dack directed responding staff to 'dump him' and no other direction was given."

While testimony combined with the language of the investigation leads some credence to the allegations concerning the investigation having not been done with an open mind and with all pertinent witnesses being interviewed and those interviewed being given a chance to review their statements, these allegations were not fully established, nor shown to be have any significant impact on the decision to demote.

However as clear as it is to this arbitrator that the grievant had no ill intent and in fact attempted to act in the best interests of CRCC, he shares some responsibility and made some missteps. As he has admitted, he might not have been the best person to conduct the dialog. He was likely partially complicit in moving too fast in initiating the extraction. In the confusion over the assembly of the team, he didn't have them wearing the proper protective equipment, and he showed some irresponsibility by not attempting to secure more detailed instructions before proceeding in each phase of the incident.

Thus, the employer having established some violations by the grievant largely based on haste and confusion, and the grievant having rebutted the more serious allegations based on intent, the discipline imposed is properly mitigated.

Award and Remedy

The grievance is sustained.


The Department of Corrections will immediately reinstate the grievant to the rank at which he was employed on October 21, 2010, with interim time served at that rank credited to him, but without any other award for back pay or benefits.

Furthermore within 30 days the Department of Corrections will issue the grievant a written letter of reprimand, specifically requiring him to attend appropriate use of force training.

The Arbitrator remands this remedy to the parties to determine any further specifics of its implementation. The Arbitrator will maintain remedial jurisdiction for a period of sixty days, as stipulated, to resolve any disputes that may arise regarding the remedy.

As specified in Article 9.6 of the parties' negotiated agreement, the expenses and compensation of this arbitrator shall be borne by both parties equally.

Dated this 30th day of June 2012.



Lawrence E. Little
Arbitrator