STANLEY T. DOBRY, ESQ.
ARBITRATOR, MEDIATOR & FACT FINDER

FEDERAL MEDIATION AND CONCILIATION SERVICE
VOLUNTARY LABOR ARBITRATION TRIBUNAL

In the Matter of the Arbitration Between:

***** COUNTY and
***** COUNTY SHERIFF, FMCS Case No. 12-00579-6

Co-Employers Re: Employee 1/Termination

-and-

***** COUNTY DEPUTY
SHERIFF'S ASSOCIATION,

Union

ARBITRATOR'S OPINION AND AWARD

Dated: January 18th 20**

BACKGROUND AND OPERATIVE EVENTS

A. Procedural matters

The ***** County Deputy Sheriffs' Association ("Union") and ***** County and the Sheriff of ***** County ("County," "Sheriff," "Department" or collectively "Employer") are parties to a collective bargaining agreement ("CBA") for the period January 1, 20** to December 31, 20**. Pursuant to that agreement, the arbitrator was appointed labor arbitrator under the rules of the Federal Mediation and Conciliation Service. Arbitration hearings were held on July 23 and October 2, 20**.

The grievance challenges the discharge of Employee 1 on October 14, 20** as being without just cause in violation of Section 6.1 of the contract (it Ex 2). At the time of his/her discharge, Employee 1 held the position of Corrections Officer and had nearly 15 years of seniority with the ***** County Sheriff Department, having been hired on December 16, 19** and continuously employed since that date with no layoffs up to his/her discharge. The contract provides that the arbitrator's decision is final and binding upon the parties.

All witnesses testified under oath or affirmation. Seven witnesses testified during the two days of hearing namely: Employees 1-7. 37 exhibits were received.

Both parties had a chance to present any witnesses and exhibits they deemed appropriate. They had a full opportunity for examination and cross examination. The parties agreed that the matter is properly before the arbitrator for final and binding resolution. There are no procedural issues. The parties stipulated the arbitration panel may retain jurisdiction as to the meaning and application of the award, if any.

Post hearing briefs were exchanged through the arbitrator.

B. Question Presented

The parties stipulated the Issue to be decided: Was there just cause for the termination of Grievant, and if not, what shall the remedy be?

C. Background

The Employer operates the ***** County Correctional Facility ("Jail"), which normally houses about 1,100 inmates. The Employer employs about 225 Corrections Officers to staff the Jail, with 24 to 36 Corrections Officers on duty at any given time. At the time of the incident involved in this ease, Corrections Officers worked 12-hour shifts (7:00 a.m. to 7:00 p.m. and 7:00 p.m. to 7:00 a.m.). In operating the Jail, the Employer has a duty to try to ensure the safety and well-being of inmates, including the prevention of inmate suicide.'

The Jail has a video surveillance system. used to monitor the activities of inmates and Corrections Officers. The system is a security and safety measure which also allows the Employer to investigate and review incidents that occur in the Jail. The cameras are connected to DVR recording equipment and the recordings are retained for 30 to 60 days depending on the circumstances. There are more than a hundred cameras in various locations, including doors, housing areas and Corrections Officer work stations.

One of the core duties of Corrections Officers is an activity called a "block check." A block check involves walking around the assigned housing unit and visually inspecting the cells to make sure that inmates are safe and not engaged in suspicious activities. Block checks are required to be done on an irregular basis at least every 35 or 40 minutes depending on the time of day. A "head count" is similar to a block check but also involves using a list or roster of inmates to verify that each specific inmate is accounted for and located where the inmate is supposed

to be. A "suicide check" involves checking on the cell of a specific inmate who has been put under a suicide watch and can occur as often as every 15 minutes.

Corrections Officers are required to document their activities on the Jail's computer system in a duty log, also called the "daily journal." Officers select the appropriate code for a block check or other activity and click on it to make an entry in the daily journal. For a block check, officers make an entry when they start the activity and also when they end it. When an entry is made, the computer automatically fills in the time of the entry.

As recognized by the Management's Rights clause, the Employer has adopted policies and procedures relating to the activities of Corrections Officers, including block checks, as well as rules of conduct for all. employees. Those are detailed hereafter.

D. The Grievant's Prior Discipline

On July 21, 20**, the Grievant received a 24-hour disciplinary suspension from the Employer for violation of several polices and rules.' As stated in the suspension letter:

> On or about 5/27/**, you were assigned to guard inmate 1, who was admitted to **** Hospital. Inmate 1 was a pre-trial detainee in custody for robbery — armed and had hazard/alerts in place, which included an escape risk alert. You failed to ascertain that Inmate 1 was properly restrained and failed to periodically inspect those restraints as required. Inmate 1 remained unsecured until approximately 0525 hours the

following morning, or for a total of approximately seven hours. . .Additionally, you fell asleep while on duty and were awakened by the nurse at approximately 0530 hours.

***

Your inattention to duty *jeopardized the safety and security of the hospital and community.* Your failure to remain awake while on duty discredited the reputation • of the ***** County Sheriff Department and the County of *****.

* * *

*You are forewarned that should you continue to violate ***** County Human*

'Eight hours were to be immediately served without pay and 16 hours were to he held in abeyance for two years.

*Resources Policies and Procedures or ***** County Sheriff Department rules, policies, or procedures, you may subject yourself to further discipline up to and including termination.* [Emphasis added.]

The Grievant signed the suspension letter, acknowledging that he/she had received and reviewed it. Neither Grievant nor the Union grieved the discipline. The suspension letter became part of the Grievant's work record and personnel file.

E. The Grievant's Conduct on September 30, 20**

At 7:00 p.m. on September 29, 20**, the Grievant began a 12-hour shift that ran until 7:00 a.m. on September 30, 20**. For the last four hours of his/her shift

(beginning at about. 3:00 a.m.) the Grievant was stationed in and responsible for the housing unit designated as "DIA." At approximately 4:49, while assisting in distributing breakfast to the inmates, the Grievant discovered an inmate named Inmate 2 in cell DIA-42 hanging by the neck in a noose fashioned from pieces of a bed sheet and attached to a vent. Despite rescue efforts, Inmate 2 was pronounced dead at the scene.

The Employer initiated an internal affairs ("IA") investigation regarding Inmate 2's death. The investigation was conducted by Lt. 3 with the assistance of Lt. 1 and Lt. 2. As part of the investigation, Lt. 1 and Lt. 2 reviewed the recording of the video feed from housing unit D1A during the night shift as well as the log of activities shown in the daily journal. Lt. 1 and Lt. 2 submitted the results of their review to Lt. 3.

On the video recording from the camera showing the officer work station and some of the cells in housing unit D1A, at 3:30[3] the Grievant can be seen sitting at his/her work station and making an entry into the computer. This is consistent with the daily journal, which shows that the Grievant made an entry for the start of a block check ("BLCK") at "03:30." The Grievant then stands up and begins walking around the perimeter of the housing unit to do the block check. After starting the block check, he/she walks out of the camera's view for a brief time, back in view walking on the upper level, briefly out of view again, and finally back in view walking on the lower level and then to his/her work station. The Grievant sits down and makes another entry into the computer. This is consistent with the daily journal, which shows that the Grievant made an entry for the end of

the block check at "03:35." The entire block check process took the Grievant approximately five minutes to complete. The daily journal shows that about a half hour later the Grievant performed another block check starting at 4:00 and ending at 4:07.

Just past 4:33, the recording shows Grievant turning in his/her chair to make another computer entry. This is consistent with the daily journal, showing Grievant made an entry for the start of a block check at "04:34." This time, however, Employee 1 did not get up from his/her work station to do the block check. Instead, he/she turned away from the computer and remained seated. Around 4:35, two trustees (inmate workers) enter the housing unit, check in with Grievant, and seat themselves at a table nearby. Just before 4:39 and again at 4:40, the Grievant can be seen moving in his/her chair. Shortly after, his/her hands move. Just before 4:44, the Grievant turns to the computer and makes an entry. The daily journal shows Grievant made clicked on his/her computer and made an entry for the completion of his/her (non-existent) block check at "04:44."

As part of the I.A. investigation, Lt. 1 and Lt. 3 interviewed the Grievant OD October 5, 20**, in the presence of his/her Union representative. The audio of the interview was recorded and a transcript was prepared from the audio recording. During the interview, the lieutenants asked the Grievant numerous questions and the Grievant responded with his/her account of events. Among other things, Grievant admitted that he/she falsified the log on September 30, 20**, in connection with the block check he/she entered as starting at 4:34 a.m. and ending at 4:44 a.m. but did not actually perform, and that the falsification was a serious matter.

At the conclusion of the IA investigation, Lt. 3 prepared a written report, then submitted the report to Chief Deputy 1.

F. The Employer's Decision

The Chief Deputy is in charge of the general operations of the Sheriff Department and is third in the chain of command, reporting directly to the Sheriff and Undersheriff. After receiving the investigation report from Lt. 3, the Chief Deputy reviewed it and arranged a meeting with the Grievant so that he/she could have another opportunity to provide information regarding the situation before the Employer made a final decision. The Chief Deputy notified the Grievant of the meeting in writing.

On October 7, 20**, the Chief Deputy and Capt. 1 with the Grievant and his/her Union representative. Among other things, the Grievant stated that he/she had no excuse for his/her actions and apologized for them. He/she again admitted that he/she falsified the log in connection with the block check in question.

Shortly after his/her meeting with the Grievant, the Chief Deputy discussed the situation with the Sheriff and Undersheriff. He/she provided them both a copy of the IA investigation report and gave them an overview of the facts that had been established. His/her discussions with them focused on the Grievant's admitted falsification of the log in connection with a block check as well as the previous disciplinary suspension he/she had received. He/She recommended to the Sheriff and Undersheriff that the Grievant's employment be terminated and they concurred with his/her recommendation.

On October 14, 20**, the Chief Deputy met with the Grievant to inform him/her of the decision to terminate his/her employment. At that meeting he/she was given an official termination letter. The letter's last paragraph sets forth the Employer's stated reasons for the decision:

> Your failure to attempt to or completely check the housing area and falsifying documentation indicating that you had precluded the discovery of a suicide death in a timely manner. Your actions in this incident and in previous incidents, in which you were suspended, demonstrate a lack of propensity for the detailed attention necessary to work as a correctional officer. In addition, the falsification of computer entries related to your block check shows a lack of honesty that would not allow you to continue your employment with the County. For these reasons, you are being terminated from your position as a Corrections Officer effective today, October 14, 20**.

G. The Grievance

On October 1 S, 20**, the Union filed a grievance regarding the Grievant's termination of employment. The matter proceeded through the CBA's grievance procedure to the arbitration step. The grievance was denied at all the steps. An arbitration hearing was held on July 23, 2012, and October 2, 20**, before Stanley T. Dobry. III.

RELEVANT CONTRACTUAL PROVISIONS RIGHTS OF THE EMPLOYER

Section 4.1. Reserved Rights. It is understood and hereby agreed that the Employer reserves and retains, solely and exclusively, all of its inherent and customary rights, powers, functions and authority of management to manage the Employer's operations and its judgment in these respects shall not be subject to challenge. These rights vested in the Employer include, but are not limited to, those provided by statute or law along with the right to direct, hire, promote, transfer within the department, assign, and retain employees in positions within the County consistent with the employee's ability to perform the assigned work. Further, to suspend, demote, discharge for just cause, or take such other disciplinary action which is necessary to maintain the efficient administration of the Employer. It is also agreed that the Employer has the right to determine the method, means and personnel, employees or otherwise, by which the business of the Employer shall be conducted and to take whatever action is necessary to carry out the duty and obligations of the Employer to the taxpayers thereof The Employer shall also have the power to make reasonable rules and regulations relating to personnel policies, procedures and working conditions not inconsistent with the express terms of this Agreement

Section 4.2. Maintenance of Rights. Nothing contained herein or within the Rules, Regulations, Policies and Procedures of the County of ***** and/or Sheriff of ***** County shall be construed to deny or restrict any employee covered by this Agreement, or the Association, rights each may have under the laws of the State of Michigan or the United States, or the Constitution of Michigan and the United States.

GRIEVANCE PROCEDURE

Section 5.1. Definition of Grievance. For the purpose of this Agreement "grievance" means a dispute regarding the meaning, interpretation or alleged violation of the Agreement, Letters of Understanding, or the reasonableness of the Department's rules and regulations under Section 5.12. A grievance under the Agreement may he initiated by employees in the bargaining unit either singularly or jointly or by the Association under Section 5.7.

Section 5.6. Arbitrator's Powers. The arbitrator's powers shall be limited to the application and interpretation of this Agreement as written. He shall be at all times wholly governed by the terms of this Agreement, and he shall have no power or authority to amend, alter or modify this Agreement either directly or indirectly. The Association acknowledges that the Employer retains all rights not otherwise abrogated under the express terms of this Agreement and the arbitrator may not substitute his judgment for that of the Employer. Ile shall have no authority to rule upon job descriptions, work assignments, work standards or personnel. requirements. If the issue of arbitrability is raised, the arbitrator shall only decide the merits of the grievance if arbitrahility is affirmatively decided. The arbitration award shall not be retroactive earlier than the date that the grievance was first submitted in writing. The arbitrator's decision shall be final and binding on the Association, the Employer and its employees; provided, however, either party retains all legal rights to challenge arbitration and decisions thereof where such action is beyond the power of the arbitrator or where the award was procured by fraud, misconduct or other unlawful means.

5.12. Rules and Regulations.

The Employer reserves the right to establish reasonable rules and regulations concerning the conduct of its employees and the standards or the performance of their duties. The Employer

agrees to submit to the Association President any changes or additions to the rules and regulations for comment or suggestions at least ten (10) days prior to the official promulgation or effective date of said amendment or modification. The Association may, within five (5) days after receiving notice, invoke the special conference procedure of this Agreement, in which event a special conference will be held within fifteen (15) calendar days after request for same. The Association may challenge the reasonableness of said rules and regulations by filing a grievance at Step 2 within seven (7) days after the rules or regulations have been established and the Association has received written notice thereof.

In the event that the Sheriff or the County promulgates a major revision of its rules and regulations concerning the conduct of their employees and/or the standards of performance of employees' duties, the seven (7) day period provided above shall be forty-five (45) days or such other time as the parties mutually agree. * *

DISCHARGE AND DISCIPLINE

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

Section 6.2. Association Representation. At any hearing, conference or meeting which may result in disciplinary action to an employee in the bargaining unit, the employee may and is encouraged to request the presence of an Association representative. The Employer must, if requested by the employee, allow sufficient time for the employee to arrange to have Association representation.

Section 6.3. Notice of Charges. Written notice of disciplinary action or discharge shall cite the specific sections of rules and regulations and/or appropriate law(s) which the employee is alleged to have violated.

Section 6.4. Written Notice. An employee who is given a disciplinary warning notice, disciplinary suspension or discharge shall receive such notification in writing. For informational purposes only, the Association shall be Oven a copy of such suspension or discharge notices.

Section 6.5. Disciplinary Record. Every employee shall be entitled to and shall receive a copy of any and all notices, reports, complaints, or other information filed by an employee, supervisor, or any other Employer representative or Department or Division Head in the employee's personnel record which relates to, is or may be made the basis for the disciplinary action up to and including the discharge of such employee by the Employer.

Section 6.6. Association Consultation. An employee who has been discharged may consult with his Association representative before he is required to leave the premises, provided that such consultation is conducted in a manner which will not interfere with the general public or the Employer's operations.

Section *6.1*, Employee Right to Know. An employee shall be entitled to personnel information in accordance with the Employee Right to Know Act. An employee who is disciplined may submit a Statement of Response, consistent with the "Bullard-Plawccki Employee Right to Know Act," to his supervisor, a copy of which shall be attached to the Employer's copy of the disciplinary action.

Section 6.8. Use of Personnel Record. If an employee's work record is free of disciplined for a period of two (2) years, the Employer will not take into account any prior infractions more than

two (2) years old in imposing discipline, unless the prior infractions are directly related to the current violations in which event the Employer will not take into account any prior infractions more than four (4) years old

Section 6.9. Counseling Memoranda The Association acknowledges that counseling memoranda maybe utilized by the Employer to communicate job deficincies to employees. Counseling memoranda shall not be construed as disciplinary action and shall not be subject to the grievance and arbitration procedure set forth in the Collective Bargaining Agreement Counseling memoranda shall not remain in effect for more than six (6) months from the date it is issued.

In the event that counseling memoranda is utilized by the Employer, they shall be in writing, with a copy provided to the affected employee and the Association. Counseling memoranda shall not be placed in an employee's personnel file unless within six (6) months following issuance of the counseling memoranda, the employee receives discipline for conduct which was addressed in the counseling memoranda, in which event the latter shall be attached to the discipline and be subject to Section 6.8...

IV. RELEVANT EMPLOYER RULES *Those rules and policies include:*

1) Section VI.C.00 of the Jail policies, which states that it is the policy of the Jail to "perform and document block checks and accurate inmate head counts on each shift."

2) Section XIT.B.03(f) of the Jail policies, which states that officers shall "perform head count/block checks/card count/computer checks according to schedule."

Section VI.C.02(1)(b) of the Jail policies, which states that block check will be documented in computer[.]"

4) Section VI.C.02(1)(c) of the Jail policies, which states that "[block checks should be conducted...no more than...thirty-five (35) minutes apart from 2300 hours to 0700 hours."

5) Section 4.2 of the Sheriff Department policies, which contains a rule stating that "[am employee shall not knowingly or willfully misrepresent or falsify any matter, verbally or in writing."

6) Section 27(2) of the County's policies, which contains a rule which prohibits "[I] allure to properly and satisfactorily perform the employee's job functions, including, but not limited to, failure to maintain work quality and/or productivity."

7) Section 27(31) of the County's policies, which contains a rule which prohibits "falsification of any official County documents, reports or records

V. POSITION OF THE EMPLOYER

The Employer had just cause to terminate the Grievant's employment. The record in this case establishes that 1) the Grievant engaged in the conduct identified by the Employer as the basis for its decision; 2) the Grievant's conduct violated the Employer's rules and policies; and 3) termination was warranted given the seriousness of the Grievant's misconduct and his/her prior discipline. Furthermore, there is no basis for mitigating the penalty chosen by the Employer.

A. Grievant Engaged in the Conduct Cited

As charged in the official termination letter, Grievant falsely recorded as completed a block check that was never attempted or occurred. The record is clear that the Grievant engaged in that conduct.

It is undisputed that the Grievant did not perform the block check in question. Likewise, there is no dispute that Grievant falsified the daily journal in connection with that "phantom" block check. His/her deceptive log entries speak for themselves. Moreover, during the investigatory interview, the Grievant admitted that he/she falsified the log and that his/her falsification was a serious matter.

That Grievant may have been waiting for the food cart to arrive does not account for Grievant's claim that he/she had started his/her next block check on time. The Union's position makes no sense whatsoever. His/her log entry represented that he/she was timely in starting his/her next block check when in fact he/she was not. He/she sat in his/her chair and ten minutes later recorded he/she completed the check. The claim that this second log entry was inadvertent is difficult to believe, since an honest employee would have used the available "Remarks" field in the log to explain the situation. Furthermore, even if this log entry were truly inadvertent, it would not change the fact that the Grievant, out of obvious self-interest, had 10 minutes earlier falsely logged that he/she was timely in starting the block check in question.

In an attempt to further obfuscate matters, the Union devoted significant portions of the arbitration hearing to a number of subjects completely irrelevant to this case. While there are many rules, practices and potential violations as to how block checks are performed, none is pertinent here. Grievant was

terminated for not doing a block cheek and for falsifying the log to make it look like he/she did it.

B. The Grievant's Conduct Violated the Employer's Rules and Policies

See page 11, *supra.*

C. Termination Was Warranted

The Employer's decision to terminate the Grievant's employment was warranted given the seriousness of his/her misconduct and his/her prior discipline.

Grievant was woefully derelict in his/her duty. By failing to perform the block check that he/she was required to begin by 4:35 a.m. on September 30, 20**, the Grievant utterly disregarded a core duties of a Corrections Officer. The purpose of a block check is make sure inmates are safe and not engaged in suspicious activities. This was confirmed by Union Witness 1, another Corrections Officer. Employee 1 expressed his/her understanding that "the well-being of the inmate was the primary focus of the block check" and further stated that "if you saw the inmate, everything was good, and [if] they weren't obviously trying to hang themselves or cause problems or escape, that was a block check." He/she also emphasized the importance of making visual contact with each inmate during the block check. Absent visual contact, he/she would keep investigating until he/she established it.

The Union argued rules and practices concerning block checks of sub-dayrooms, during block checks, what makes a block check "irregular," the minimum number of block checks required to be done during a shift, the nature and extent of training on bow to perform block checks, and the Employer's clarification of policies on how to perform block checks issued after the Grievant's termination.

Obviously, if a block check is not conducted as scheduled, a longer-than-normal window of opportunity is created for unsafe or suspicious activities to go unnoticed. In a correctional facility this extra time creates unacceptable risks and can have dire consequences. As a result, an untimely or missed block check undermines institutional safety and security and is inherently a serious matter. In the instant case, it. appears clear that Inmate 2 committed suicide sometime between the time he/she was seen during the last block check actually performed by the Grievant, which ended at 4:07 a.m., and the Grievant's discovery of the inmate's body at about 4:49 while passing out breakfast. The Employer does not dispute that it is possible that even if the Grievant had conducted the block check he/she was supposed to begin by 4:35, the inmate's suicide would have occurred regardless. On the other hand, it is at least equally likely that had the Grievant been diligent in his/her duties and performed a timely block check, he/she would have noticed the inmate preparing to hang themselves or in the act of hanging themselves, thus giving the Grievant the opportunity to save the inmate's life.

The seriousness of the Grievant's misconduct was compounded by his/her falsification of the daily journal to make it appear as though he/she had done his/her job properly. The daily journal is intended to accurately reflect operations at the Jail and provide a reliable record of events occurring and actions taken. Corrections Officers are responsible for overseeing the inmates in their assigned area and providing a safe and secure environment. The integrity of the log entries in the daily journal is key because, in the event of a lawsuit stemming from inmate injury or death, it is likely the Employer's only proof of providing an acceptable level of

care and oversight to inmates in accordance with policy. The daily journal demonstrates adherence to the procedures in place to ensure this care and oversight. The Grievant's falsification destroyed the credibility and integrity of this critical record, and makes it impossible for the Employer to trust him/her in the future.

Arbitrators consistently hold that falsification of employer records, including dishonest entries on production or activity records, is just cause for termination.'

Moreover, as discussed previously, *this case was not the first time that the Grievant had violated the Employer's rules and policies in connection with his/hers core job responsibilities.* He/she had been found guilty, so he/she was well aware he/she was 'on thin ice' if he/she violated the Employer's rules.

In the July 21, 20**, discipline, the Employer exercised leniency and gave the Grievant an opportunity to correct his/her behavior, commit to meeting professional standards of his/her job, and get his/her career back on track. The Grievant chose not to do so, and his/her egregious misconduct in the instant ease confirmed his/her incapability of consistently meeting expectations.

The established pattern shows that Grievant disregarded the rules, and could no longer be trusted to carry out his/her duties as Corrections Officer.

D. The Penalty Should Not Be Mitigated

Generally, arbitrators should not alter the employer's choice of penalty unless its actions have been arbitrary or in violation of a statute or the labor agreement.'

1. There Was No Disparate Treatment

At the arbitration hearing, the Union put into the record voluminous evidence relating to numerous other Corrections Officers in an attempt to show disparate

treatment of the Grievant. Absolute uniformity is not required. And treating dissimilarly situated employees based on their disciplinary records is not unfair.'

Importantly, *it is the Union's burden to prove disparate treatment!* The record is wholly insufficient to meet the Union's burden of proof in connection with its disparate treatment theory.

1. The Girolamo#3 Award Does Not Provide a Basis for Mitigation On June 28, 20**, the Employer terminated the employment of Corrections Officer Employee 2 for misconduct that included failure to perform block checks as required and falsification of the daily journal by recording those non-existent block checks as having been completed. The Union filed a grievance regarding the termination and the matter proceeded to arbitration. On August 20, 20**, the arbitrator issued an award in which he found that Employee 2 had engaged in misconduct but reduced the penalty by reinstating him without back pay or benefits (except for no loss of seniority).

The Girolamo#3 award does not provide a basis for mitigation of the penalty in the instant case. To the contrary, that award supports the Employer's position as to the Grievant. Like Employee 2 (the grievant in the Girolamo #2 case), the Grievant's misconduct involved violations of the Employer's rules and policies concerning block checks and falsification of records. However, unlike Employee 2, who had no prior discipline of any kind, Employee 1 received a 24-hour suspension less than 15 months previously for failing to properly restrain a hospitalized inmate and falling asleep at his/her post while guarding the inmate. At that time, Employee 1 was expressly warned that "should you continue to violate ***** County Human

Resources Policies and Procedures or ***** County Sheriff Department rules, policies, or procedures, you may subject yourself to further discipline up to and including termination."

Moreover, after Employee 2's discharge on June 25, 20**, the Union and its members, including the Grievant when he/she chose to engage in the same type of misconduct on September 30, 20**, were on notice that the current Chief Deputy considered such misconduct to be extremely serious and grounds for termination.

3. There Are No Other Grounds for Mitigation

The record indicates that during the investigation and in his/her meetings with Employer officials, the Grievant mentioned that he/she was taking some medications due to personal issues that sometimes made him/her sleepy. However, at that time the Grievant did not provide the Employer with any medical documentation regarding these matters. The Union's proposed exhibits should not be admitted, as they were never presented to the employer, denying them an opportunity to weigh them.

At the arbitration hearing, in tacit acknowledgment that the verbal information provided to the Employer prior to its decision to terminate was quite limited, the Union attempted to supplement that information with several documents.' These "made to order" documents should not be given any weight by the Arbitrator. They were not in the possession of the Employer when it made its decision to terminate the Grievant's employment, and had no part in the decision; in fact, they are all dated long after that decision was made. Clearly it would not be

appropriate to judge the Employer's decision based on information contained in documents created ex post facto. Rather, the Employer's decision should be evaluated based on what it was aware of at that time.

Furthermore, the Grievant's medications have no bearing on his misconduct. Even if the medications made him/her sleepy or caused him/her to "zone out" while "waiting for the food carts," there is no causal connection to Employee 1's falsification of the daily journal.. Grievant never asserted that him/her medications were connected to this falsification.

In this case, the Grievant violated the duly-promulgated work rules and policies of the Employer. These were serious violations that undermined the integrity of the Jail and the ability of the Sheriff Department to effectively fulfill its mission. In conjunction with the - Grievant's prior discipline, the violations established a pattern of profound disregard for the fundamental requirements of his/her job.

The Grievant's improper actions undermined the safety and security of inmates and co-workers and were contrary to the professionalism and high level of service rightfully expected by the community from an experienced Corrections Officer. His/her misconduct created a significant safety and security risk, jeopardized the Employer's ability to defend itself against litigation, and destroyed all trust and confidence the Employer had in the Grievant.

He/she had been suspended for serious infractions that "jeopardized...safety and security" and had been warned that further misconduct could result in discharge. He/she chose not to heed the warning. The taxpayers of the

County deserve far more from a uniformed officer fortunate enough to hold a position paying **** a year in base salary plus overtime and benefits.

The Employer had just cause to terminate the Grievant's employment. The discharge should be SUSTAINED and grievance should be DENIED in it entirety.

VI. POSITION OF THE UNION

The employer has the burden to prove just cause for discharge. The just cause analysis includes whether the degree of penalty imposed was warranted under all the circumstances. Grievant's seniority and prior record with the employer are to be considered, as well as the fairness of the disciplinary process, whether the rules and expectations were clearly promulgated, whether the employer has been even-handed in meting out discipline in comparable cases, whether management was itself at fault in any respect, and any personal circumstances of the grievant which may be a mitigating factor.' In this case, Grievant had 15 years of service at the time of his/her discharge.

As for the fairness, or lack thereof, of the disciplinary process, the evidence showed a host of significant and disturbing indicators of a lack of objectivity, if not actual prejudice, against the grievant:

1) Nowhere did the IA Report mention that the very next morning of the day following the missed block check, the grievant on his/her own initiative and on his/her own time, and before ever being notified that he/she was being investigated or charged, went to the Jail to speak with Captain 1, admitting to Captain 1 that he/she had logged in a block check that he/she did not in fact

perform, and mentioning his/her being on medication for depression that made him/her `zone out' at times.

2) The Employer put into evidence an incomplete version of the grievant's log which did not show all of his/her entries, in particular omitting the grievant's entry of the meal/suicide check which he/she logged in at the same time that he/she closed out the missed block check, which entry is shown only in the complete log put in by the Union.

3) In his/her IA Report, Lt 3 made a completely false statement in asserting that "several minutes" passed from the time the grievant entered the missed block check into the log until the trustees came up to his/her desk, when in fact it was only a minute or less between the grievant's log entry and the trustees coming in. Likewise, Grievant's statements about the effect of his/her medications were disregarded.

4) As to the investigation of the suicide, the IA Report conclusions regarding the conduct by Example 1, who ultimately received only a 12-hour suspension, and regarding the conduct by Example 2', who ultimately received no discipline, were a white-wash compared to how the IA Report treated Deputy Demphy.

5) As to Example 1, the IA Report simply concluded that he/she had failed to go into the subdayrooms in doing block checks, he/she had "missed cells" in doing a head count, and he/she failed to accurately document his/her September 25, 20** block check". However, as admitted on cross by Lt. 1, Example 1 had not only "missed cells" in doing a head count – he/she had also made a false statement in his/her log by entering "head and cards equals 27". In addition, as a result of the

Union's requesting at the hearing that Lt. 2's report be produced and entered into evidence, and that he/she be called as a witness, it was made known that Example 1 had not simply "failed to accurately document his/her September 25, 20** block check" in fact, he/she had not performed that block check at all, thus engaging in the very same conduct as the grievant, i.e., entering a block check into his/her log that he/she never in fact performed.

The employer's bald assertion that the grievant is to blame for the inmate's death by suicide is not supported by the record. The medical examiner's report is to the contrary. Moreover, the evidence showed that the true cause of the inmate's death by suicide was management's own fault in failing to classify the inmate in a manner which would have put him/her on suicide watch,' in a cell with a camera, and/or put him/her in a cell without any bed sheets, and/or required checks more frequent than every 35 minutes.

The termination letter issued to the grievant contains a list of bullet points that were never explained by management at the hearing. The IA Report concluded that there were only two violations committed by the grievant — (1) failing to always go into the subdayrooms and up to the cell door in performing block cheeks, and (2) entering a single block check in his/her log on September 30, 20** which was not in fact performed. As to the subdayrooms, the grievant's conduct was no different from that of any of the other employees investigated, which employees received only reprimands, and Lt.1 admitted that it was only after this incident that management modified the rule on block checks to require officers to

always enter the subdayroom and look into the cell window when doing block checks.

The Employers was not even-handed in meting out discipline. It has been arbitrary in characterizing rule infractions, and it has been capricious in assessing penalties. The evidence overwhelming shows that the discharge of the grievant was draconian and without just cause when compared to other discipline in similar circumstances:

In 20**, Example 3 received just a counseling report (which does not even constitute formal discipline, see Section 6.9 of the CBA) for "forgetting" to conduct a suicide check on an inmate. Evidently, this light sanction was due to Example 3's having self-reported the violation, yet even though the grievant also nearly immediately self-reported his/her own missed block check, he/she was discharged.

In 20**, Example 4 while working in the B2 Mental Health pod — which as explained by Employee 1 contains inmates classified as having a mental disorder or as — received a 40-hour suspension for logging in four (4) block checks during a 6-hour period of time which block checks were not in fact completed (Union Ex 19A, para 2, as well as for not securing the pod doors.

In 20**, Example 5 received an 80-hour suspension for a multitude of violations — he/she entered five (5) block checks into his/her log which were never performed at all, as well as a headcount which was never performed at all, resulting in an over 3-hour period during which no blockchecks or headcounts were done at all; in addition, he/she entered two block checks into his/her log which were only partially done and not completed; also, he/she threw a chair off the mezzanine level

onto the floor below. This member also had prior discipline for sleeping on the job, and another prior discipline in I001 for submitting false sick time documentation.

In 20**, Example 6 received a 40-hour suspension for a multitude of violations while assigned to the Mental Health Unit: entering in his/her log two (2) block checks that were not done at all, entering in his/her log another three (3) block checks that were only partially done, entering in his/her log eight (8) suicide checks that were not done at all, and leaving the pod unmanned on four (4) occasions, the longest being 13 minutes. This member also had a prior suspension for lying to supervisors.

In 20**, Example 7 received a 40-hour suspension for a multitude of violations while working in the Mental Health Unit: on one duty shift he/she entered into his/her log two (2) suicide checks that he/she did not perform at all, and on another duty shift he/she entered into his/her log three (3) suicide checks that he/she did not perform at all. This member also had a prior suspension for tardiness.

Moreover, another relevant comparative arising out of this very same investigation is the discipline meted out to member Example 1, who had less than four years seniority, and who received just a 12-hour suspension for logging in a block check that he/she did not perform at all, as well as for doing an incomplete headcount which was represented in his/her log as complete, and for not entering subdayrooms in doing block cheeks. As such, Example 1 committed the exact same violations as the grievant (logging in a block check not done, and not entering subdayrooms), as well as an additional violation of not completing a headcount which he/she entered into the log as complete — and yet as an employee with far less seniority than the grievant,

he/she was not discharged but rather received only a 12-hour suspension. Not even the grievant's prior discipline justifies this shocking degree of disparity.

Finally, the recent award by Arbitrator Joseph Girolamo (Girolamo #3) should be a basis of comparison. He overturned the discharge imposed by the Employers and reinstating Employee 2 without back pay. Employee 2 had far less seniority than the grievant (just under 7 years), and over the course of numerous shifts on numerous occasions, he/she had entered into his log block checks which he/she did not in fact perform at all or did not complete.

Moreover, in this case there are two mitigating factors that must be considered first, the grievant's taking the initiative to go to the Jail on his/her own initiative and on his/her own time the very next morning so as to tell Captain 1 of the missed block cheek, and second, the grievant's being under the influence of three new medications all having the side effect of somnolence which he/she had just started taking in mid-July and which the grievant testified caused him/her to feel "a little spacey and sleepy". The grievant reported to management these medications as early as his/her conversation the next day with Captain 1, and again at the pre-termination hearing. There is absolutely no basis whatsoever for the Employers' claim that the grievant "falsified" his/her log in any deliberate way — he/she merely entered a single block check which he/she did not in fact perform, due to the confluence of the medications he/she was taking and the mental lapse arising from the trustees coming to his/her desk announcing that food trays were coming within a minute after entering the block check.

The Union requests that the Arbitrator find that there was no just cause, and OVERTURN the discharge. The grievance should be GRANTED and make Grievant whole for all lost pay, benefits, seniority and other emoluments of office.

Alternatively, if some discipline was warranted, then the Employer should be ordered to do the following:

1) Immediately reinstate the grievant with his/her original seniority date and with full seniority and service credit for the time that he/she has been off work;

2) Reduce the discipline to a 40-hour suspension without pay, and make the grievant whole for all wages and other losses suffered in excess of that 40-hour loss of pay;

3) Expunge and correct the grievant's personnel records to eliminate the discharge from the grievant's records, and to reflect a 40-hour suspension without pay.

(4) The Arbitrator to retain jurisdiction for an unlimited period of time in order to address any issues that may arise as to proper implementation of the Award.

IV. DISCUSSION

General considerations

This CBA provides that the Employer will discipline or discharge an employee only for "just cause". It does not, however, define the term. No precise or universally accepted definition of just cause exists. However, a comprehensive body of arbitral analysis on the subject is available and certain basic principles of what constitutes just cause are generally recognized. Thus just cause is a concept with a

well-developed meaning. By using those terms, the negotiators made an informed decision divvying up the burden of proof, and requiring a fair result based upon facts and a full weighing of the equities.

"Just cause" is not monolithic. It must relate to each employer's and union's unique policies and practices, especially those repeated over a period of time, and the total record.

Absent a negotiated agreement that particular behavior will result in a particular penalty, the meaning of the phrase "just cause" is subject to interpretation and application, just like any other contract term. Therefore, the question is not, "How does Mr. Arbitrator feel about it?" but rather, "What does the parties' bargain require?'"

The arbitrator strives to give effect to the parties' agreement as proven in the record presented.

In the public sector at least, just cause is a mixed question of law, public policy, contract and fact, which the parties have agreed will be finally adjudicated by the arbitrator. When an Arbitrator was appointed, he was designated by the parties to be their contract reader, and to interpret and apply on a final and binding basis the law, as necessary, as though it were part of the contract."

"Just cause" is individual. It requires consideration of an individual's circumstances and disciplinary record, and all mitigating and aggravating circumstances proven at the hearing.

"Just cause" must be based on the more credible proofs presented at the hearing. The question directly is whether there was "just cause" for the decision to terminate Grievant's employment.' As indicated hereafter, safety concerns could affect

such a proceeding. Working under this contract, the employer chose to terminate Grievant's employment. Given the contract's implicit preference for progressive discipline," the employer must be held to a rigorous standard of proof, and must temper its exercise of extreme power unless fully warranted by the circumstances amid ample proof of a most serious offense. *Prior discipline stands as a fact.* Here that fact was not properly contested.

On the one hand, the employer has the burden of raising the issue of alleged procedural defects. Likewise, the employer has the burden of persuasion on the issue. The employer protested at the earliest possible opportunity.

On the other hand, the Union belatedly attempted at the hearing to contest the particulars of the July 21, 20**, 24-hour disciplinary suspension. The arbitrator sustained the employer's objection. If the Union were permitted to offer an explanation, inevitably the employer would have brought in evidence claiming that the matter was a lot worse than the paperwork indicated. The hearing would have been needlessly protracted.

Permitting reopening of ungrieved discipline, many months after the fact, subverts both the grievance process, and the carefully negotiated disciplinary system. The time to grieve runs from the date the discipline is imposed." Ungrieved discipline stands as written — no more and no less. This is a situation where settled matters are what they are, and should not be reopened.

Under this disciplinary scheme, Employees are treated as responsible adults. When discipline is imposed, it is consequential. This is true even though the employee may misunderstand the long term implications.' Every incident may be a

progression up the rungs of the ladder, as one may not know whether in a given year that progression will become important.

The suspension was not grieved at the time it occurred. Whether the Union knew about the discipline at the time was not put on this record. However, it is clear that Grievant knew. Therefore, the argument is contractually untimely.

In sum, prior ungrieved discipline is a fact. The time to grieve and the time to investigate is when the discipline is imposed, not months or years later. The employer's objections are noted and SUSTAINED. The discipline stands as written.

The Charges

The burden of proof lies with the Employer. For all the gingerbread, the gravamen of the charges is that Grievant failed to conduct blockcheck on a timely basis as required by jail policy, and simultaneously entered into the computerized record a non-fact: that he/she started and completed the blockcheck.

Given the video and computer records, those facts are essentially undisputed. Grievant entered into the record erroneous information.

Nevertheless, there are remaining issues: (1) as to his/her intent (management has the burden of proof on that issue), *Le.,* was this a "deliberate falsification"; (I) whether "substantial compliance" with the rules would excuse, explain or mitigate the error; (3) whether there is other evidence that should be considered that aggravates or mitigates the charges or his/her culpability; and (4) whether the punishment fits the crime. The first three are primarily factual issues, and the last is an interpretation and application of the contractual "just cause" standard.

Disparate Treatment

Without belaboring the record, it is clear that other officers have had similar or worse defalcations. While they did not have Grievant's disciplinary history, some of the omissions were far greater than Grievant's.

The blinking away or minimizing of strikingly similar instances calls into question the employer's characterization of Grievant's conduct as deliberately fraudulent and utterly disqualifying from further employment. The use of the prior discipline to impute such an intent is a stretch that the arbitrator is unwilling to indulge.

Grievant's statements about the one blockcheck were inaccurate. But they were substantially less of a defalcation than some other similarly situated employees. That they too entered false information into the computer and keep their job — supports the inference that it is not per se a disqualifying event for future employment.

To be sure, the employer gets to treat different employees differently based upon their disciplinary record. To require equal treatment under those circumstances would be the opposite of the reasoned decision inherent in the phrase "just cause."

Belated Troubled Employee Evidence as it Relates to Penalty

Management has a point when it urges that it should not be held to documentary evidence that it was not provided, and which was not part of its deliberations. From the Sheriff's perspective, 'the clock stopped when the discharge decision was made' and only evidence that was available and actually considered by the employer ought to be considered by the arbitrator.

Keeping back important arguments and evidence in the grievance procedures earlier steps impedes its usefulness as a process for dispute settlement.

Assertion of a new issue for the first time at arbitration is disfavored.' Nondisclosure also has other consequences. Belated submission of an argument, defense, or exhibit not submitted in the lower steps, implies lack of merit, unless there is a reasonable excuse for its nonproduction.

The Supreme Court, in *NLRB v Acme Industrial Co.*, 385 U.S. 432, 64 LRRM I069 at 2071 (1967) stated that "Arbitration can function properly only if the grievance procedures leading to it can sift out unmeritorious claims."

As Professors Marvin Hill and Anthony Sinicropi note:

> "This machinery generally consists of a series of steps which must be followed prior to arbitration_ Failure to submit a claim through the early stages of the grievance process denies the parties the opportunity to negotiate a resolution of their complaint. Accordingly, when the agreement is silent on this issue, arbitrators will generally refuse to consider a claim or issue which has not been alleged or discussed in the lower steps of the grievance procedure."'[1]

'id. at p. 113. Dennis R. Nolan, *Labor Arbitration Law and Practice in a Nut Shell,* (West, 1979), pp 22-24. [21] Marvin F. Hill, Jr. and Anthony V. Sinicropi, *Evidence in Arbitration* (2[a] Ed.), (BNA, 1987), pp. 305-308.

Belated evidence tends to show that Grievant was a "troubled employee" and that the trouble contributed to the incident. While the evidence was received by the arbitrator, over the objection of the employer, it is a fact that the employer was not given all of the documentation until shortly before the arbitration hearings began. At a minimum, this belated submission denied the employer the opportunity to react to it, and to decide whether the arbitrate, settle, or even vacate the discipline. It is also a factor that relates to the penalty imposed.

Early on in the investigative process, Grievant called to the employer's attention his/her medical conditions. These communications were not recorded, and apparently were given no consideration.

There is also the related question of relevancy. Ordinarily, evidence of facts that are post discharge have little relevance, if any, to the decision to terminate. However, if they are part of a larger transaction, they may be taken into account. Further, evidence of corrective measures and Grievant's rehabilitation are relevant, and may be considered.'

On the other hand, the presence of powerful psychotropic drugs in Grievant's system is intrinsic to Grievant's negligence. While it does not excuse Grievant's conduct, it at least puts it into a more complete light. His/her psychological condition, the reasons for it, and his/her treatment and recovery are necessarily involved in his/her actions and the decision to terminate his/her employment.

As to his personal circumstances at the time of this incident, Grievant explained that in April of 20** his/her daughter had attempted suicide, and this caused him/her exacerbated anxiety and depression issues, leading to his/her personal doctor referring him/her to a psychiatrist. He/She first saw the psychiatrist, Dr. 1, on July 13, 20**.

This is confirmed in a letter from Dr. 1, which also indicates that he/she was diagnosed by her as having Bipolar Disorder. There were three new medications prescribed by Dr. 1 on July 13, 20**, which medications he/she had never taken before — Lamotrigine, Abilify, and Sertraline. Documentation obtained by from the Walmart pharmacy where he filled these prescriptions confirms that they were prescribed and filled on July 13 and 14, 20**.

At the time of the September 30, 20** incident Employee 1 was taking all three medications, and as he/she credibly testified they were causing him/her to feel "a little spacey and sleepy". The Union also put into evidence the Physicians' Desk Reference monographs for these three medications. The adverse reactions for Lamotrigine and Sertraline include dizziness and somnolence. Adverse reactions for Ability include fatigue and somnolence.'

Employee 1 further testified that the morning of the very next day, on October 1, 20**, he/she went to the jail even though it was not a work day for him/her and asked to speak with Captain 1, telling the latter that he/she had accidentally closed out a block check that he/she did not perform prior to the inmate's suicide, and that he/she was taking heavy medication that made him feel spaced out and sleepy. At the time of this meeting with Captain 1 the morning of October 1, Grievant had not yet been informed of any disciplinary investigation.

Employee 1 also explained that when in the investigatory interview he/she told Lt. 3 that the food carts coming was a "big factor" in his/her missing this block check, that even though that was a big factor in his/her mental lapse, the medications he/she was taking were also a factor. Grievant further testified that in the pre-discipline meeting with Chief Deputy 1 on October 7, 20**, he/she told him/her

that he/she was being treated by a psychiatrist and was taking medications that he/she believed contributed to his/her missing the block check. He/she denied ever telling Chief Deputy 1 at that pre-discipline meeting that he/she had anxiety issues with the inmates; rather, what he/she told him/her was that he/she had anxiety issues generally and that he/she had chosen to work the night shift because it is not as busy since the inmates are in lockdown most of that shift.

Grievant has apparently stabilized. He/she is down to one drug and his/her bipolar disorder is under control; he/her is also on notice as to the employer's future expectations. If he/she wasn't conscious of it before, he/she should now be acutely aware that almost his/her every move is subject to surveillance and recording — correctional officers are monitored like bank tellers.

The Troubled Employee and Modified Just Cause Standard

This is a matter that is within the scope of a "Troubled employee analysis '124 which would apply a "modified just cause" standard.

An employee's status as "troubled" may warrant a modification of the just cause standard. This modification has been extended to employees who are mentally ill, or who are not so diagnosed, but are subjected to extreme stress.'

Professor Dennis R. Nolan set forth the prerequisites for a modified just cause standard:

> "(1) As in all cases, the employer bears the burden of proving that the employee is guilty of the misconduct that is charged. The order of proof and the standards of proof, where a troubled employee is concerned, are also unchanged.

"(2) The union bears the burden of proving that the employee is a 'troubled employee.' The employee must be found to be troubled before any special consideration or modification of the just cause standard is warranted.

"(3) The union bears the burden of proving that the employee's 'trouble' caused, in whole or in part, the misconduct for which the employee was discharged. Unless this is established, no special consideration or modification of the just cause standard will be warranted.'"

As indicated, Grievant was troubled. His/her misconduct was caused, in large part, by stress and associated psychological disorders. Thus, I find that each of those required elements was established by a preponderance of the credible evidence.

Once those elements are established, the arbitrator may choose to apply the Modified Just Cause Standard, to wit:

"Where a troubled employee has engaged in dischargeable conduct (because of the trouble), the arbitrator expects the employer to assess the employee's potential and willingness for rehabilitation, prior to opting for discharge; that is, before discharging the troubled employee, the employer must (1) have given the employee an adequate opportunity to become rehabilitated; and (2) have concluded, with reason, that the employee is not salvageable.'"

Here, management specifically ignored Grievant's illness and his/her fitness for rehabilitation. To the contrary, the evidence suggests that Grievant was salvageable and worth salvaging. Further, the arbitrator finds that Grievant has gone a long way toward rehabilitation.

Remedies for cases involving a modified just cause standard are problematical. As Professor Nolan wrote:

"(1) An immediate reinstatement may be conditioned on an objective of evaluation of fitness for work.

"(2) (a)Where the grievant is not fit to return to work but is deemed salvageable, the discharge may be converted to a medical leave or leave of absence, with reinstatement conditioned on the employee's understating and successfully completing rehabilitation.

"(b) Post rehabilitation reinstatement may be conditioned under Subsection

"(3) Where the grievant is fit to return to work, reinstatement is generally conditional. For example:

"(a) It may be conditioned on future sobriety and compliance wit a specific rehabilitation regiment, for example, attendance at Alcoholics Anonymous Meetings, taking of medication, etc.

"(b) Where safety is concerned, it may be conditioned on random drug and alcohol testing.

"(c) "(c) The employee may be reinstated subject to discharge, possibly without recourse to arbitral review, where the employee violates any of the conditions of the reinstatement or commits a wrongdoing similar to that which was the cause for discharge.

"(4) Typically, no back pay is awarded. It is assumed that the employee, though improperly discharged, was not fit for work. The period since the

discharge may be converted to a leave of absence, sick leave, or disability leave, rather than treated as a disciplinary suspension.'"

V. CONCLUSION

An epigram attributed to Napoleon Bonaparte has some application here: "Never ascribe to malice that which is adequately explained by incompetence.'

This was not a deliberate falsehood, but in context was a foreseeable human error caused by inattentiveness, distraction, fatigue, and prescription drug side effects.' This does not excuse Grievant's inattentiveness and negligent performance. However, it relates to the proper penalty — the other side of the 'remedy coin' — and establishes that termination of employment was a step too far.

Perjury and willful misstatement in official records is a particularly serious charge. As the employer urges, public confidence in public institutions requires strict attention to the truth. Serious charges require serious proofs.

But it does not follow that every factual misstatement in the records of government is an occasion of perjury. It is foremost a question of intent. Thus, why he did what he did, and whether he had a fraudulent intent, has always been material to this dispute.

The unfortunate suicide of the inmate while housed in the jail is a fact. However, there were systemic decisions that may have contributed to the incident. Importantly, he/she had not been placed on suicide watch, even though he/she attempted to cut himself/herself on the way to the jail. He/she had not been housed in those special facilities under a much tighter level of supervision, and which have constant video

monitoring. Based on this record, and excepting hindsight, it is not clear that the department acted unreasonably. But it is equally unclear that Grievant's conduct was a causal factor in the suicide. Nevertheless, the existence of a suicide brought about a serious investigation and correction of the climate in the jail. It increased awareness of problems, and begat corrections, including several instances of employee discipline.

It is also unclear as to when the inmate committed suicide. Some of the cells are physically laid out so that they are not completely open to inspection or view from the outside, and he/she could have prepared the instruments of his hanging in the period during one block check, and hanged himself later.

The error Grievant made was a singular incident involving a mere matter of minutes. He/she opened the block check on his/her computer and within a minute his/her activities were interrupted by the arrival of two trustees. While he/she closed the block check out a few minutes later, he/she almost immediately thereafter became involved in the distribution of breakfast, and it was during that activity that he/she discovered the suicide.

The employer took into account one set of logs, but the Grievant's complete log was not part of its investigative file.

The decision to discharge was seriously flawed. Management failed to take into account mitigating circumstances. Grievant was "on watch", which made him/her an available target. While the Union implies that Grievant was a scapegoat, his/her job was to be 'the pilot of the ship.' He/she was expected to be vigilant and responsible.

The fact that Grievant was "troubled" does not give him/her a complete pass. However, Grievant almost immediately self reported his/her error, coming in and

admitting his/her mistake. He/she had medical issues, and was under treatment by a psychiatrist, including use of three prescription pharmaceuticals that were a factor in his/her error. Early on he/she put the employer on notice of his/her medical issues, and these concerns were essentially overlooked, under reported and not investigated further. These explanatory circumstances deserve weight as to penalty and remedy.

In some respects, both the investigation and its conclusion were thorough but perverse. This important fact was at various stages of the proceeding ignored, or at times used as an aggravating factor *(i.e.*, he/she "admitted" the wrongdoing) -- in contradistinction to some of the other employees, who stood by their denials. The inconsistency is apparent, and the documentary hole is striking.

Management's notations on the existence of these mitigating circumstance, which was presented early on to them in the disciplinary process, was essentially conflicted and inconsistent. These mitigating circumstances deserved serious consideration, and were given no weight by the employer.

VI. AWARD

The grievance is GRANTED IN PART and DENIED IN PART.

The Discharge is hereby OVERTURNED, and modified into a 20 day disciplinary suspension, followed by a nondisciplinary suspension without pay until October 2, I012. Grievant shall be REINSTATED to his/her former employment and position. Subsequent to October I, 20** and through the date of his/her reinstatement, he/she shall be "made whole" for all lost wages, subject to the contractual adjustments for lost wages attributable to that period, as required by the collective bargaining agreement. Provided,

however, that he/she shall also receive all other benefits from the date of his/her purported discharge (understanding that vacation and other compensatory time will be reduced to the suspensions) , including health and medical insurance coverage. If health insurance coverage is not available, then he/she shall be indemnified for his/her hospital, medical and pharmaceutical expenses in accord with the coverage provided to members of the bargaining unit. If Grievant would have owed for his/her share of premiums had he/she been employed, he/she will owe that and it can be subject to a repayment plan (presumably from his/her wage claim) to be negotiated. Provided, further, that he/she shall suffer no reduction in seniority for the periods of his/her suspension. His/her personnel record shall be notated accordingly.

Grievant shall be referred to his/her psychiatrist for continued evaluation and treatment as required, and subject to monitoring of compliance with his/her psychiatrist's orders. The terms and extent of monitoring is remanded to the parties, so they can craft an appropriate order agreed; and failing that, then the arbitrator will make a supplemental order as necessary

Pursuant to the stipulation of the parties, I retain jurisdiction as to disputes as to the meaning or application of the award, if any.

Dated: January 18th 20**

STANLEY T. DOBRY, Arbitrator