

AMERICAN ARBITRATION ASSOCIATION

In the Matter of Arbitration Between

AMERICAN FEDERATION OF STATE, COUNTY :
AND MUNICIPAL EMPLOYEES, LOCAL 159 :
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"Union" :
: :
and :
: :
CITY OF PHILADELPHIA :
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"City" :
: :
: :
AAA CASE NO. 01-18-0003-4902 :

At issue in this Final Award is whether just cause existed for the twenty (20) day suspensions received by Correction Officers ("COs") Lawrence Murphy, Jr., Bruce Sowell, Jr., Hector Rosa-Antonetty ("Rosa"), Clifford Durham, III, Marquise Robinson, Amber Wood and Keyleea Morris ("Grievants"). The Union seeks rescission of all discipline imposed upon all Grievants and a "make whole" remedy for them. The City maintains that the grievance is entirely without merit.

The undersigned Arbitrator previously issued an Interim Award finding the current grievance to be arbitrable, which is hereby incorporated by reference into this Final Award. Following issuance of this Interim Award, an additional day of hearing was

held for the purpose of taking testimony and evidence concerning the merits of the grievance.

FACTS

The City operates the Philadelphia Industrial Correctional Center ("PICC"). The Union represents the COs who work there.

The City has implemented Policies and Procedures ("Policy") applicable to COs who work at PICC. It has also promulgated a matrix containing summaries of the different Sections covered by that Policy, as well as specified penalties for the first, second and third offenses of each Section. That matrix includes the following:

01. It is essential that each employee has a working knowledge of and complies with the policies and procedures.

1st Offense – Employee Warning Record to 3 days Suspension
2nd Offense – 3 to 9 days Suspension
3rd Offense – 9 to 15 days Suspension
Reckoning Period - 1 year

02. Lack of Knowledge of any policy, procedure, rule or law shall not excuse or mitigate the failure to comply with, or the breach or violation of any rule, or several of them by an employee.

1st Offense – Employee Warning Record to 3 days Suspension
2nd Offense – 3 to 9 days Suspension
3rd Offense – 9 to 15 days Suspension
Reckoning Period - 1 year

03. An employee shall be responsible for the efficient performance of his/her assigned duties.

1st Offense – Employee Warning Record to 5 days Suspension
2nd Offense – 5 to 10 days Suspension
3rd Offense – 10 to 30 days Suspension

Reckoning Period - 1 year
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05. All employees shall cooperate in maintaining the security and good order of the institution at all times.

1st Offense - 5 to 15 days Suspension
2nd Offense - 10 days Suspension to Dismissal
3rd Offense - 20 days Suspension to Dismissal
Reckoning Period - 2 years
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20. Employees whose duties involve the original entry, updating, or modification of information contained on the PPS computer systems are responsible for the timeliness, correctness, and integrity of such data.

1st Offense - Employee Warning Record to 5 days Suspension
2nd Offense - 5 to 10 days Suspension
3rd Offense - 15 to 20 days Suspension
Reckoning Period - 2 years
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35. Knowingly and willfully making a false report, improperly removing or altering any departmental report, document or record shall constitute grounds for disciplinary action.

1st Offense - 5 days Suspension to Dismissal
2nd Offense - Dismissal
3rd Offense - _____
Reckoning Period - Duration of Employment
* * *

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.

1st Offense - 5 days Suspension to Dismissal
2nd Offense - 10 days Suspension Dismissal
3rd Offense - 20 days Suspension to Dismissal
Reckoning Period - 2 years
* * *

PICC contains a Restricted Housing Area known as [REDACTED].

There are [REDACTED] in [REDACTED], [REDACTED]

[REDACTED] [REDACTED]. Inmates housed in [REDACTED] are particularly

problematic for various reasons, and each is therefore placed in his own cell.

██████ Inmates require special attention and care. They normally are let out of their cell only for relatively brief periods of time and for limited reasons. Each time one of their cells is open, two COs must be present at the cell, and a third CO present at the console from which the cell doors are opened and closed. In addition, COs serve the ██████ Inmates' meals in their cells, with COs passing a meal tray through a wicket in their cell doors.

Because of the extra attention required for ██████ Inmates, the staffing level for this Unit is different than other units in PICC. While other units have two COs assigned on the morning and afternoon shifts, on ██████ there are four.

██████ COs normally work shifts running from 7:00 am - 3:00pm, 3:00pm - 11:00pm, and 11:00pm - 7:00 am. Sometimes, however, they also work overtime and/or are not on ██████ for an entire shift.

Cos who work on ██████ are classified as either Housing Officers or Escort Officers. The Specification for Housing Officers contains the following concerning their duties:

Tours of the unit and recreation yard should be conducted at least every thirty minutes at irregular intervals in order to safeguard against escapes and disturbances. Frequency should be increased when inmates who are violent, mentally disturbed, or demonstrate unusual behavior are present on the unit. Power to console should be turned off whenever the unit officer leaves the control station.

The Specification for Escort Officers does not include the above language, but does include the following:

This post primarily involves escorting [REDACTED] inmates to and from any and all destinations. The Escort Officer is also required to assist the unit officers in their daily duties.

On [REDACTED] [REDACTED], the incident occurred that ultimately led to the discipline of all of the Grievants. On that day, the Grievants all worked on [REDACTED] during at least part of the 7:00 am - 3:00pm or 3:00pm - 11:00pm shifts. Grievants Robinson, Murphy, Morris and Durham worked during the 7:00 am - 3:00pm shift and Grievants Wood, Rosa, and Sowell worked during the 3:00pm - 11:00pm shift.¹

Around noon that day, the [REDACTED] COs served all the Inmates lunch in their individual cells without incident, concluding by about 12:30pm. This included the Inmate in Cell 11 ("Inmate Z"), who had recently been re-located into [REDACTED]. This Inmate had previously been in the mental health unit, something the Grievants were not told.

In the time between when the [REDACTED] COs finished serving Inmates their lunch at approximately 12:30pm and began serving their dinners at approximately 5:00pm, no one performed a complete tour of cells that included Cell 11. This was later confirmed by

¹ Another CO, who is not a Grievant in this arbitration proceeding, was also on duty during the 3:00pm - 11:00pm shift.

management's review of video taken by security cameras located in [REDACTED].

At approximately 5:20pm, Grievant Sowell went to serve dinner to Inmate Z in Cell 11 and found him not to be responsive. Sowell called for assistance, and when the door was opened to Cell 11, they found indications that Inmate Z had asphyxiated himself. CPR was administered to Inmate Z and medical assistance was sought. Inmate Z was not revived, and the time of his death was later recorded as 5:56pm.

After conducting an investigation into what occurred on [REDACTED], the City issued to each of the Grievants the 20 day suspensions now at issue. The formal Notice of Suspension received by each Grievant included language substantially similar to the following:

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

Specifically, on [REDACTED] at the Philadelphia Industrial Correctional Center (PICC), Office you were assigned to [REDACTED] for the (7am to 3pm or 3pm to 11pm) shift. During your tour of duty (Inmate Z) successfully completed suicide. Upon investigating this incident, video surveillance for the unit was reviewed. It was discovered that no tours were conducted from the time of the afternoon meal was distributed until the time the body was found during the evening meal. Video surveillance supports this finding.

Although the IMJS log indicates tours were made it was not captured on the video surveillance. Officers are required to make tours of the unit at least every thirty minutes at irregular intervals. From the time the afternoon meal was completed, up and until the evening meal was being served, no one assigned to the unit conducted any full physical tours on the unit including during the shift change with the oncoming and existing shift.

Although the IMJS log indicates tours were made it was not observed on the video surveillance. It is suspected that sometime between the times the afternoon meal was served and the evening meal being served, Inmate Z successfully completed suicide.

A hearing concerning this matter was held on May 31, 2018. As a Correctional Officer, you are expected to perform a physical tour of your post every 30 minutes and are expected to accurately log those tours. You failed to do those tours and hence failed to perform your duties in an efficient manner and as per policy.

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

In addition to receiving Notices of Suspension containing the above language, Grievants Morris and Wood were also charged with violation of General Order/Policies 20 and 35. Their Notices of Suspension also included language stating that "...by your own admittance, you logged tours into the IJMF System that were not conducted by you or any other Officers assigned to [REDACTED] during your tour of duty."

POSITION OF THE CITY

The Grievants received all the due process to which they were entitled. Each had a full opportunity to present his/her account of what happened on [REDACTED] before discipline was imposed.

The evidence is clear that the Grievants had an obligation to ensure that tours were conducted on [REDACTED] every 30 minutes. Despite the Grievants and Union coming up with various theories as

to how the Grievants supposedly fulfilled this function, the video evidence clearly demonstrates that they did not, and there are no mitigating factors which justified their failure to perform this duty. At all times there was sufficient manpower on [REDACTED] for this important duty to be performed. Nonetheless, for almost five hours no Officer looked into Cell 11.

As the failure to perform the required tours stretched over both the 7:00am - 3:00pm and 3:00pm - 11:00pm shifts, it was appropriate that all Officers on both shifts be treated equally and given twenty (20) day suspensions. It would have been unfair to make distinctions between the Officers based upon the shift they worked or other factors.

The penalty imposed upon the Grievants was appropriate for their collective failure to perform the required tours. While in other circumstances the offense they committed might not result in COs involved receiving 20 day suspensions, in this instance Inmate Z committed suicide during the critical time.

Finally, the evidence establishes that Grievants Morris and Wood committed additional violations of Policy on [REDACTED]. In particular, they violated Rules 20 and 35 when they made entries into records indicating that the required tours were done on that day when they in fact were not.

The City has therefore met its burden of establishing that just cause existed for all discipline imposed upon the Grievants.

Accordingly, the Arbitrator must deny the grievance in its entirety.

POSITION OF THE UNION

The City has completely failed to carry its burden of proving that just cause existed to give any of the Grievants a 20 day suspension. The concept of just cause includes many elements, and numerous tests of just cause were not here met by the City.

As an initial matter, none of the Grievants were afforded proper due process. None were given an opportunity to present their explanation as to what occurred on [REDACTED] prior to management deciding to discipline them.

Moreover, the City failed to take into account differences in the situations involving each of the Grievants and factors of mitigation that were present for each of them. For example, some of the Grievants were Unit Officers, while others were Escort Officers with no obligation to do tours every 30 minutes. Some Grievants worked the 7:00 am to 3:00pm shift, for which there is no evidence that Inmate Z committed suicide, and some Grievants worked only portions of a shift. Indeed, Grievant Robinson took lunch at 1:30pm and properly left his shift at 2:00pm, yet still received 20 days of suspension. None of these distinctions were taken into account by the City.

Finally, the Grievants are by and large good employees with good employment records. There was no need to impose upon them a severe sanction that amounts to a full month of lost wages.

The Arbitrator must therefore sustain the grievance in full for each Grievant, or at the very least reduce the penalty imposed upon them to be commensurate with principles of just cause, and provide them with the appropriate monetary award.

OPINION

The City has fully established the responsibilities of ████████ COs insofar as it concerns their obligation to do tours of cells. More specifically, ████████ Officers are collectively obligated to do such tours at least once every 30 minutes. In addition to Officers receiving this instruction as early as their training in the Academy, this obligation is explicitly set forth in the Specification in place for ████████ Housing Officers. While it is not explicitly in the Specification for ████████ Escort Officers, their Specification does explicitly state that they are required to assist Housing Officers in their daily duties.

The City has also fully established the basic facts concerning what occurred on ████████. Between approximately 12:30pm, when the ████████ COs completed serving Inmates their lunch, and approximately 5:20pm, while the COs were serving them dinner, none of the Grievants did the necessary complete tours of the Inmates'

cells, including Cell 11. The City has further established that during this time Inmate Z committed suicide in Cell 11.

Given that the City has established all of the above facts through its witnesses and documents, it follows that the City has carried its burden of establishing that just cause existed to discipline all of the Grievants for their collective failure to perform the required cell tours. While the Union has put forth various arguments as to why the Grievants collectively, or each Grievant individually, should be absolved of all responsibility for what occurred on [REDACTED], those efforts fall short of the mark. Most important in this regard, I am persuaded by the City that all the Grievants worked a sufficient amount of time on J-Unit between 12:30pm and 5:00pm to have had some personal responsibility for the collective failure to do the required tours of cells during this time.

The question therefore becomes whether the amount of discipline imposed upon each Grievant was commensurate with principles of just cause. In answering this question, I understand the City's reasoning in issuing identical 20 day suspensions to all of the Grievants, thereby making the point that all of them failed in their collective duty to insure that the required tours were done, and to avoid any claims of disparate treatment. It is indeed well settled that when it comes to disciplinary penalties

similarly situated employees must be treated the same in order to avoid the pitfalls of disparate treatment.

In this instance, however, I disagree with the City's belief that all of the Grievants were similarly situated. For reasons which follow, I find a distinction must be made between the Grievants who worked the 7:00am – 3:00pm shift on [REDACTED] and those who worked the 3:00pm – 11:00pm shift that day. I also determine that there must be a distinction made between Grievants Morris and Wood, who were charged with additional Policy violations beyond those of the other Grievants, and the remaining Grievants.

Turning first to the Grievants who worked during the 7:00am – 3:00pm shift, specifically Grievants Robinson, Murphy, Morris and Durham, the Union has established that they suffered a significant shortage in staffing between 1:00pm and 3:00pm that mitigated, although did not excuse, their collective failure to do the required tours every 30 minutes. More specifically, shortly after 1:00pm there was an incident outside of [REDACTED] that necessitated a reduction in the staffing on [REDACTED] for a significant period of time. In addition, as was customary at the time, Robinson left work one hour before the 7:00am – 3:00pm shift ended to account for his coming to work at 6:00am to prepare breakfast for the inmates, and his position was left unfilled for the remainder of that shift. Thus, for much of the time between the end of lunch and the end of the shift there was a shortage of

staffing on [REDACTED], as four COs were not present. This shortage impacted the ability of Robinson, Murphy, Morris and Durham to do all of their assigned duties, particularly because when a prisoner in [REDACTED] is permitted to leave his cell there must be two COs present, and a third CO at the console which controls the opening and closing of cells.

Furthermore, it is apparent that one of the reasons the City decided to issue the Grievants 20 day suspensions was because a suicide occurred during the time that the required tours were not performed. Insofar as it concerns the Grievants who worked during the 7:00am – 3:00pm shift, however, there is no evidence that the suicide occurred while they were still working and/or Inmate Z was dying or dead while they were on duty. While that could have been the case, the City cannot prove that this was in fact the case.

None of these mitigating circumstances applied to the Grievants who worked during the 3:00pm – 11:00pm shift. More specifically, they did not suffer from the same staffing shortages as did the Grievants working the 7:00am – 3:00pm shift, and there is no doubt that Inmate Z either committed suicide during their shift and/or was dying or dead during their shift.

It follows that were I to leave in place the same length of suspensions for all of the Grievants, notwithstanding that the above noted elements of mitigation were only in place for the Grievants who worked during the 7:00am – 3:00pm shift, I would be

sanctioning disparate treatment for Grievants Robinson, Murphy, Morris and Durham. As this would be inconsistent with principles of just cause, this I will not do.

Moreover, in order to ensure that none of the Grievants in this case are subjected to disparate treatment, I must also take in to account that Grievants Morris and Wood were charged with violations of Policy beyond those the City leveled against the other Grievants. In particular, Grievants Morris and Wood were charged with violation of Section 20 ("Employees whose duties involve the original entry, updating, or modification of the information contained on the PPS Computer Systems are responsible for the timeliness, correctness and integrity of such data") and Section 35 ("Knowingly and willfully making a false report, improperly removing or altering any departmental report, document or record shall constitute grounds for disciplinary action").

Taking into account all of the above, I turn to the question of the length of suspensions for which the City had just cause to discipline each Grievant. For Grievants Robinson, Murphy and Durham, I conclude that this was a suspension of 10 days in length. This properly accounts for the distinctions between them and the Grievants who worked the 3:00pm – 11:00pm shift, as well as the distinction between them and Grievants Wood and Morris.

A 10 day suspension for these Grievants is also consistent with the range of penalties set forth in the matrix used by the

City when imposing discipline. I recognize these Grievants, like all the Grievants, were charged with a number of different Policy violations, but the reality is that all those charges involve a single act of misconduct, specifically not doing the required tours of cells while they were working. It is therefore appropriate that the penalty imposed upon them be based upon the most serious of their Policy violations, but not compounded because they were charged with multiple violations of the Policy.

According to the matrix established by the City, the most serious Policy that Grievants Robinson, Murphy and Durham violated was Section 37, which provides a penalty of five days suspension to dismissal for the first offense and a 10 day suspension to dismissal for the second offense. Given all of the above considerations, I have concluded that just cause existed to issue them a penalty near the bottom end of this range, specifically a 10 day suspension.

As to Grievant Morris, I conclude that the City had just cause to impose a more severe total penalty upon her than Robinson, Murphy and Durham because of the additional Policy violations she committed. In particular, just cause existed to issue her an additional 5 day suspension for her proven violation of Section 20 and/or 35, which is again within the parameters of the matrix used by the City when imposing discipline for violation of these Sections. Thus, in its totality, 15 days was the length of

suspension the City had just cause to impose upon Morris for all her misconduct. For the reasons which follow, this length of suspension also insures that she is not treated disparately in relationship to Grievant Wood.

I now turn to the three Grievants in this case who worked during the 3:00pm to 11:00pm shift on [REDACTED], specifically Grievants Rosa, Sowell and Wood. For the same reasons I above found that Grievants Robinson, Murphy, Morris and Durham were properly charged with violating Sections 1, 2, 3, 5 and 37 of the Policy, I make the same findings concerning Grievants Rosa, Sowell and Wood.

As I previously noted, however, there is an absence of mitigating factors for Rosa, Sowell and Wood similar to those applicable to the Grievants who worked the 7:00am – 3:00pm shift. They were not similarly short-staffed, and there is no doubt that Inmate Z either committed suicide while they were working, or that his dead body was present in Cell 11 during their tour of duty.

Given the totality of circumstances, I conclude that just cause existed to impose upon Rosa and Sowell a 15 day suspension. I reduce their suspensions in part so as to insure they are not disparately treated in comparison to Wood. It would be fundamentally unfair to leave Rosa and Sowell with the same discipline as Wood, given that Wood was charged with two distinct types of misconduct (failing to ensure the tours were done and

improper entries into records), and they only one. The reduction in length of suspension from 20 days to 15 days for Rosa and Sowell avoids such disparate treatment.

This leaves me with consideration of the situation involving Grievant Wood. As I stated above, the City has proven that she, like Rosa and Sowell, violated the cited Policy Sections applicable to their part in the collective failure of the Grievants to perform the required cell tours. In addition, I am satisfied that the City has met its burden of establishing that Wood was also properly charged with the additional violations of Policy, specifically Section 20 and/or 35. Given these findings, I conclude that the City has established that just cause existed to issue Wood the full 20 day suspension, and the portion of the grievance that applies to her will therefore be denied in its entirety.

In conclusion, the City has established that the failure of all of the Grievants to fulfill their collective obligation to ensure that a tour of cells was done at least every half hour was a serious offense that justified serious discipline, and that Grievants Morris and Wood committed a further serious violation of Policy that justified additional discipline. Nonetheless, the Union has established that this is not a case where "one size fits all", and that the principles of just cause addressed above require establishment of the specific penalties for each of the Grievants, based upon their own specific circumstances.

AWARD

The grievance is denied in part and sustained in part concerning Grievants Robinson, Murphy, Morris, Durham, Rosa and Sowell. The grievance is denied in full concerning Grievant Wood. As a remedy for the partially sustained portions of the grievance, the City shall make the applicable Grievants whole for all wages and benefits lost as a result of their suspensions exceeding what was proper under principles of just cause, as set forth in the above Opinion.

Signed this 1st day of June 2020.



SCOTT E. BUCHHEIT, ARBITRATOR