

VOLUNTARY LABOR ARBITRATION TRIBUNAL
FEDERAL MEDIATION AND CONCILIATION SERVICE

**** COUNTY AND ****
COUNTY SHERIFF

-and-

GR: Employee/DISCHARGE

**** COUNTY DEPUTY
SHERIFFS ASSOCIATION

APPEARANCES:

UNION: UNION ATTORNEY

EMPLOYER: EMPLOYER ATTORNEYS

SUBJECT: EMPLOYEE TERMINATION

STATEMENT OF ISSUE: WHETHER THE GRIEVANT WAS TERMINATED FOR JUST CAUSE
AND, IF NO, WHAT IS TO BE THE REMEDY.

CONTRACT PROVISIONS INVOLVED: DISCHARGE AND DISCIPLINE

GRIEVANCE DATA:

PROTEST FILED_ JULY 1, 20**
CASE BEARD: MARCH I and MAY 23, 20**
AWARD DATE: AUGUST 20, 20**

STATEMENT OF AWARD:

THE GRIEVANCE IS GRANTED, IN PART, AS FOLLOWS:

MR. EMPLOYEE IS TO BE REINSTATED _TO HIS FORMER
POSITION WITHOUT UNDUE DELAY. HE IS TO BE RETURNED TO
WORK WITHOUT BACK PAY OR BENEFITS, EXCEPT HE SHALL
SUFFER NO LOSS OF SENIORITY FROM THE, DATE OF
TERMINATION TO REINSTATEMENT

I RETAIN JURISDICTION FOR THIRTY (30) DAYS TO
RESOLVE ANY ISSUE RELATIVE TO IMPLEMENTATION OF THIS
AWARD.

STATE OF MICHIGAN

FEDERAL MEDIATION AND CONCILIATION SERVICE

COUNTY AND SHERIFF

-and-

FMCS CASE NO. *****
GR EMPLOYEE DISCHARGE

COUNTY DEPUTY
SHERIFFS ASSOCIATION

ARBITRATOR'S OPINION AND AWARD

BACKGROUND

The Grievant in this case, the Employee (Grievant) filed a Grievance contesting his termination from the position of Corrections Officer he had held. The employer operates a County Correctional Facility (Jail) in which Corrections Officers have a variety of duties relating to inmate custody. The Union represents various classifications in the Sheriff's Department, including those in the classification of Corrections Officer.

By communication dated June 28, 20**, the Grievant was informed by the Sheriff Chief Deputy:

"The Sheriff Department has reviewed your actions while working as a Corrections Officer on May 31, 20** as part of an in custody death investigation. During this investigation, the video captured in the housing area was reviewed in detail. During this review, it became evident that the documented block checks and headcount that were entered into the computer were not completed at the times recorded. Consequently, I directed command staff to review multiple shifts of your work over the last six months to determine if these failures constituted an ongoing work pattern, As a result of this review, the following observations have been made and need to be addressed:

- You recorded as 'completed' block checks that were never accomplished.
- You failed to complete suicide checks of the housing area during meal periods.
- You failed to document your on duty status in the computer.
- You failed to do multiple block checks in a timely manner and have missed block checks completely.

Such actions are violations of several correctional and county policy and procedures including but not limited to the following:

Employer Correctional Facility Policy and Procedure Manual X11.13.03

1. D Document on-duty status and housing unit officer assignments in computer.
1. F Perform headcount/block checks/card count/computer checks according to schedule.
1. O Supervise Meal distribution/Circulate among pods and dayrooms during .meal/conduct suicide check of housing unit at meal/account for all food trays utensils.

Employer Block Check/Head counts policy

It is the policy of the Kent County Correctional Facility Administration to perform and document block checks and accurate inmate head counts on each shift.

Head Counts

1. The term headcount describes a physical cell-by-cell count of inmates in the housing unit. The headcount includes not only the number of inmates in an area but name verification as well.
 - a. Head counts will be conducted at the following times:
IV 2000 evening shift head count

Block Checks

2. A. During third shift a minimum of fourteen block checks shall be conducted.
2. B. The first and last block check of each shift shall be an actual headcount.
2. e. Block checks should be conducted on an irregular basis but no more than (40) minutes apart...The block checks shall be documented in the computer and shall include the officer's name, area checked and the beginning and ending times of the block check.
2. d. Block checks, known as suicide checks, shall be conducted in areas containing group activities, i.e. meals, recreation, dayroom, etc... After the inmates have been secured in the group activity, an officer shall conduct a suicide check in the housing unit in which those inmates reside to ascertain who may have remained behind and for what purpose or reason.

Employer's Human Resource Policy and Procedure Section 27

- (4) Inattentiveness to work, sleeping during working hours, or intentional restriction of output.
- (31) Falsification of any official work documents, reports or records....

On June 23, 20** you along with your union representative met with me to discuss these incidents. Although you expressed regret for the lapses of judgment and your failure to complete assigned tasks, you were unable to articulate mitigating circumstance for your behavior. You are being terminated from your employment with the Employer as of June 28, 20**."

The Grievance is displayed:

"Statement of Grievance:

On June 28, 20** member Employee was discharged. This discipline was without just cause, inclusive of the penalty being unduly harsh, in violation of Section 6.1.

Pursuant to Section 5_8 of the contract, this grievance is being filed on an expedited basis at Step 3.

Remedy Requested:

Rescind the discipline entirely, or alternatively reduce the discipline and penalty imposed; make the member whole for all losses suffered, including interest; any other relief that may be requested."

Hearings were convened on March 1 and May 23, 20**. At the conclusion of the Hearing, the respective Advocates elected to file Post-Hearing Briefs which have been received and considered. I have given careful consideration to all of the evidence and arguments submitted by the Parties, even though the Opinion herein may not specifically reference each and every one of the above.

The Employer called two Witnesses to testify and their testimony is summarized.

Witness 1, Second Shift Lieutenant, noted an in-custody death had occurred at the Jail on May 31, 20**. The Department conducted an investigation, reviewing floor logs and video. Discrepancies relative to Policy were noted. It was determined that some violations of Policy by the Grievant had occurred as it related to block checks and head counts. Witness 1 was assigned to conduct a further investigation of the Grievant's work activities which entailed the Witness reviewing journal log entries and comparing those to videos for the same time periods on a series of dates: January 6, February 17, March 27, April 9, May 25, 26, June 3 and 5, 20**. The Witness compared the log entries with the videos and concluded Policy violations had been committed by the Grievant. The Witness explained that a "block check" involves the Correction Officer going around the housing unit and conducting a check of each cell to insure no adverse activity is

occurring. The problems detected by Witness 1 as it relates to the Grievant concerned the following:

- (1) failure to conduct block checks within the prescribed 40 minute time interval;
- (2) failure to perform block checks which had been recorded as done on the log;
- (3) failure to conduct block checks at irregular intervals;
- (4) failure to perform the requisite number of block checks on his shift; and
- (5) Recording a block check as a late entry but it was done after the log entry.

Witness 1 reviewed the tapes and compared them to the log entries in order to verify his findings.

He also interviewed the Grievant relative to the occurrences on the above referenced dates. The

Witness prepared an Internal Affairs Report based on his review of logs and videos for the dates of

May 25, 26 and June 22, 20**, which contained the following conclusions:

"VIII. CONCLUSION

It is clear that the Employee does not place a high priority on his block checks and head counts. He continually delays them if something else is going on in the pod and if he is playing a computer game. He is able to log his checks on time 85% of the time but he is only able to complete them on time 66% of the time. It is also clear that he sets a timer to alert him when he is due for a check, as 53% of his checks were exactly on time and not at *irregular intervals* (KCCF VIC-02 2c).

The Employee also is lacking in logging himself on duty when he arrives at his work station.

The most troubling find is the 3 ½ missed block checks. The Employee logged these checks as complete, which destroys the credibility of his logs.

The Employee appears to completely disregard policy on suicide checks, even though his definition of a block check included making sure no one was hanging.

The Grievant also has a practice of locking down the whole day room for various reasons. While some of them may be legitimate, he fails to document them in his log."

After completing his Internal Affairs (IA) Report, the Employer instructed Witness 1 to review logs and videos for other dates — he selected five other dates in different months in order to determine if his findings in his IA Report were isolated occurrences or a continuing pattern. Based on the additional dates which were investigated the Employer concluded the Grievant's failures were not isolated occurrences.

On cross-examination, Employer Witness 1 agreed that Correction Officers in the course of performing their duties may encounter events which cause them to have interruptions in the tasks they are performing. The Witness acknowledged that the reference to "computer games" in his IA Report was not confirmed and it was not pursued as a part of the disciplinary investigation. With regard to the issue of irregular block checks, the Witness did not dispute that in the case where a computer entry does not coincide with the actual time a block check is conducted, it is the latter which is apparent to the inmates. The existing Employer Rule in regard to frequency of block checks on a given shift specifies 12 on the first and second and 14 on the third shift. The Grievant at the incident time was assigned to a 12 hour shift 7:00 p.m. to 7:00 a.m. The Witness concluded that the Grievant was obligated to perform 20 block checks on his assigned shift — 14 plus 6 - even though the applicable Rule had not been amended to pertain to 12 hour Shifts.

Employer Witness 2 confirmed that she assigned Employer Witness 1 to conduct an investigation regarding the Grievant. After meeting with the Grievant and his Union Representatives, Employer Witness 2 met with the Sheriff and Undersheriff. The three came to a decision to terminate the Grievant primarily for the reason that he missed block checks and logged them as having been completed. On cross-examination, Employer Witness 1 agreed the Grievant had no discipline prior to the matter herein. Employer Witness 2 confirmed that the termination letter and the letter informing the Grievant of the charges both reference the

Department Rule indicating 14 block checks were required — the Witness maintained that the need to conduct block checks within a period not to exceed a 40 minute time period leads to a minimum of 20 block checks when the shift is one of 12 hours. Subsequent to the Grievant's termination, the Employer issued a Rule revision which specified a minimum of 20 block checks and also states that "Headcount takes priority over all other routine events or activities in a housing unit." Employer Witness 2 agreed the Shift Sergeant had the duty to review the log entries of the COs under their supervision and address Policy violations with an officer if any were found to have occurred from a review of the CO's logs. In this case no documentation shows that any violations were addressed with the Grievant. On the issue of suicide checks, the Union pointed out that they occur during the meal period when the Officer has responsibilities relating to supervising inmates during the meal period and that at one time two Officers were assigned to perform the referenced duties. A block check logged during the meal period is regarded as a suicide check so that, if it is not completed, a Supervisor would have no basis for questioning an omission.

The following is a summary of the testimony provided by Witnesses called by the Union.

Corrections Division Deputy and Local Union President, submitted a PERA request to the Employer in regard to four individuals who had been in situations he believed were similar to this case. The first disciplinary action was a five day suspension issued on March 31, 20**; for an incident in which the Deputy logged a block check but he did not perform it because all of the inmates were in the day room. The next one involved multiple disciplinary occurrences with the most recent being a Last Chance Agreement issued on August 15, 20**, in which several Policy violations are cited, including Block Checks/Head Counts Policy; Security Gates/Doors, etc. The third disciplinary action issued on May 21, 20** related to block checks being logged

but not performed and a failure to perform suicide checks, leaving his work area— a five day suspension was imposed. The last discipline, issued on May 21, 20**, involved the logging of suicide checks — two on one day and three on another — which were not completed and a five day suspension was the penalty. Mr. Gonzales noted that since the termination herein, the Employer has implemented a procedure whereby the Sergeant reviews the Deputy log entries.

The Grievant had been a County Sheriff Department Corrections Officer since December 6, 20** and he had no discipline prior to his discharge. His file contains a Letter of Recognition issued on March 7, 20** and a Letter of Commendation issued on March 4, 20**. He also received a "letter of thanks" on May 3, 20** relating to escorting of inmates. With regard to the number of block checks required on a 12 hour shift, the Grievant stated he was not sure of the required number since the existing Rule pertained to 8 hour shifts.

The following provision of the Collective Bargaining Agreement (CBA) is most directly relevant:

"DISCHARGE AND DISCIPLINE

Section 6.1 Just Cause. The Employer agrees that they shall not discipline or discharge an employee except for just cause."

POSITION OF THE PARTIES

EMPLOYER:

The Employer Rules require Correction Officers (CO) to perform the tasks for which he was terminated. The Grievant failed to perform the required tasks — logged block checks were not performed or only partly done; he failed to conduct suicide checks and did not always document his on-duty status. The above referenced failures —especially falsification of records, *i.e.*, inaccurate logs constitutes just cause for termination. With regard to the Union

attempt to show disparate treatment, it is emphasized that in none of those cases did the COs engage in repeated instances of misconduct as in this case. Mitigation of the penalty imposed is unwarranted because the Employer decision was neither arbitrary nor in violation of the CBA.

UNION:

The Employer has the burden to establish that the Grievant, a CO with significant tenure and no disciplinary record, was discharged for just cause. Many of the violations cited by the Employer were apparent from his logs — *i.e.*, failure to log on-duty status and failure to conduct suicide checks during the meal periods — and therefore the failure of Supervisors to correct the deficiencies obviates a finding of just cause for termination. With regard to the failure to conduct logged block checks, the Union and the Grievant concede that behavior is not acceptable. Termination, however, is not an appropriate penalty given the penalty imposed on other COs for similar violations and the Grievant's employment record of no prior discipline.

DISCUSSION AND FINDINGS

In a termination for just cause case, a two-step inquiry is involved in making the decision of whether the discipline should be upheld.

The first inquiry relates to whether the charged misconduct has been established.

The first item of misconduct relates to the failure to conduct a sufficient number of block checks. At the time relevant herein, the Employer Rules pertained to eight hour shifts and the requisite number of block checks for each shift was as follows: a minimum of 12 block checks on the 1st and 2nd shift and 14 on the 3rd shift. The Grievant was working a 12 hour shift-- 7:00 p.m. to 7:00 a.m. The Employer maintains that the Grievant was required to conduct 20 block checks.

Even though the Employer Rule did not specify the number of block checks to be performed on a 12 hour shift, it cannot be overlooked that its Rule also specified:

"Block checks should be conducted on an irregular basis but no more than forty (40) minutes apart."

On the basis of the above, it is not unreasonable to conclude that more than 18 are necessary. The Grievant's relevant logs show he was cited for having one block check below what the Employer regarded as the required number — 20. This cited violation occurred on four separate dates and all involved "1 short". One can perform 19 block checks and be in conformity with the "no more than 40 minutes apart" requirement, so a violation is not found. If 20 block checks were required, it needed to be specified in the Employer Rule.

The next item concerns a failure to document on-duty status. The Grievant did not always comply with this requirement. It needs to be noted that when he logged on his computer in his POD, his on the job presence was verified.

The failure to conduct suicide checks is a cited deficiency. The Grievant noted his area consisted of two and one-person cells and, therefore, it was not clear to him that he was required to conduct suicide checks which he said would he logged as a SUIK. The basis for his confusion related to the following Employer Rule:

- "c. Block checks, known as suicide checks, shall be conducted in areas containing group activities, i.e.: meals, recreation, dayroom, etc. After the inmates have been secured in the group activity, an officer shall conduct a suicide check in the housing area in which, those inmates reside to ascertain who may have remained behind and for that purpose or reason. Cells with a maximum capacity of greater than TWO must have 50% of its population, in the cell to allow for inmates to remain in the cell."

While the Grievant did not log a SUIK, he did log block checks during the mealtime so the extent of his confusion is in doubt. The Union contention that a suicide check is designated as a

SUIK is not convincing since the Chief Deputy expressly stated a block check during the meal period is regarded as a suicide check.

The most egregious violation for which the Grievant was charged relates to his log of block checks which were not done or only partially completed. The log of a block check without its actual completion cannot be sugarcoated and must be regarded as a source of serious concern. On January 6, 20**, the Grievant logged a block check at 5:40, however, the video shows it was not done – 19 block checks were completed on that date. On March 27, 20**, the Grievant logged block checks at 22:26, 3:35 and 5:20, however, the video shows only the lower half of the POD was checked at 22:31 and the other two were not done. On April 9, 20**, a block check logged at 2:05 was not done. On May 25, 20**, block checks were logged at 19:40, 20:22 and 5:26, yet the latter two were not done and only the lower half was completed at 19:40. On May 26, 20**, a block check logged at 5:30 was not done. On June 5, 20**, a block check logged at 5:05 was not done. Most of the uncompleted block checks occurred during the morning meal time. Some of the other block checks which were logged but were incomplete or not done occurred in connection with other activity -- medical activity; prisoner release; professional visit. The accompanying events do not excuse the failure of logged block checks to coincide with their actually being accomplished. The presence of other activities does suggest that the failure to conduct logged block checks was negligent behavior rather than an outright intent to falsify the log entries. Once an item is logged into the computer, it is not possible to negate the entry. The Deputy Chief noted that a CO can enter a comment relative to an activity which was not performed. While I find some basis for mitigation, I am unable to conclude that the Grievant's failure to perform the block checks is excusable.

The remaining inquiry is whether termination of employment is reasonable in this case. The Union did offer evidence that some bargaining unit members received lesser discipline for conduct similar to that herein. Some of the failures for which the Grievant was charged could have been corrected with more adequate supervision. The number of block checks and their irregularity were items which were observable from the log entries. Most of the block checks, which were logged but not done, occurred during the meal period or during a time when another event happened at the same time. Even though the failures are not excusable, it is a fact that mitigating factors were present. I am unable to disregard the prior disciplinary actions which the Employer imposed in situations analogous to this case. If the Department intends to more strictly enforce its Rules with more severe discipline that intent needs to be communicated so that everyone is on notice of that fact. Finally, the Grievant's good work record and substantial tenure are deserving of consideration in assessing the appropriate level of discipline in this case.

AWARD

The Grievance is Granted, in part, as follows:

The Grievant is to be reinstated to his former position without undue delay. He is to be returned to work without back pay or benefits, except he shall suffer no loss of seniority from the date of termination to reinstatement.

I retain jurisdiction for thirty (30) days to resolve any issue relative to implementation of this Award.