

**AMERICAN ARBITRATION ASSOCIATION (“AAA”)**

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In the Matter of the Arbitration between:

**AFSCME LOCAL 159, (“Union”),**

-and-

**CITY OF PHILADELPHIA (“City” or “Employer”)**

Grievance: Sgt. Garland Vorn 20 Day Suspension

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**OPINION and AWARD**

**AAA Case No. 01-18-0000-3056**

**BEFORE:** Robert A. Grey, Esq., Arbitrator

**HEARING DATE:** May 29, 2019, at American Arbitration Association, 230 South Broad Street, Philadelphia, PA 19102

**APPEARANCES:**

**FOR THE UNION:**

Willig, Williams & Davidson  
By: Jessica R. Brown, Esq.

**FOR THE EMPLOYER:**

City of Philadelphia Law Department  
By: Benjamin Patchen, Esq.

**INTRODUCTION**

The Philadelphia Department of Prisons (“PDP”) suspended Correctional Sergeant Garland Vorn (“Grievant”) for 20 days for alleged improper on-duty conduct pertaining to an incident on [REDACTED]. The Union seeks that the discipline be completely rescinded. The City seeks denial of the grievance in all respects.

Pursuant to the parties’ Collective Bargaining Agreement (“CBA”), the hearing of this grievance was held on May 29, 2019. Both parties appeared by counsel and were afforded full, fair and ample opportunity to present and challenge evidence,

examine and cross-examine witnesses, and argue their positions. Both parties did so. Neither party questioned the arbitrability or fairness of the proceedings. The proceedings were not transcribed, and no official transcript was produced. The parties gave oral closing statements at the conclusion of the hearing. There were no post-hearing submissions. This Opinion and Award is based upon detailed and thorough review and analysis of the entire record. All party positions have been considered in rendering this Opinion and Award, whether or not specifically addressed herein.

### **STIPULATED ISSUES**

The parties submitted the following stipulated issues for final and binding determination:

**Was there just cause to suspend Grievant, Garland Vorn, for twenty (20) days?**

**If not, what shall be the remedy?**

### **RELEVANT BACKGROUND FACTS**

The following salient background facts are not materially in dispute, unless noted otherwise. They are presented in chronological order where practicable.

Grievant was appointed to the PDP as a Correctional Officer on November 1, 2004. He was promoted to Correctional Sergeant on February 22, 2010.

On [REDACTED] the on-duty incident which underlies this arbitration occurred. The incident is discussed below, in the Discussion and Opinion section.

On February 28, 2017 Lt. Akhtar submitted an Investigation Report regarding the incident. The report included that, *“At this point in the investigation it is ascertained*

that Sgt. Vorn failed to take proper action as a supervisor and jeopardized the safety and security of the Officers and inmates. For that Sgt. Vorn received an Employee Violation Report (EVR).” The Investigation Report was resubmitted on March 8 and 12, 2017.

On March 8, 2017 PDP issued said EVR for the alleged [REDACTED] incident. The Complaint section of the EVR states, *verbatim*:

*Sergeant Vorn, on Sunday, [REDACTED] on the 7x3 shift, you were assigned as the floor sergeant at ASDCU. At approximately 10:00hrs you were contacted by B-Unit Officer D. R. [REDACTED] to come on the unit and speak with inmate J. [REDACTED] R. [REDACTED]-M. [REDACTED], PP#[omitted]. Inmate M. [REDACTED] told Officer R. [REDACTED] that he was having a problem with another inmate on the unit and was afraid to stay on B-Unit and asked to see a supervisor. Sgt. Vorn you arrived on the unit and asked inmate M. [REDACTED] what his issue was. Inmate M. [REDACTED] stated to you that he was having issues with another inmate on the unit and identified inmate J. [REDACTED] J. [REDACTED], PP#[omitted] as the person he was having problems with. Sgt. Vorn you then proceeded to call inmate J. [REDACTED] and took him in front of inmate M. [REDACTED] and asked if either one was having any problem with one another to which both inmates denied. Sgt. Vorn your actions jeopardized not only the safety and security of the Officers on the unit but also the inmates. After you spoke with both inmates you did not separate them and sent them back on the same unit. You also failed to take proper action by not sending inmate M. [REDACTED] to medical for evaluation. Inmate M. [REDACTED] was sent to the hospital on the 3-11 shift for [REDACTED]. Future occurrences will result in further disciplinary action. Because you failed to take proper action as a supervisor, you are receiving this Employee Violation.*

City Exhibit 2.

On April 3, 2017 the EVR was referred for formal disciplinary action.

On May 25, 2017 a PDP formal disciplinary hearing was held pertaining to the EVR. Grievant appeared with Union representation, denied the charges, and gave his version of what happened. In the resulting June 2, 2017 Memorandum to the PDP Commissioner, the Board concluded:

*After deliberations, based upon the evidence presented and the employee's record, the Board sustained the violation of General Orders/Policies 01, 02, 03, 05 and 37. The Board recommends a twen[t]y (20) calendar day suspension. The Board believes that Correctional Sergeant Vorn should have spoken with the inmates separately rather than together.*

City Exhibit 2.<sup>1</sup> Emphasis added.

On June 20, 2017 Grievant was served with Notice of Suspension. The Union subsequently filed a grievance, and then a Demand for Arbitration with AAA, leading to the parties' selection of this arbitrator, and the instant proceeding.

The Notice of Suspension served on Grievant states, *verbatim*:

*Violation of General Orders/Policies: 01, 02, 03, 05 & 37*

*Specifically, on Sunday, [REDACTED], on the 07:00 to 15:00 hours shift, you were assigned as the Floor Sergeant as A.S.D.C.U. At approximately 10:00 hours, you were contacted by B-Unit Officer D [REDACTED] R [REDACTED] (PYR #[omitted]) to report to the unit and speak with Inmate J [REDACTED] R [REDACTED]-M [REDACTED] (PP #[omitted]).*

*Inmate M [REDACTED] told Officer R [REDACTED] that he was having problem with another inmate on the unit and was afraid to stay on B-Unit and asked to speak with a supervisor. You arrived on the unit and asked Inmate M [REDACTED] what the issue was. Inmate M [REDACTED] stated that he was having issues with another inmate on the unit and identified the other inmate as Inmate J [REDACTED] J [REDACTED] (PP #[omitted]) as the person he was having problems with.*

*You then proceeded to call Inmate J [REDACTED] and took him in front of Inmate M [REDACTED] and asked if either one of them was having a problem with the other, to which both inmates denied having any problems with each other.*

*After you spoke with the inmates, you did not separate them, instead they were sent back to the unit. Inmate M [REDACTED] was later sent to the hospital by Medical due to [REDACTED].*

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<sup>1</sup> The Memorandum noted that at the formal disciplinary hearing Grievant, "stated that inmate M [REDACTED] went out to the hospital in [REDACTED], due to [REDACTED]."

Therefore, after a review of the record and due to the nature of the charges, you are hereby suspended for (20) Calendar Days.

...

City Exhibit 2.

**RELEVANT GENERAL ORDERS (“GO”)**

- GO 5. *All employees shall cooperate in maintaining the security and good order of the institution at all times.*
  
- GO 37. *Any employee who fails to take the proper action while on duty, fails to assert proper authority, or shows reluctance to carry out rules or orders shall be subject to disciplinary action.*

City Exhibit 1.

**POSITIONS OF THE PARTIES**

The positions of the parties are from their respective opening and closing statements, nearly *verbatim*. They are set forth in *italics*, single spaced, to denote they are the words of the parties, not the arbitrator.

**City Position**

*Not much is factually in dispute. Lt. Akhtar, Major Miranda and Grievant all testified that Grievant was aware there was an issue with the other inmate. They all testified that Grievant was aware that inmate R [REDACTED]-M [REDACTED] was “having trouble” with inmate J [REDACTED]. Then the question becomes “What is the proper action based on that?”*

*Grievant was made aware that inmate R [REDACTED]-M [REDACTED] was having issues and/or trouble with inmate J [REDACTED]. Based on that information Grievant spoke with the inmates separately and then together. Grievant failed to determine what the issue or trouble was between them, and failed to take proper action to alleviate any threats to R [REDACTED]-M [REDACTED].*

*Grievant is a Sergeant and 15 year employee. All employees, and especially supervisors, are required and expected to look after inmate welfare and protect inmates from safety risks. Specifically, there is an obligation to protect inmates when made aware an inmate may be in danger. Obviously it is impossible to eliminate all risks in a prison. But, there is an obligation to take affirmative steps to minimize the possibility of risk, and to take proper action to ensure best practices are done to keep inmates as safe as possible. COs and supervisors are expected to take proper action. Based on Grievant’s experience, and his role*

*as a supervisor, he is expected to take proper action in a situation such as this incident. Under the mostly undisputed facts of this incident Grievant failed to do so.*

*Grievant brought the inmates face to face and asked them in front of each other if they had any problems with each other. Of course the complaining inmate said was no problem. Grievant thereby created risk to the complaining inmate. Grievant's doing so made R ██████-M ██████ known to as a "snitch", someone who runs to the guards, thus creating real danger for R ██████-M ██████.*

*Here, it is undisputed there was an issue, there was trouble, between R ██████-M ██████ and J ██████. R ██████-M ██████ reported it to CO R ██████, and then directly to Grievant. Based on this information, proper action would have been to investigate and figure out what the issue and trouble was, and separate the inmates to eliminate risks to the complaining inmate. Instead, Grievant sent them both back without separating them, creating risk. Both the Major and Lt testified proper action would have been to move R ██████-M ██████, or send him to protective custody. Instead, Grievant placed R ██████-M ██████ in danger. Based on Grievant's experience and role as supervisor, Grievant should have taken proper action. Taking proper action would not have included bringing them together.*

*Grievant's biggest failure was his decision to not figure out or investigate what R ██████-M ██████'s issue/trouble was, before bringing them together. Grievant testified R ██████-M ██████ wouldn't tell him. But you either believe there was an issue/trouble, and that you need to take action to protect the inmates; or you believe there wasn't any issue/trouble, and then there would be no reason to bring them together. By bringing them together, all Grievant did was to notify J ██████ that R ██████-M ██████ snitched to a CO or Grievant.*

*Even if there was no issue or trouble, the fact that Grievant called both inmates together, and asked them what's the issue/problem between you two, Grievant created danger because of the appearance of R ██████-M ██████ being a snitch who runs to the guards. The testimony shows the ramifications of that in prison. Lt. Akhtar and Major Miranda both testified about the concept of snitching in prison, and what happens to inmates known as snitches. Both testified it is dangerous for inmates, and inmates get attacked for it. Grievant acknowledged that this is a possibility. Grievant's testimony was not as credible as that of Lt. Akhtar and Major Miranda regarding snitching, and the consequences of snitching. This is extremely important, because what happened when Grievant brought the inmates together, even if no issue or trouble, was that Grievant's action made J ██████ aware that R ██████-M ██████ had some type of issue or problem with J ██████, and that R ██████-M ██████ went to guards about it. If Grievant didn't do so, J ██████ would not have been aware of this. J ██████ would not have known that R ██████-M ██████ "snitched", but for Grievant's improper action.*

Sgt C [REDACTED] testified that on his shift later that same day, J [REDACTED] attacked R [REDACTED]-M [REDACTED], causing severe injury and that is why R [REDACTED]-M [REDACTED] went to hospital. Yes, R [REDACTED]-M [REDACTED] initially stated he fell in the shower, but once at Medical he said he was injured by J [REDACTED] assaulting him. The overwhelming circumstantial evidence is that J [REDACTED] attacked R [REDACTED]-M [REDACTED] for snitching. But even if there was no fight or violence after bringing them together, what Grievant did placed R [REDACTED]-M [REDACTED] in danger.

Grievant testified that he used "conflict resolution" training he received he received at work. But Grievant had no proof of such training and couldn't say when he took it, what it was about, or that it was applicable to this scenario, anyway. Grievant really had only 2 options in this scenario: 1) R [REDACTED]-M [REDACTED] had issue/trouble with J [REDACTED], and Grievant would have had to take action to separate them for safety. Or, 2) There was no issue/trouble, and thus there was no need to bring them together or figure out the issue/trouble, because there were none.

Grievant also created a liability issue for the City. Grievant, a supervisor, at the very least was aware of an issue or trouble, but he did nothing other than "conflict resolution". City has to act to correct Grievant's behavior for protection from future incidents/claims.

We are not here for termination or criminal charges. But Grievant needs to be held accountable for his actions. Discipline is warranted, and a 20 day suspension is appropriate and well within the Matrix. Grievant could have received a much harsher penalty based on his disciplinary history. Grievant is charged with violating GOs 1, 2, 3, 5, and 37. GO 37 is the most appropriate charge: failing to take appropriate action on duty. Exactly what happened in this case. This is Grievant's fourth offense; the Matrix only goes up to a third offense. The penalty range for GO 37 3rd Offense is 20 day suspension to dismissal. Grievant has three (3) other incidents within the year before this incident. Grievant constantly has disciplinary problems. A severe penalty is warranted. The Department has shown just cause for same. Twenty days is a low penalty given Grievant's disciplinary history. Grievant needs to correct his behavior going forward. A 20 day suspension is warranted to put Grievant on notice that this behavior is not ok, and to learn from it and not make the same mistakes in the future. Therefore, the grievance should be denied and the 20 day suspension upheld.

### Union Position

Being a correctional officer and correctional supervisor are challenging jobs. You have to be concerned with protecting the safety of the public by keeping inmates inside. You have to maintain safety, order and security inside, with inmates of different levels of dangerousness, while dealing with an unreliable population. Based on what Grievant actually knew in this case, Grievant acted properly. He did not act in violation of any prison policy. Therefore, there was no just cause for any discipline.

Grievant was told by CO R [REDACTED] that inmate R [REDACTED]-M [REDACTED] wants to speak to a supervisor. Grievant went to R [REDACTED]-M [REDACTED] and spoke with him, alone, asking 'What is going on, what is the problem?' R [REDACTED]-M [REDACTED] refused to tell Grievant anything, other than that he was having an issue with inmate J [REDACTED] and wanted to be moved – from Block B to Block A, not to protective custody. Grievant was aware that R [REDACTED]-M [REDACTED] had previously been transferred from Block A to Block B, and that R [REDACTED]-M [REDACTED] was not happy about that transfer. Grievant observed that inmate R [REDACTED]-M [REDACTED] had no visible injuries and did not complain of being hurt or being scared. Grievant then went and spoke to inmate J [REDACTED], alone. J [REDACTED] told Grievant he was not having any trouble with R [REDACTED]-M [REDACTED]. Grievant had good reason to believe J [REDACTED], because he knew J [REDACTED] was being released the next day. Why would an inmate about to be released risk charges by getting involved with another inmate?

Grievant wanted to make sure no there were no further situations between them, so he then brought the two inmates together to see if they could work out whatever their issue was. At this point in time Grievant had no reason to believe there would be assaultive conduct, or anything else, between these two inmates. Both inmates said to Grievant that things were fine between them, so Grievant left. He had no reason investigate any further because he couldn't find anything else out. This was early in the shift. The rest of the shift went by with no problems. Grievant had no reason to think anything unsafe or unusual was going on. When something happened later, it was not a severe injury. R [REDACTED]-M [REDACTED] was taken to the hospital, where he was treated and released. He had minimal-to-no visible injuries, as evidenced by the photographs in evidence.

The policies Grievant was found in violation of are: Knowing the policies and procedures and ignoring them: there is no evidence of that. Not knowing the policies and procedures: there is no evidence of that. Failing to cooperate and maintain security and good order: there is no evidence that Grievant didn't work with fellow COs. Failing to take proper action, assert authority, reluctance to carry out rules: there is no evidence of that – Grievant came in, investigated, talked to the inmates. There was nothing Grievant could do to force inmate R [REDACTED]-M [REDACTED] to give more information. R [REDACTED]-M [REDACTED] did not request to go to the health center and did not request protective custody. He simply asked to be moved to the Block he preferred to be in. That is not failure to take proper action or assert authority. Accordingly, there is no just cause for any discipline.

This case is about exercising judgment. It is not a clear, black and white case. Everyone agrees there is no applicable written policy or procedure. City Exhibit 1 has 72 General Orders. This shows that the Department is more than capable of coming up with written polices and procedures. There was no testimony by the Major or Lieutenant that supervisors are trained never to bring inmates together to try to solve conflicts or disputes.

The real reason Grievant was disciplined is concern about liability. This case seems to be about the City protecting itself from liability, as touched on by the City in its closing. This



case is certainly not about Grievant's educated decision based upon his lengthy experience as a CO and as a Sergeant. It is not about that he spoke to both inmates, knew both inmates, knew the circumstances that R [REDACTED]-M [REDACTED] had already been transferred from Block A to Block B, wasn't happy about it, and wanted to be transferred back. Grievant knew there were no physical injuries. Grievant knew R [REDACTED]-M [REDACTED] had treatment for [REDACTED]. Look at the medical records: there is nothing specific about it. Similarly, Grievant knew that J [REDACTED] was being discharged the next day. J [REDACTED] had a calm demeanor. It doesn't make sense that J [REDACTED] would do these things to R [REDACTED]-M [REDACTED].

ASD is a facility with very low custody steps. Inmates are essentially coming and going. Grievant took his experience, and what he knew about these two inmates and made a decision that included concern with the safety and security of the facility. All Grievant did "wrong" was not make R [REDACTED]-M [REDACTED] happy by transferring him back to the Block he'd been transferred from against his will. Grievant was concerned about drugs in the prison, and knew R [REDACTED]-M [REDACTED] was implicated with drugs, and how drugs also impacted the safety and security of the prison.

Yes, Grievant has prior discipline. But, his first prior was failure to notify a supervisor about a lost radio: not the same thing as this incident. His second prior was not saying something when a CO was speaking loudly to an inmate: maybe Grievant should have taken care of it, but still not the same thing as this incident. His third prior was for not submitting a memo for something going on in the receiving room: maybe Grievant should have been aware of it, but still not same thing as this incident. All the evidence shows that in this case Grievant made decisions based on information he had available to him. Grievant was not given information that an inmate scared, or that one was substantially bigger than the other, or that there were any problems of violence between them.

Grievant testified credibly, as did a City witness, that you treat inmates differently depending on the facility and circumstances, including being more concerned about violence in maximum security facilities versus a low level security facility like ASD, which is essentially a community facility. Essentially, everyone in ASD is not Boy Scout, but they are not charged with murder or assault. Yes, fights happen in ASD, but you have to be aware of the circumstances. You have to make judgment calls. That is what Grievant did. None of the charges deals with issues of a judgment call. The charges deal with having working knowledge of and complying with written policies and procedures. Well, there are none. Not having knowledge of rules and procedures? There aren't any. Maintaining security and good order? Well, there is no testimony that Grievant was not trying to do that or did not take steps to do so. Grievant went in, and he took steps; he did not blow this off.

There is no policy about bringing inmates together. Grievant took action. Grievant asserted authority. There is no evidence of a rule or order not being complied with. Not even a rule or order that if you get a complaint that an inmate wants to be moved, that you have to report it up the chain of command. The reason for this is that the prison expects its

supervisors to exercise discretion. That is what Grievant did. There is no evidence that Grievant was not in compliance with any training he was provided with, or with any written policies or procedures. Therefore, there is not enough for just cause for any discipline, be it one (1) day or 20 days. Accordingly, the grievance should be sustained.

### DISCUSSION AND OPINION

#### The [REDACTED] On-Duty Incident

Grievant described the incident in his [REDACTED] Memo to Lt. Santiago.

Grievant wrote, *verbatim*:

*On Sunday [REDACTED] at approximately 10:30am I, Sgt. Vorn received a call from Officer D. R [REDACTED] PR#[omitted]. Officer R [REDACTED] was assigned to ASDCU B-unit. She stated that inmate R [REDACTED] was having an issue with someone.*

*I arrived on B-unit at approximately 10:35am. Inmate R [REDACTED] was sitting in the dayroom alone. I approached him and asked what his issue was. He stated that he was having trouble with inmate J [REDACTED] J [REDACTED] PP#[omitted].*

*I called inmate J [REDACTED] to the MPA and asked him what is his issue with inmate R [REDACTED]. Inmate J [REDACTED] stated that he had no issue with R [REDACTED]. I took inmate J [REDACTED] in front of inmate R [REDACTED] to find out if either of them had issues and they both said everything is over and fine.*

*I returned to my desk.*

City Exhibit 4.

The facts of the incident as quoted from Grievant's memo are not materially in dispute. Notably, Grievant's memo undisputedly establishes that Grievant was aware from CO R [REDACTED], "that inmate R [REDACTED] was having an issue with someone", and, that Grievant was aware from inmate R [REDACTED], that R [REDACTED], "was having trouble with inmate J [REDACTED] J [REDACTED]." **Emphasis** added. Grievant confirmed on cross-examination that he was aware inmate R [REDACTED]-M [REDACTED] was having both *issue(s)* and *trouble* with

inmate J [REDACTED]. Grievant also confirmed that R [REDACTED]-M [REDACTED] did not disclose what the issue(s) or trouble with inmate J [REDACTED] were.

The City alleges that later in the day after this joint questioning by Grievant, J [REDACTED] assaulted R [REDACTED]-M [REDACTED] for snitching, resulting in injuries, including [REDACTED] in R [REDACTED]-M [REDACTED], [REDACTED]. The Union disputes that any such assault occurred, and that even if it did, R [REDACTED]-M [REDACTED] was not injured. For reasons discussed below, the disputed fact of whether or not there was an assault is not dispositive.

As the Union accurately asserts, Grievant took proper action when he met separately with R [REDACTED]-M [REDACTED], upon Grievant being called by CO R [REDACTED]. PDP does not object to Grievant next having met separately with J [REDACTED]. The crux of the Department's charges and case is that after Grievant met with R [REDACTED]-M [REDACTED] and J [REDACTED], separately, Grievant acted *improperly* when he next, "*took inmate J [REDACTED] in front of inmate R [REDACTED] to find out if either of them had issues [with each other] . . .*"

The record supports PDP's charges that Grievant's doing so was improper, and violated General Orders 5 and 37.

This conclusion is based on the testimony of Major Miranda and Lt. Akhtar regarding "snitches" in prison. Both of their testimonies regarding "snitches" withstood Union counsel's rigorous cross-examination. Major Miranda has 36 years of PDP service, including approximately five (5) years as a Sergeant, four (4) years as a Lieutenant, six (6) years as a Captain, and four (4) years as a Deputy Warden (*i.e.*, Major). Lt. Akhtar has 22 years of PDP service, and has been a Lieutenant since 2015.

Their testimonies established that it is common knowledge and common sense in PDP that officers and supervisors not bringing the inmates together and questioning them about each other in front of each other, because it shows inmate “B” that inmate “A” “snitched” or “told” on inmate “B”. Their testimonies established that R [REDACTED]-M [REDACTED] and J [REDACTED] should not have been brought together and questioned about each other in front of each other, because it showed J [REDACTED] that R [REDACTED]-M [REDACTED] snitched on J [REDACTED]. Furthermore, Major Miranda testified on cross-examination that in the real world of prison, inmate “A” is not going to admit in front of inmate “B” that inmate “A” has an issue or problem with inmate “B” – to do so would label inmate “A” as someone who “tells” or “snitches”, and that being labeled as such can get an inmate hurt by other inmates.

Moreover, Major Miranda’s and Lt. Akhtar’s testimonies established that inmate safety is paramount, and it is common knowledge in PDP that in the usual course of events in prison, “*snitches get stitches*”, thus creating risk to inmates, officers and prison safety, security, and good order. Lt. Akhtar testified that in his experience, “*snitches have gotten stabbed, beaten-up, and hurt badly.*”, for being snitches.

The record establishes that Grievant, with 12 $\frac{1}{3}$  years of service on the date of the incident, the last seven (7) years of which as a supervisor, knew or should have known this, even without a specific written policy or procedure. Indeed, Grievant’s cross-examination testimony established that he *knew* snitches *do* sometimes “get stitches” – even if it is just a *perception* that an inmate is a snitch. The record establishes that Grievant knew or should have known that bringing these two inmates

together was unnecessary, and would at the very least create the perception to J [REDACTED] that R [REDACTED]-M [REDACTED] was snitching on J [REDACTED].

Grievant's assignment when the incident occurred was Floor Sergeant. Grievant testified that the responsibilities of the Floor Sergeant are to "*patrol the areas [of the whole facility] to make sure the safety and security of the institution is kept, and do lunch relief for the Desk Sergeant.*" Emphasis added. Grievant also testified that generally speaking, a sergeant is obligated to look after inmate welfare, and obligated to take proper action to minimize threats to inmate safety. It is evident from the record that Grievant's bringing the inmates together and questioning them about each other in front of each other was *contrary* to keeping the safety and security of the institution, and *increased* rather than minimized threats to inmate safety. It is evident from the record that Grievant knew or should have known this, even without a specific written policy or procedure.

Grievant raised several affirmative defenses as to why doing so was not improper, none of which are persuasive. These include Grievant's opinion that doing so with ASD inmates does not endanger or place them in jeopardy; that Grievant had previous contact with both inmates; that neither inmate seemed aggressive; that J [REDACTED] was being released the next day; that R [REDACTED]-M [REDACTED] was bigger and taller than J [REDACTED]; that Grievant did not see J [REDACTED] as a bully; and that Grievant believed R [REDACTED]-M [REDACTED] was "scamming", and, "*using J [REDACTED] as a scapegoat to get transferred back to A Block*" for personal preference and/or access to contraband drugs.

Grievant testified unpersuasively that he did not agree with the Major's and

Lieutenant's testimonies that snitches get hurt, because *sometimes* snitches don't get hurt, such as when they are known to other inmates to be "bluetenants" or "unconfidential informants"; and that bringing R [REDACTED]-M [REDACTED] and J [REDACTED] together was an opportunity to "keep the peace". Grievant's contention that R [REDACTED]-M [REDACTED] never told Grievant that he was scared or afraid of J [REDACTED] does not alter the fact that bringing them together and asking them in front of each other if either had a problem with the other was improper and created risk.

Notably, on cross-examination Grievant acknowledged that even in a relatively low-custodial-level facility such as ASD there are fights between inmates, and inmates sometime do attack each other in ASD; that sometimes smaller inmates can be more physical than bigger inmates, and vice versa; that snitches do "sometimes" get hurt, even in ASD; and that even in ASD an inmate can "sometimes" be in danger if *believed* by other inmates to be a snitch.

Grievant also raised the affirmative defense that he brought the two inmates together pursuant to conflict resolution training provided to him by PDP. This is not supported by the record, and thus unpersuasive. Grievant was unable to provide any information whatsoever as to when or where he received this purported training. His testimony of how the training applied to this incident was not persuasive.

The Union argues that the record does not establish that J [REDACTED] assaulted R [REDACTED]-M [REDACTED] on [REDACTED] after Grievant brought them together for questioning about each other. The City argues that the circumstantial evidence is strong that J [REDACTED] did assault R [REDACTED]-M [REDACTED] after Grievant brought them

together. However, it is not necessary to make this determination, because the record establishes that Grievant's bringing the inmates together for questioning about each other was improper, and created risk to security and good order, whether or not J [REDACTED] afterward assaulted or actually injured R [REDACTED]-M [REDACTED]. Similarly, Grievant acted improperly, whether or not R [REDACTED]-M [REDACTED] disclosed to Grievant what the issue(s)/problem(s) with J [REDACTED] were, and regardless of the fact that J [REDACTED] was being released from prison the next day.

The Union accurately points out that Grievant did not ignore R [REDACTED]-M [REDACTED]' initial complaint, but rather, Grievant *took action* and *asserted authority*. However, it was incumbent upon Grievant to take *proper* action. The record demonstrates that Grievant acted improperly when he brought the two inmates together for questioning about each other, in front of each other. Grievant knew or should have known that doing so was not proper action, and created unnecessary risk to security and good order.

Thus, the City met its burden to prove that Grievant violated General Orders 5 and 37.

#### PENALTY

PDP Human Resources witness Pulimkalayil testified regarding the Disciplinary Matrix ("Matrix") used for determining the appropriate level of discipline for GO violations. His unrebutted testimony was that any prior GO violation within the reckoning period counts for purposes of determining which Matrix offense-number column applies ("1<sup>st</sup> Offense", "2<sup>nd</sup> Offense, or "3<sup>rd</sup> Offense"; there is no "4<sup>th</sup> Offense" or

higher column), regardless of which GO number (*i.e.*, Matrix *row*) was previously violated. Additionally, his unrebutted testimony was that when more than one GO is currently violated, PDP uses the penalty range for the most serious current GO violation. It is undisputed that the Matrix penalty column applicable to Grievant, based on his disciplinary record, is the “3<sup>rd</sup> Offense” column. The penalty ranges for the “3<sup>rd</sup> Offense” columns of GO 5 and GO 37 are the same: “20 days suspension to Dismissal”. Thus, the City contends that it had just cause for a 20 day suspension as the appropriate penalty, at a minimum.

The Union strenuously argued that the City had no just cause for any discipline at all. However, having determined that the City did have just cause for discipline regarding the charges of violating GO 5 and GO 37, the arbitrator turns to the Union’s argument that Grievant’s conduct in this case was at most an error in judgment, and that Grievant’s prior discipline is clearly distinguishable, thus allegedly justifying a penalty less than a 20 day suspension. The Union points out that Grievant’s prior disciplinary incidents were for failing to notify a supervisor regarding a lost radio; not correcting a CO who was speaking loudly to an inmate; and not being aware of something going on in the receiving room, and not submitting a memo for same.

The arbitrator notes that Grievant’s prior discipline of record is for incidents which all occurred in 2016, and that this incident occurred in early 2017. However, the arbitrator disagrees with the City’s assertion that this shows Grievant “*constantly has disciplinary problems, warranting a severe penalty for a 4<sup>th</sup> Offense.*” While Grievant’s disciplinary record is not stellar, four (4) violations in 12 $\frac{1}{3}$  years of service is not in



and of itself evidence of “*constant disciplinary problems*”.

The Matrix is Appendix A to PDP Policy Number 1.C.13., entitled “Represented Employee Disciplinary Procedures”. City Exhibit 3. The Policy specifically states that the Department, “*is committed to progressive discipline.*” The Policy specifically states that, “*The concept [of progressive discipline] also carries with it the feature that the penalties which management may seek to invoke are appropriate given the circumstances of the employee’s infraction.*” Furthermore, the Policy specifically states that, “*These disciplinary guidelines are guidelines only and shall be considered in conjunction with aggravating and mitigating circumstances surrounding each case. . . .*” City Exhibit 3.

Taking into account the above-quoted commitment to progressive discipline, and the Policy’s “*Factors Considered When Determining Penalty*” to determine aggravating and mitigating circumstances surrounding this case, the arbitrator finds that under the facts and circumstances of this particular record, while a significant penalty is warranted for Grievant’s error in judgment, a 20 day suspension is excessive. The record shows that the penalties assessed for Grievant’s previous violations were warnings, and a three (3) day suspension. The Union’s contention that the conduct involved in Grievant’s prior violations was not the same as his conduct in this case has merit. Grievant’s underlying conduct in each of his prior disciplinary incidents was not the same or similar to Grievant’s underlying conduct in the incident at bar.

Consequently, in view of the entire record, the arbitrator concludes that the City did not have just cause to suspend Grievant for twenty (20) days, but did have just cause to suspend Grievant for five (5) days. A five (5) day suspension is sufficient on

this record to achieve the City's stated purposes of placing Grievant on notice that this behavior was and is not acceptable, that Grievant learn from this incident, and that he not make the same mistake in the future.

Grievant should take notice that in the future, the same or similar proven conduct may persuade an arbitrator that mitigation is *not* warranted.

Based upon all of the foregoing, the following Award is issued:

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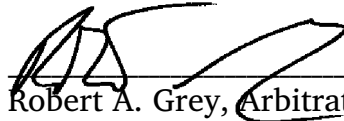
**AWARD**

The grievance is denied in part and sustained in part.

The City did not have just cause to suspend Grievant for twenty (20) days, but did have just cause to suspend Grievant for five (5) days. Grievant's suspension is reduced to five (5) days.

The Arbitrator retains jurisdiction to resolve any disputes that may arise from the implementation of this Award.

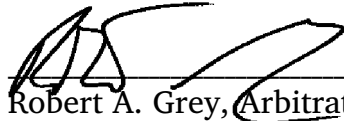
Dated: October 4, 2019

  
Robert A. Grey, Arbitrator

**AFFIRMATION**

I hereby affirm that I executed this instrument as my Opinion and Award.

Dated: October 4, 2019

  
Robert A. Grey, Arbitrator