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GRIEVANCE COORDINATOR

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OPINION AND AWARD

IN THE MATTER OF THE ARBITRATION BETWEEN
Ohio Department of Youth Services (Indian River School)

-AND-

OCSEA, Local 11

DYS—Indian River School

Beth A. Lewis, Labor Relations Specialist OCB
Lou Kitchen, Labor Relations Specialist OCB
Barry Braverian, Labor Relations Officer 3 (DYS)
Renee B. Macy, Labor relations Specialist
Barbara Bryan, IRS Staff
Diane Barboza, IRS Staff
Henry K. Dickey, Duty Officer
Kirk Braithwaite, Unit Administrator, IRS

OCSEA, Local 11

Frank Thomas, OCSEA # 7660
Shelli A. Jackson, Grievant
James McElvain, OCSEA Staff
James Koss, Juvenile Corrections Officer

GRIEVANCE #

35-04-980710-0194-01-03

HEARING HELD

NOVEMBER 4, 1999

CASE DECIDED

DECEMBER 19, 1999

ARBITRATOR: ROBERT BROOKINS, J.D., PH.D.

SUBJECT: FALSIFICATION; WORK-RULE VIOLATION; INSUBORDINATION

Table of Contents

I.	The Facts	3	
	A.	Roll Call Violations	3
	B.	Falsification of Documents	5
	C.	Refusal to Carry Out a Work Assignment	6
I.	Factual Stipulations	7	
I.	The Stipulated Issue	7	
I.	Relevant Contractual and regulatory Provisions	7	
	A.	Relevant Contractual and Regulatory Provisions	7
I.	The Parties' Arguments	10	
I.	Discussion	10	
	A.	Procedural Issue	10
	B.	Substantive Issues	13
		1.	Did the Grievant Violate Roll-Call Provisions 13
		a.	Duty to Remain Throughout Roll Call 13
		2.	Did the Grievant Leave Roll Call Early 14
		3.	Was the Grievant Absent From Roll Call 14
		4.	Did the Grievant Falsify Documents 14
		5.	Did the Grievant Refuse to Carry Out Work Assignment 15
I.	The Penalty Decision	17	
I.	The Award	18	

I. The Facts

The Indian River School (the Employer or IRS) is a Branch of the Ohio Department of Youth Services (DYS). The Employer houses troubled youths, some of whom are suicidal and/or violent.

In 1998, DYS instituted a rather strict policy backed by two sets of detailed rules and procedures that require JCOs to attend roll call at the beginning of each workday governing roll call.¹ Consequently, IRS must administer roll call as and JCOs must report and fully participate in that process. Roll call serves the general ends of assuring that JCOs are present, properly uniform, and properly apprised of situations from previous shifts that may impact their shifts. Although assignments are made during roll call, most JCOs are permanently assigned and know their assignments.

Ms. Shelli A. Jackson (the Grievant) is a Juvenile Corrections Officer (“JCO”) with approximately ten years of service with DYS. When the instant dispute arose, the Grievant’s was assigned to observe clients in the disciplinary Unit, which houses youths with aggressive predilections and other social maladjustment. On July 8, 1998, the Grievant received a fifteen-day suspension for engaging in several types of misconduct involving roll call, falsification of documents, and refusal to carry out a work assignment. The Grievant signed a statement, on April 4, 1998, acknowledging that she had received a copy of the D.Y.S. General Work Rules and understood them.

A. Roll Call Violations

On February 3, 1998, Duty Officer Barbara Bryan submitted a written report, which summarized the Grievant’s conduct during roll call.² According to Duty Officer Bryan, while Mr. Jeffery Dickey was conducting roll call, on January 21, 1998, the Grievant walked out prematurely— after name and uniform verifications but before announcements and assignments. However, upon the requests of Duty Officers Dickey and Bryan, the Grievant returned to complete roll call.³ Duty Officers Dickey and Bryan were again conducting roll call on January 22, 1998, when the Grievant left after name and uniform verifications.⁴ Both Duty Officers called her back, and,

¹ See *infra* relevant Contractual and Regulatory Provisions.

² Employer Exhibit 3.

³ The Duty Officer Log did not reflect that the Grievant was not present.

⁴ Joint Exhibit 11B, at 2, notation at 10:45 p.m..

this time, asked her to avoid early departures from roll call in the future. The Grievant replied that she was required to be present only for name and uniform verification and that announcements and assignments were of no concern to her. Still, she agreed to avoid premature departures from roll call.⁵

On January 23, 1998, the Grievant reported to work promptly but simply skipped roll call altogether.⁶ Duty Officer Bryan was conducting roll call alone that day. As Duty Officer Bryan sat in her office approximately 5 minutes before roll call, she observed the Grievant walk pass. Because Duty Officer Bryan saw the Grievant shortly before roll call, she knew the Grievant was in proper uniform. Shortly after roll call, the Grievant approached Duty Officer Bryan and asked, “Did I miss it?”⁷ When Ms. Bryan subsequently confronted the Grievant about being absent from roll call, the Grievant said she was needed elsewhere to assist with a client who was “kicking on a door.”⁸ Duty Officer Bryan pointed out that this problem was not the Grievant’s concern, and the Grievant suddenly remembered that she also had lost track of time because the clocks in her area were off. Duty Officer Bryan then told the Grievant that her attitude toward roll call and Duty Officer Bryan’s authority was unacceptable. The Grievant denied being disrespectful and promised to attend and remain throughout roll calls, and that she simply forgot about roll call.

Notwithstanding the Grievant’s apologies and promises, on January 27, 1998, Duty Officer Bryan sent a memorandum to Ms. Linda Bess, Superintendent, recommending disciplinary action against the Grievant for leaving roll call prematurely, on January 22, 1998 and for being absent from roll call on January 23, 1998.⁹ According to Duty Officer Bryan, this behavior violated “Rule 26-C, Unauthorized absence (AWOL); Rule 6-a, Insubordination ; and Rule 1-C, Failure to Follow Procedure.”¹⁰ However, the memorandum made no mention of the Grievant’s early

⁵ Again, the Duty Officer Log for January 22, 1998 made no mention of the Grievant’s absence.

⁶ Joint Exhibit 11D, at 2, notation at 10:45p.m.

⁷ Employer Exhibit 3.

⁸ *Id.*

⁹ Employer Exhibit 1.

¹⁰ *Id.*

departure from roll call on January 21, 1998. On March 14, the Grievant was in the building during roll call but failed to show up.

B. Falsification of Documents

On February 12, 1998, Duty Officer Diane Barboza observed that all the door logs of all the clients on the Grievant's unit had been initialed approximately forty-five minutes too early, thereby indicating that someone had checked on the clients at the proper intervals.¹¹ Although Duty Officer Barboza did not note this problem on the door logs, she recorded it, at 1:30 a.m., in her personal log.¹² In fact, Duty Officer Bryan was not required to note annotate the door log itself. On February 20, 1998, Duty Officer Bryan spoke to the Grievant about prematurely filling out her clients' door logs.¹³ Duty Officer Bryan admitted, under cross examination, that she and the Grievant had a personality conflict before Ms. Bryan became a Duty Officer. On February 21, Duty Officer Bryan submitted a memorandum to superintendent Bess, noting that, on February 13 & 20, 1998, she counseled the Grievant about prematurely filling out door logs.¹⁴

C. Refusal to Carry Out a Work Assignment

On January 26, 1998, Deputy Lee A. Williams requested Unit Administrator Kirk Braithwaite to investigate allegations of insubordination and roll-call violations against the Grievant.¹⁵ Mr. Braithwaite met with the Grievant and her Union representative James A. Koss, on January 31, 1998, to notify the Grievant of the pending investigation into the foregoing charges against her.¹⁶ During that meeting, Mr. Braithwaite gave the

¹¹ Joint Exhibit 9A, at 3.

¹² *Id.*

¹³ Joint Exhibit 10A, at 3.

¹⁴ Duty Officer Bryan also claimed that she observed the Grievant's door logs prematurely completed on February 20, 1998 (Employer Exhibit 5); however, the Arbitrator has yet to find documentary evidence of that event.

¹⁵ Employer Exhibit 6.

¹⁶ Employer Exhibit 7.

Grievant a list of questions but did not give her a deadline on which to answer them. That same day, the Grievant requested clarifications of who, what, where, and when regarding Mr. Braithwaite's questions.¹⁷ On or about February 23, 1998, Duty Officer Bryan notified Mr. Braithwaite that the Grievant had subsequently falsified documents and missed another roll call session on March 15, 1998. Mr. Braithwaite again met with the Grievant and Union Representative Charles Danzy, on March 19, 1999. This time Mr. Braithwaite gave the Grievant an updated list of questions reflecting the new allegations of falsification and absenteeism. He also ordered her to respond to those questions by 7:00 a.m. on March 20, 1998; she failed to do so. On March 21, 1998, Mr. Braithwaite again told the Grievant to answer the updated list of questions. The Grievant said that she lacked sufficient time to respond to the questions, and Mr. Braithwaite reiterated that he expected her responses before the end of her shift on March 21, 1998.

On March 25, 1998, Mr. Braithwaite met with Grievant and Union representative Bethanie Marvin and once again instructed the Grievant to respond. The Grievant told Mr. Braithwaite that she had responded by certified mail, on March 24, 1998. After receiving the Grievant's responses that day, Mr. Braithwaite determined that they were still unresponsive to his questions. Finally, on March 29, Mr. Braithwaite met with the Grievant and Union Representative William Taylor and, again directly ordered the Grievant to fully respond to the questions of March 19 by 2:00 a.m. or face another insubordination charge. Mr. Braithwaite received the Grievant's second responses on March 29, 1998 only to discover that they were as unresponsive as the first responses. Despite repeated efforts by Mr. Braithwaite, the Grievant steadfastly refused to amend her answers.

Consequently, on June 3, 1998, DYS (Director Geno Natalucci-Persichetti and Superintendent Conrad L. Adams) issued a letter notifying the Grievant that she would be suspended for fifteen-day suspension, beginning July 8, 1998 and ending July 28, 1998. The suspension was for violating: Rule 1(c)— Failure to Follow Procedure, Rule 2—Falsification of Documents, and (3) Rule 6(a)—Refusal to Carry Out a Work Assignment.¹⁸ The Union grieved the suspension, and, after failing to resolve their differences, the parties selected the undersigned to hear the

¹⁷ Employer Exhibit 8. The Employer claims that Duty Officer Bryan submitted the requested clarifications to the Grievant, however, the Arbitrator has yet to find documentary evidence of that proposition.

¹⁸ Joint Exhibit 2.

instant dispute on November 4, 1999.¹⁹

II. Factual Stipulations

1. This grievance is properly before the Arbitrator.
2. The Grievant was hired by the Department of Youth Services on April 11, 1988
3. The Grievant's prior discipline includes: 4/24/98—Oral Reprimand, Rule 26(b) - Tardiness; 5/4/98—Written Reprimand, Rule 26(c) - AWOL - 2 or less days.
4. The Grievant was suspended for fifteen (15) days on July 8, 1998 for violations of the following work rules: 1(c)—Failure to follow procedure 2 - Falsification of documents, 2—Falsification of Documents, and 6(a)—Refusal to carry out a work assignment

III. The Stipulated Issue

Was Grievant, Shelli Jackson, suspended for fifteen (15) days for just cause? If not, what shall the remedy

IV. Relevant Contractual and regulatory Provisions
A. Relevant Contractual and Regulatory Provisions

State of Ohio		Department of Youth Services	
Direction: Personnel	Chapter: B	Directive: B-50 Roll Call	
Effective Date: 1/1/98	Authority: Ohio Revised Code, 5139.10(B)		
Responsibility: Local Procedure: Not Required	Review: _____ _____ _____	References: ACA RE: 3-JTS-1C-01 Basic Policy# N/A	
Approval: [Signature]	Director		

A. POLICY PROVISIONS:

The Department shall establish a uniform policy for the purpose of conducting a roll call of Juvenile Correctional Officers in each institution it maintains. The Procedure shall require JCO staff to report to the Roll Call Assembly Area at his/her institution at least fifteen (15) minutes prior to the beginning of his/her established shift and be paid for thirty (30) minutes of straight time pay. Roll Call Pay shall be paid as a part of the employee's earnings for that pay period and shall not be convertible to overtime or compensatory time. Roll Call Pay shall not be paid when an employee is on approved leave to include but not limited to, sick leave, vacation leave, personal leave, compensatory time leave, administrative leave, and/or leave without pay. Any employer-initiated absences from the institution shall entitle the employee to be paid for Roll Call Pay, except during new employee orientation and for actions taken under Article 24, Discipline, in the OCSEA/AFSCME contract.

B. DEFINITIONS: (As used in this Directive, the following definitions apply:)

Roll Call Period (RCP) – A period to begin fifteen (15) minutes prior to the shift start time, i.e. 5:45 AM; 1:45 PM; 9:45 PM; etc. for the purpose of calling the roll, uniform and equipment inspection, announcements and assignments, etc. for that shift.

Roll Call – Physical accounting of all Juvenile Correctional officers (JCOS) assigned to work that shift.

* * * *

C. PROCEDURE GUIDELINES:

1. The Roll Call Administrator shall prepare the Roll Call Accountability Form prior to Roll Call (Attachment A).

¹⁹ Joint Exhibit 3.

2. The Roll Call Period shall begin promptly fifteen (15) minutes prior to the institution's established shifts. Any JCO not present at the Roll Call Assembly Area at this time will be considered late for work (tardy) and will be subject to the institution's tardiness policy. LCO call-offs for their assigned shift shall be at least ninety (90) minutes prior to the Roll Call Period.
3. During the RCP the Roll Call Administrator shall conduct the following:
 - 3.1 Take Roll - Conduct attendance by calling names of staff scheduled for work on the shift.
 - 3.2 Uniform inspection - Physical inspection of JCO uniforms to ensure compliance with DYS Directive B-15, Professional Dress for Uniformed Personnel.
 - 3.3 Equipment Inspection - Physical inspection of JCO equipment required for the performance of their job duties according to the daily assignments of their shift.
 - 3.4 Make Assignments - Relief and/or Special
 - 3.5 Make Announcements - Any information or special events which needs to be shared with JCO staff as it relates to the overall operation of the institution. Memos may also be distributed at this time (Unit announcements should occur on the unit by the appropriate unit supervisor).
 - 3.6 Release of JCO staff to assignments - JCO staff should be released prior to the end of the current shift which is awaiting relief of their assignment, for exchange of information and/or equipment.
 - 3.7 End of Roll Call Period - RCA shall complete the Roll Call Accountability Form with a copy placed in the Roll Call Log Book and a copy sent to the Superintendent or designee for his/her review.

**DEPARTMENT OF YOUTH SERVICES
INDIAN RIVER SCHOOL January 9, 19913**

TO: All J.C.O, Staff
 FROM: Lee Williams, Deputy Direct
 Conrad Amos, Deputy Indirect
 SU13JECT: NOW I.R.S. Will Do Roll Call

Please be advised that Roll Call at Indian River School will take place In the following manner:

1. You must be clocked in and seated at a table on a chair in the cafeteria (please note that this is a change from the previously identified roll call site) a minimum of fifteen (15) minutes prior to the beginning of your old assigned shift. . . .
 2. The Duty Officer will conduct attendance by calling names of JCO staff scheduled for work on that shift. Where) the JCO name is called, the JCO will answer with the word "here".
 3. The Duty Officer will instruct all JCO staff to stand at their seats and make a visual observation of each JCO to ensure the JCO is uniformed in compliance with DYS Directive B-15, Professional Dress For Uniformed Personnel. Should the JCO not be in compliance with B-16, the Duty Officer will make a notation on the Roll Call Accountability Form indicating the violation and will also verbally inform the JCO of the exact violation at that time. The JCO will be instructed to remove the article of clothing and possibly remove it from the building.
- * * * *
5. The Duty Officer will make any of announcements that need to be shared with the JCO staff.
 6. The Duty Officer will instruct all JCO staff to report to their assignment immediately. JCO staff must report directly to their assignments and will not be permitted to go any where other than their assignment to ensure the prior shift is relieved on time and that pertinent information is passed on to the next shift. . . .

Article 24.02 Progressive Discipline

The Employer will follow the principles of progressive discipline. Disciplinary action shall be commensurate with the offense. . . . Disciplinary action shall be initiated *as soon as reasonably possible consistent with the requirements of the other provisions of this Article. An Arbitrator deciding a discipline grievance must consider the timeliness of the Employer's decision to begin the disciplinary process.*¹

Article 24.05 Imposition of Discipline

The Agency Head or designated Deputy Director or equivalent shall make a final decision on the recommended

¹ (emphasis added).

disciplinary action as soon as reasonably possible but no more than forty-five (45) days after the conclusion of the pre-discipline meeting.

* * * *

Disciplinary measures imposed shall be reasonable and commensurate with the offense and shall not be used solely for punishment.

V. The Parties' Arguments

The Employer's Arguments

1. The Grievant displayed disrespect for the authority of Duty Officers and for valid work rules.
2. Specifically, the Grievant flouted work rules governing roll call and completion of door logs. She falsified door logs by prematurely initialing them. Furthermore, the Grievant repeatedly refused to answer straightforward questions about the foregoing misconduct.
3. The Grievant's misconduct fully warrants the fifteen-day suspension under the penalty table of DYS and IRS.

The Union's Arguments

1. The fifteen-day suspension is untimely under Article 24.05 of the Collective-Bargaining Agreement and under Department of Youth Services directives B-34.
2. The Employer failed to establish its charges against the Grievant.
3. The Employer failed to impose progressive discipline pursuant to Article 24.02 of the Collective-Bargaining Agreement.

VI. Discussion

A. Procedural Issue

The Union argues that the fifteen-day suspension is untimely under both the Collective-Bargaining Agreement and the Department of Youth Services directive B-34. Before addressing this issue, four general observations are indicated. First, only the Union broaches this procedural issue, management focuses exclusively on the merits of the dispute. Second, even though the Union raises the procedural issue in its opening and closing statements, it offers no developed argument on that issue. Instead, the Union, like the Employer, focuses its adversarial energy on the merits of the dispute. Third, because Directive B-34 is not a part of the arbitral record, the Arbitrator cannot consider it. Finally, the Union's procedural objection triggers some concern because the parties explicitly stipulated that this dispute was properly before the Arbitrator. Therefore, even if the union prevails on the procedural issue, the effect on the outcome of the dispute is less than clear.

Articles 24.02 and 24.05 contain clear, positive contract language that reflects an unmistakable intent specifically to define and limit the Employer's window of disciplinary opportunity following a predisciplinary hearing. Article 24.02 generally requires the Employer to initiate the "disciplinary action . . . as soon as reasonably possible consistent with the requirements of the other provisions of this Article." However, Article 24.05 adds

specificity by requiring that, "The Agency Head or designated Deputy Director or equivalent [to] . . . make a final decision on the recommended disciplinary action as soon as reasonably possible but *no more than forty-five (45) days after the conclusion of the pre-discipline meeting.*"¹

Furthermore, Article 24.02 clearly reflects an intent that the Arbitrator does not allow issues relating to timely discipline fall through the "analytical cracks." In addition the forty-five-day disciplinary window under Article 24.05, there is the requirement under 24.02 that, "An Arbitrator deciding a discipline grievance *must consider* the timeliness of the Employer's decision to begin the disciplinary process."² Accordingly, the Arbitrator turns to a discussion of this issue.

Evidence in the arbitral record clearly establishes that the fifteen-day suspension violates the strictures of Article 24.05. The Grievant's predisciplinary hearing was scheduled for and held on May 14, 1998. However, the employer did not impose the fifteen-day suspension until July 8, 1998, approximately fifty-five days after the pre-disciplinary hearing. Nor is there anything in the record that would explain or justify this delay.

Not surprisingly, labor arbitrators have expressed diverse views about proper remedies where, as here, there is a clear violation of a contractual procedure. Most arbitrators refuse to nullify the discipline merely because the Employer "dropped the procedural ball":

When a due process guarantee of the contract (either one that is an inherent part of just cause, or one arising out of a specific contract provision) has been violated in a significant way, *most arbitrators* conclude that the violation will affect the degree of the penalty or other adverse employer action, and *some arbitrators* conclude that the violation will nullify the penalty entirely.³

In other words, most arbitrators will recognize the importance of procedural rules by adjusting the disciplinary measure, the grievant's backpay, et cetera, thereby penalizing employers for having committed the procedural error while holding the Grievant responsible for his/her misconduct. Another approach involves determining whether the procedural error somehow harmed the grievant—Harmful Error Rule. If so, then some

¹ (emphasis added).

² (emphasis added).

³ See, e.g., NATIONAL ACADEMY OF ARBITRATORS, THE COMMON LAW OF THE WORKPLACE, THE VIEWS OF ARBITRATORS 199 (THEODORE J. ST. ANTOINE, ED.1998) (emphasis added).

arbitrators will nullify or at least adjust the measure of discipline or otherwise penalize offending employers.) Still other arbitrators try to determine whether employers substantially complied with the procedural provision in question.⁴ In their view, substantial compliance warrants full implementation of the discipline.

Conversely, Arbitrators who nullify disciplinary measures because of employers' procedural errors argue that application of the harmful error rule unduly emphasizes the arbitrator's judgement while discounting the weight or significance of negotiated language in collective-bargaining agreements.⁵ Finally, other labor arbitrators subscribe to views that fall on various points along the continuum formed by the three foregoing views.⁶

As mentioned earlier, however, by stipulating that this dispute is properly before the Arbitrator, the parties manifested an intent for the merits to be addressed. Moreover, even though Articles 24.02 and 24.05 establish clear temporal demarcations on the Employer's right to impose discipline, neither Article explicitly requires that the Employer forfeits the case because of this procedural error. Indeed, both articles are silent as to remedies for violating their provisions. These specific facts together with the general arbitral practices discussed earlier persuade the Arbitrator that even though the fifteen-day suspension falls without the boundaries of Article 24.05, the proper response would involve adjusting the penalty in a manner that reflects the Employer's error without exonerating the Grievant. The task now is to determine whether evidence in the record as a whole establishes the charges against the Grievant.

B. Substantive Issues
1. Did the Grievant Violate Roll-Call Provisions.
a. Duty to Remain Throughout Roll Call

Although there is no specific language requiring that JCOs remain in attendance throughout roll call sessions, several provisions suggest that they must. First, section C, 3.5 of "Procedure Guidelines," in Directive B-50, provides that the role Call Administrator shall announce, "Any information or special events which needs to be shared with JCO staff as it relates to the overall operation of the institution. Memos may also be distributed at this

⁴ FAIRWEATHER'S PRACTICE AND PROCEDURE IN LABOR ARBITRATION, 307 (Ray A. Schoonhoven, ed., 3rd ed. 1991).

⁵ MARVIN HILL, JR. & ANTHONY V. SINICROPI, REMEDIES IN ARBITRATION 95 (1981).

⁶ See, e.g., ELKOURI AND ELKOURI, HOW ARBITRATION WORKS 918-919 (5th ed. 1997).

time (Unit announcements should occur on the unit by the appropriate unit supervisor). This passage suggests that announcements are as integral to roll call sessions as any other aspect of that process. Therefore, it stands to reason that if JCOs are to remain for name calls, they are also to remain for announcements. Similarly, Section 3.6 of Procedure Guidelines provides for, "Release of JCO staff to assignments—JCO staff should be released prior to the end of the current shift which is awaiting relief of their assignment, for exchange of information and/or equipment." The statement JCOs are to be "released" suggests that they are not free wander in and out of roll call at their pleasure. Finally, on January 9, 1998, Deputy Director Lee Williams informed JCOs that: "The Duty Officer will instruct all JCO staff to report to their assignment immediately. This statement reinforces the idea that JCOs are on a tightly regulated schedule during roll call.

2. Did the Grievant Leave Roll Call Early

Credible evidence in the record establishes that, on January 21-22 the Grievant left roll call early and was informed that such conduct was unacceptable and must cease. Notwithstanding the Grievant's denials, the Arbitrator finds Duty Officer Bryan's account persuasive. The Grievant denies that she walked out of roll call on January 21-22, 1998 and contends that no other person observed her as she left roll call. However, Mr. Dickey witnessed the event.

3. Was the Grievant absent From Roll Call

Here also, credible evidence shows that, on January 23, 1998 and March 14, 1998, the Grievant did not attend roll call, even though she was in the building. The same reasons that persuaded the Arbitrator that the Grievant walked out of roll call also convince him that she was absent on the foregoing days. The Grievant's best response to these accusations is that she was paid for attending roll call on those days, hence, she must have been present. The Arbitrator finds that reasoning unpersuasive. That the Employer did not deduct fifteen minutes in wages from the Grievant's paycheck hardly establishes that Duty Officer Bryan falsely accused the Grievant. Some evidence in the record suggests that Duty Officer Bryan and the Grievant had personality conflicts, presumably suggesting that Duty Officer Bryan was bias toward the Grievant. Mere allegations (without more) of personality conflicts do not establish a nexus between Duty Officer Bryan's reporting the Grievant's misconduct and her feelings about the Grievant.

4. Did the Grievant falsify Documents

The falsification charge are slightly different because they entail an element of intent. Nevertheless, evidence in the record shows that on — all of the door logs on the Grievant's assigned floor were completed from thirty to forty-five minutes early. Two witnesses observed this situation and reported it. Moreover, Duty Officers Byran and Barboza credibly testified in support of the reports in their personal logs. The Union stressed that neither Duty Officer Bryan nor Duty Officer Barboza altered or removed the door logs, thereby suggesting that they found nothing amiss. However, evidence in the record shows that when they discovered the falsifications, Duty Officers no longer made notations in those logs.

With respect to the element of intent to falsify, once it is established that the Grievant prematurely initialed numerous door logs in her unit, it follows that she could hardly have accidentally or negligently initialed all of those logs. In other words, that numerous logs were prematurely initialed constitutes a basis for presuming or imputing the necessary element of intent to establish falsification.

5. Did the Grievant Refuse to Carry Out Work Assignment

Based on the nature of Mr. Braithwaite's questions to the Grievant and her responses thereto, the Arbitrator finds that the Grievant answered some questions and basically ignore others. Moreover, Mr. Braithwaite asked only simple, clear, and direct questions, which beg for like responses. Following is a summary list of Mr. Braithwaite's questions and the Grievant's answers. Mr. Braithwaite asked the Grievant, "On Wednesday January 21, 1998, while Duty Officer Mr. Jeff Dickey and Intern Duty Officer Barb Bryan were conducting roll call did you get up during the roll call and walked out? If you answered yes could you explain why." Ultimately, the Grievant answered in pertinent part: "Yes, I did attend roll call on the above dates [January 21-23, 1998]; February 13, 20, 1998 and March 14, 1998. Although she answered this question, her answer was over-inclusive, since February 13, and 20 were not days when anyone had accused the Grievant of missing roll call. When subsequently asked this same question, the Grievant answered in pertinent part: "I did write a statement about this incident in the presence of-union vice-president James Koss. This statement was submitted to UA Braithwaite. I do not wish to alter the statement I submitted seven weeks ago, thus the statement will stand as written." Also, she said, "My Previous statement of 3-24-98 will stand as written. I was also told if I did not answer the question I was insubordinate!!!"

Next Mr. Braithwaite asked the Grievant: "On Friday January 23, 1998, Intern Duty Officer Barb Bryan was conducting roll call at approximately 10:45 p.m. and you were not present during the roll call, however you were

present in the building. Could you please explain why you did not attend roll call on January 23, 1998"?

The Grievant replied: "On 3-28-98 of a time until 2:00 a.m., I was given a direct order to answer the above question by UA K. Braithwaite. My previous statement of 3-24-98 will stand as written. I was also told if I did not answer the question I was insubordinate." Recall that the answer to which the Grievant refers stated in relevant part: "Yes, I did attend roll call on the above dates [January 21-23, 1998]; February 13,20, 1998 and March 14, 1998." Since the Grievant's answer included January 23, 1998, one can reasonably conclude that she also answered that question.

Finally, Mr. Braithwaite again asked the Grievant: "On March 14, 1998, did you attend roll call prior to working on this day? If you answer no could you please explain why you did not attend roll call at 10:45 p.m." The Grievant offered the same statement. And added in a post scrip: "All questions have been answer to the best of my ability on 3-24-98." Here too, the Grievant's reference to her earlier answer is probably sufficient, since sh denied missing roll call on dates including March 14, 1998.

Concerning the falsification charges, Mr. Braithwaite asked: " On February 13, 1998, were you informed by Intern Duty Officer Barb Bryan concerning signing off on 15 minuted door logs 30 minutes ahead of time?" The Grievant answered: "On 3-28-98, of a time until 2:00 a.m. I was given a direct order by UA K. Braithwaite to answer this question. My previous question statement of 3-24-98 will stand as written." Here the Grievant's answer bears no relation whatsoever to the question asked. Indeed, it seems flippant and intentionally unresponsive. Neither answer addresses the question asked—whether Duty Officer Bryan had expressed their concerns to the Grievant that she was prematurely signing door logs thirty minutes too soon. The record reveals that the Grievant never offered a straight answer to this straightforward question. Mr. Braithwaite gave the Grievant a second and even a third chance to answer the same question regarding falsification, and she offered the same unresponsive answer: "On February 20. 1998, did you fill out the 15 minute door logs from 1:15 a.m. up till 2:00 a.m. prior to checking youth's rooms? If so, why?" She offered the same unresponsive answer depicted above.

The foregoing discussion shows that the Grievant essentially denied missing roll call, and, of course, a denial is an answer. However, she never answered the questions about falsification of documents.

To the extent that the Grievant refused to answer questions in an official, civil employment-related investigation, she clearly refused to perform a work assignment, especially since on at least one occasion, Mr.

Braithwaite asked her to respond to the questions before leaving work for the day. Mr. Braithwaite had the authority to question the Grievant. He asked clear, direct questions. And several times he clearly and specifically ordered her answer the falsification questions. That the Grievant answered some of the questions is not grounds for mitigation, since she stoutly refused to answer others.

VII. The Penalty Decision

Consequently, the Arbitrator finds that the Employer established its charges of violating roll-call rules, falsification of documents and refusing to carry out a work assignment. Having concluded that the Grievant engaged in misconduct, it follows that some measure of discipline is warranted. One determines the precise measure of discipline by balancing aggravating and mitigating factors and referring to applicable rules of progressive discipline.

Aggravating factors include the Grievant's disciplinary history. The record shows she has been disciplined twice before for tardiness—received an oral reprimand—and for being AWOL—received a written reprimand. More important, both prior disciplinary measures resulted from attendance-related misconduct, similar to the roll-call violations in the instant case. This clearly rather strongly suggests that the prior discipline failed either to rehabilitate or to deter the Grievant. In addition, the Grievant's attitude toward valid work rules and authority figures leaves much to be desired and, quite frankly, concerns the Arbitrator. With respect to mitigating factors, the Grievant is a ten-year employee. Also, the Employer's procedural violation must be considered a mitigative factor.⁷

In the Arbitrator's view, the Employer did not violate any rules of progressive discipline in this case. According to the penalty table in the record, for a first offense of falsifying or altering an official document, discipline can range from a fifteen-day suspension to removal.⁸ Refusal to carry out a work assignment can trigger discipline ranging from a warning to a 1-3 day suspension for the first occurrence. Finally, failure to follow procedures carries a warning for the first incidence. Given the range of penalties for these charges—especially for falsification of documents—and the Grievant's prior disciplinary history, one would be hard-pressed indeed to say

⁷ The Arbitrator has been unable to find any evidence about the Grievant's job performance before the behavior that triggered the instant dispute.

⁸ Joint Exhibit 4, at 2.

that the fifteen-day penalty is anything but progressive. Nevertheless, that penalty must be reduced, solely because of the Employer's procedural error. The Arbitrator finds that an eleven-day suspension strikes the proper balance between discouraging future violations of Article 24.05 and holding the Grievant accountable for her misconduct. Therefore, the Employer shall reimburse the Grievant with 4 days back pay, which effectively imposes an eleven-day suspension.

VIII. The Award

In closing, the Arbitrator wishes to clearly inform the Grievant that but for the Employer's procedural error, the entire fifteen-day suspension would have been sustained. Accordingly, the grievance is **denied in part and sustained in part.**