

#1880

VOLUNTARY RIGHTS ARBITRATION

In the Matter of Arbitration Between:

**STATE OF OHIO, DEPARTMENT OF REHABILITATION
AND CORRECTIONS,**

Employer,

And

**OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION,
LOCAL 11, AFSCME, AFL-CIO,**

Union.

**GRIEVANT: RICHARD MOORE (TERMINATION)
CASE NO.: 27-25 (20050725)—2563-01-03**

**Arbitrator's Opinion and Award
Arbitrator: Dr. David M. Pincus
Date: June 10, 2006**

Appearances

**For the Employer
Chris Lambert**

**Ohio Department of Rehabi-
tation and Correction**

**For the Union
Lynn Belcher**

OSEA Staff Representative

I. Introduction

This is a proceeding pursuant to a grievance procedure in the negotiated agreement between State of Ohio, Department of Rehabilitation and Corrections (the Employer) and the Ohio Civil Service Employees Association, Local 11, AFL-CME, AFL-CIO (the Union). The arbitration hearing was held on February 28 and March 14, 2006. The parties agreed to submit post-hearing briefs in lieu of making closing statements.

At the arbitration hearing, the parties were given the opportunity to present their respective positions on the grievance, to offer evidence, to present witnesses, and to cross-examine witnesses. At the conclusion of the hearing, the parties were asked by the Arbitrator if they planned to submit post-hearing briefs. The parties submitted briefs in accordance with the guidelines agreed to at the hearing.

II. Stipulated Issue

Was the grievant, Richard Moore, removed from his position of Corrections Officer at the Southern Ohio Correctional facility for just cause? If not, what shall the remedy be?

III. Joint Stipulations

1. The grievant's date of hire is October 4, 1999.

- 2. The grievant's date of removal is July 20, 2005.
- 3. The grievant's classification was Corrections Officer.
- 4. The grievance is properly before the Arbitrator.
- 5. At the time of his removal, the grievant's employee record included an active performance-related written reprimand.
- 6. Terry Tibbals, Regional Security Administrator (Southeast), has stated that it is permissible for corrections officers at SOCF to view DVR recordings to ensure accuracy of reports.

IV. Joint Exhibits

Joint Exhibits

Title

- | | |
|----|--|
| 1 | The Contract--The parties negotiated agreement |
| 2 | The grievance trail |
| 3 | Standards of Employee Conduct |
| 4 | Disciplinary trail |
| 5 | Three letters of recognition on behalf of the grievant |
| 6 | The grievant's performance evaluations |
| 7 | Investigator Lewis investigation notes |
| 8 | Incident reports |
| 9 | Interview transcripts |
| 10 | Digital and audio recordings |
| 11 | SOCF Department Head meeting minutes |

- 12 Investigator Dave See's investigation report
- 13 Post orders for J-Corridor
- 14 J- 2 Middlebooth ledger

V. Applicable Work Rules

Disciplinary Grid Performance Track

24. Interfering with, failing to cooperate in, or lying in an official investigation or inquiry.

1st offense: Either a 2-day fine, suspension or working suspension or a removal.

25. Failure to immediately report a violation of any work rule, law or regulation.

1st offense: Either a written reprimand or a 1-day fine, suspension or working suspension.

VI. Post Orders

Definitions

1. Unit E-J-2 Cellblock. Unit E-J-2 Cellblock is a twenty-four (24) hours a day, seven (7) days a week Post, which consists of three (3) eight (8) hour shifts a day. All inmates assigned to this area are Maximum supervision at all times. Three officers will be assigned from 6:00 am to 10:00 pm and one officer from 10:00 pm to 6:00 am. The Cellblock will house Security Control, Disciplinary Control, Security Control Investigation, and Protective Control Investigation.

2. **Block Control Center Officer.** The Block Control Center Officer assigned to J-2 must remain inside the Control Area until properly relieved. Under no circumstances will inmates have access to the inner-chamber of this Control Center. The Block Control Officer will be relieved by one of the Block Officers. The Block Control Center Officer will maintain all assigned documentation and logs within the Cellblock and make security calls.

The Block Control Center Officer shall be in charge of all keys and will issue keys to the Block Officers as needed.

The Block Control Center Officer will also control all traffic inside of the Cellblock. He/she will always keep the range gates, as well as the sallyport gates secured when not in use.

3. **Block Officer.** The Block Officer is assigned to a specific Cellblock wing and is responsible for maintaining security within that Cellblock. He performs range security checks, cell shakedowns, and assures that Cellblock activities are completed as efficiently as possible. The Block Officer will also check all doors and locks in their immediate Cellblock and unit areas. These checks will be noted on the daily security check log, DRC Form 2557 and post/cellblock work sheet, DRC Form 4238.

4. **Correctional Officers.** The Correctional Officer is responsible for enforcing the Rules and Regulations consistently with the inmates assigned to his/her block. The officer is to make Range Checks to ensure the inmates are physically well, receive complaints and address security issues. The

Officer is to be readily familiar with the rules, regulations and policies and will review Post Orders and the Addendum daily. The Officer will pass on information from other staff members, and may be required to serve on committees, such as reclassification for job assignment, counselor, and all concerns should be directed to the appropriate unit staff. When unit staff is not available, the officer will contact a shift supervisor.

VII. Case History

The grievant, Richard Moore, was the Block Control Center Officer in the J-2 on June 4, 2005. This position is also commonly known as the "booth officer." The Range Officers are referred in the J-2 Cellblock post-orders as the "block officer" or "wing officer."

In accordance with post-order, effective January 7, 2005, the Block Control Officer's responsibilities included, in part:

The Block Control Center Officer assigned to J-2 must remain inside the Control Area until properly relieved. Under no circumstances will inmates have access to the inner-chamber of this Control Center. The Block Control Officer will be relieved by one of the Block Officers. ***The Block Control Center Officer will maintain all assigned documentation and logs within the Cellblock and make security calls.*** (Emphasis added.)

In addition, the grievant was subject to the Ohio Department of Rehabilitation and Correction Standards of Employee Conduct, effective

October 17, 2004, which included the following disciplinary grid, performance track, restrictions:

24. Interfering with, failing to cooperate in, or lying in an official investigation or inquiry.
25. Failure to immediately report a violation of any work rule, law or regulation.

On June 4, 2005, Investigator Lewis received a page from Lt. Fout from the Southern Ohio Correctional Facility (SOCF) advising him that inmate Owens in J2-13 had attempted suicide by hanging himself and was in serious condition. Lewis immediately contacted Lt. Fout and told him to secure the cell and the inmate's clothing. Lewis arrived at SOCF at approximately 9:20 p.m..

Upon Investigator Lewis' arrival, Capt. Brill informed Lewis of the inmate that had committed suicide. He also showed Lewis that a possible discrepancy existed in the Range Check Ledger Book and the range checks that were conducted in the cellblock, J-2 North. The Range Check Ledger Books are utilized to record the time of range checks conducted by the Correction Officers that are assigned to J-2 cellblock.

Capt. Brill had retrieved the Range Check Ledger Book from J-2 North, as well as the log sheet from the J-2 Control Booth. Later, the same night, he retrieved the Range Check Ledger Book from J-2 South. Lewis took possession of both Range Check Ledger Books and the J-2 Block Control Sheet.

On June 5, 2005, Lewis reviewed the digitally recorded video of the J-2 cellblock. He looked specifically at the time frame from 6:00 p.m. to 9:30 p.m. on June 4, 2005. He compared the actual activity in the J-2 block with the Range Check Ledger Books for both J-2 North and J-2 South.

After reviewing the video recordings and the Range Check Ledger Book, Lewis confirmed several discrepancies existed between the video recordings and the entries made in the Range Check Ledger Book. He noted that the grievant had been assigned to the J-2 Control Booth, that Correction Officer William Riffle had been assigned to J-2 South, and that Correction Officer Kyle Burdett had been assigned to the J-2 North. Lewis interviewed the grievant that day with a union representative present. The grievant stated that he had no contact with Inmate Owens on June 4, 2005 and that prior to Owens' suicide, no problems existed in the J-2 cellblock.

The grievant stated that his job was to operate the switches to control the cell doors in J-2. He indicated that he was also responsible for completing the majority of the Post/Cellblock Worksheet. The grievant felt the range officers had to complete the range check times on the Post/Cellblock Worksheet. This part of the form was usually completed at the end of the officer's shift.

Lewis asked the grievant if it seemed unusual that the other two officers were not making range checks but were sitting on the job. The grievant replied that the officers "probably could have done more."

Lewis also questioned the grievant about the time frame of 7:27 p.m. on June 4, 2005. During this time C/O Burdett, C/O Riffle, and Nurse Riggs were on the J-2 range for distribution of medicine. Nurse Riggs started passing medication on the J-2 North range and C/O Burdett and C/O Riffle were escorting her. The grievant stated that when they were passing medication, he did not consider it a range check.

On June 10, 2005, Lewis interviewed C/O Dan Evans. C/O Evans stated that he went to the J-2 Control Booth after the suicide had occurred. He stated that C/O Burdett told Evans that he had not made his range checks and that he had not been on the range for an hour just prior to the suicide incident. The grievant had been the booth officer and he had operated the Digital Video Recorder (DVR) so that Evans and C/O Burdett could review the video recordings.

On June 10, 2005, Lewis interviewed the grievant again with a union representative present. The grievant denied that he had reviewed the video recordings on June 4, 2005, while in the J-2 Control Booth. C/O Burdett was interviewed again that day. He stated that after the suicide had occurred, C/O Evans, C/O Cumpton and himself went into the J-2 Control Booth. The grievant was the booth officer that day. C/O Burdett said that he had a conversation with the grievant about him not making proper range checks. The grievant also operated the Digital Video Recorder (DVR) so that the

officers could review the video recordings of the J-2 North range (1 - 20) prior to the suicide.

Later, on June 10th, the grievant was interviewed again with a union representative present. The union representative indicated that the grievant was unable to speak and that the representative would speak in his behalf. Lewis explained the Garrity Rights to the grievant and he acknowledged that he understood them. He was very upset. The grievant stated that he was the block control officer in J-2 on June 4, 2005. He could not, however, remember who came in the booth after the suicide occurred. He had not reviewed the video recordings. Lewis told the grievant that C/O Evans and C/O Burdett both said that he had reviewed the video recording and that they had discussed the problems concerning the range checks.

The grievant denied again reviewing the video recordings or discussing the incident with any of the officers. He stated that he was writing Incident Reports and running the booth.

On June 10, 2005, C/O Cumpton was also interviewed by Lewis. C/O Cumpton confirmed that the grievant had operated the DVR so that they could watch the video recordings of the J-2 North 1 - 20 range. He also stated that C/O Burdett was talking about how he had not done his range checks.

The grievant again stated that he did not review the video recordings, nor did he discuss the incident with any of the officers. He said that he was writing incident reports, and running the booth.

C/O Cumpton was interviewed on June 10, 2005 by Investigator Lewis. He also confirmed that the grievant had operated the DVR so that they could watch video recordings of the J-2 North 1 – 20 range. C/O Cumpton also stated that C/O Burdett was talking about how he had not done his range checks.

Listed below in the first column is a list of range checks that were logged into the J-2 South Range Check Ledger Books by C/O Riffle. The notes in the second column indicate if a proper range check had been conducted. This information was discovered after Investigator Lewis reviewed the video recordings of the J-2 South range.

| | |
|--------------------------------------|----------------------------|
| J-2 South | |
| 2:06 range check | Range check completed. |
| 2:32 range check | Range check not completed. |
| 3:00 range check | No range check. |
| 3:19 range check | No range check. |
| 3:57 range check | No range check. |
| 5:31 range check | No range check. |
| | 5:40 to 5:43 |
| | Range check completed. |
| 5:53 range check | No range check. |
| 6:21 range check | No range check. |
| 6:40 range check | Range check completed. |
| 7:20 walk ranges with Nurse Riggs | On range with Nurse Riggs. |
| 7:45 range check | Range check completed. |
| 8:13 range check | No range check. |

8:37 range check
 8:56 range check
 9:38 range check

No range check.
 Range check 8:48 to 8:52
 Range check complete.

C/O Riffle indicated that he had made 14 range checks on his log book.

After reviewing the video recordings, it was determined that C/O Riffle actually failed to make 7 of the 14 that he had logged.

The following in the first column is a list of range checks that were logged into the J-2 North Range Check Ledger Books by C/O Burdett. The notes in the second column indicate if a proper range check had been conducted. This information was discovered after Investigator Lewis reviewed the video recordings of the J-2 North range.

J-2 North

| | |
|------------------|--|
| 2:10 range check | Range check complete. |
| 2:40 range check | No range check. |
| 3:06 range check | No range check. |
| 3:30 range check | Range check complete |
| 3:56 range check | No range check. |
| 4:17 range check | No range check. |
| 4:45 range check | Feeding inmates. |
| 5:12 range check | No range check. |
| 5:37 range check | Range check complete. |
| 6:04 range check | No range check, went half way |
| 6:30 range check | Range check complete. |
| 6:59 range check | No range check. |
| 7:25 range check | On the range with Nurse Riggs, however not a proper range check. |
| 7:53 range check | No range check. |
| 8:18 range check | No range check. |
| 8:45 range check | Range check (suicide J-2-13). |
| 9:15 range check | Relieved from post. |
| 9:41 range check | Relieved from post. |

Between 2:10 p.m. and 8:45 p.m. C/O Burdett logged that he had completed 16 range checks. After reviewing the video recordings, it was determined that C/O Burdett actually failed to make 10 of the 16 that he had logged.

As a result of the evidence in the investigation, the grievant was charged with three different rule violations:

- Rule 7: Failure to follow post orders, administrative regulations, policies or Directives.
- Rule 24: Interfering with, failing to cooperate in, or lying in an official investigation or inquiry
- Rule 25: Failure to immediately report a violation of any work rule, law, or regulation.

Ultimately, the grievant's termination resulted from alleged violations of rules 24 and 25. On or about July 18, 2005 based on the two rules' infractions, the grievant was given his notice of disciplinary removal as follows:

DEPARTMENT OF REHABILITATION AND CORRECTION

NOTICE OF DISCIPLINARY ACTION

Richard Moore

Dear Mr. Moore:

Pursuant to the authority granted in the collective bargaining agreement between the State of Ohio and OCSEA/AFSCME this letter is to advise you that you are to be removed from the position of Correction Officer effective:

You are to be removed for the following infractions:

On June 4, 2005, Investigator Lewis received a page indicating that an inmate in J2-13, had attempted suicide by hanging from Lt. Fout. The

Inmate did die as a result of the hanging. You were assigned to the J2-Control Booth.

Upon Investigator Lewis' arrival to SOCF, he was informed by Capt. Brill that there was a possible discrepancy in the Range Check Ledger Book and the range checks that were conducted in the cellblock, J-2 North. Both Range Check Ledger Books and the J-2 Block Control Sheet were collected on June 4, 2005. Investigator Lewis reviewed the video recordings of J-2.

On June 5, 2005, you were interviewed by Investigator Lewis. You indicated that prior to the suicide, there were no problems in J-2 and that you had no contact with the inmate. You were asked by Investigator Lewis, "Did it seem unusual to you that they (the other two officers) were not making range checks in this time frame and were sitting over there?" You replied, "They probably could have done more. You were questioned in regard to the time frame from 7:27 p.m. on June 4, 2005. During this time frame, both officers were escorting the nurse on the North range. You were asked if you considered escorting the nurse was considered a range check. You stated, "I consider a range check is when you look in every cell to make sure the inmate is in and okay."

The investigation concluded that you failed to report that both officers were not making proper range checks while they were in J-2 North and South. You were aware of the improper range checks because you made mention of the problem when you were interviewed by Investigator Lewis in June 5, 2005. You also denied that after the suicide had occurred, you had operated the Digital Video Recorder (DVR) so that other officers and yourself, could review the video recordings of the J-North, 1-20 range upon the officer discovering that a suicide had occurred. Three officers gave statements that you had operated the DVR while they were in the J-2 Control Booth and that the officer mentioned that he had not made proper range checks prior to the suicide in your presence.

This constitutes a violation of Rule(s) 24 & 25 of the Standards of Employee Conduct effective October 17, 2004. Therefore, I am removing you from the position of Correction Officer.

Pursuant to the OCSEA/AFSCME contract, Article 25.02, you may choose to grieve this disciplinary action. You must file a grievance through your union representative within 14 calendar days of notification of this action.

S/s
Appointing Authority

S/s
Director's Signature

The grievant's removal is now before this Arbitrator.

VIII. The Merits of the Case

The Employer's Position

1. The grievance is meritless and should be denied.
2. Officers Burdett and Riffle admittedly failed to complete range checks in the J-2 Cellblock on June 4, 2005. The grievant was well aware that these corrections officers failed to perform these proper range checks and therefore should be held equally accountable.
3. In addition, the grievant's cavalier attitude about whether Burdett and Riffle performed their duty underscores why discipline is necessary. He did not assume any responsibility for this misconduct and indicated that he did not care that it even occurred.
4. Regardless of his testimony during the arbitration hearing, the evidence showed that the grievant knew that the corrections officers were

not doing their checks and did not report this knowledge. His failure to report what he knew supported his co-workers non-feasance which ultimately led to a failure to intercede with the death of an inmate. The grievant was appropriately held accountable for his negligence.

5. The grievant was lying about not reviewing the DVR record of the J-2 Cellblock activity on the night of June 4, 2005. His denials were undermined by the testimony of Officers Burdett, Compton, and Evans.

The Union's Position

1. The Union's grievance has merit and should be sustained.
2. The Employer assumes that the grievant was aware of the lack of sufficient range checks and failed to report the violation of post orders to the supervisor. This conclusion was reached by the investigation without analysis of the supervisor's responsibility to monitor the range officers' ledgers or range checks.
3. The Employer was well aware of a pervasive problem on the second shift with regard to untimely range checks. It requested that Union President Campbell speak at roll-call to second shift officers about the necessity of making range checks and the threat of discipline for not doing so. This testimony demonstrates that the Employer did not need to be

notified that this was a particular post order that needed proactive supervision due to deficiencies.

4. The grievant has specific duties requiring his attention in particular areas of security and the range officers have responsibility to perform their own duties. The grievant is responsible for watching any employee while on the range to make sure they were safe. He is not able to evaluate the quality or the purpose of the visits to the range or keep track of the time frames because he does not log these records. It is the wing officer that must be responsible for accurately logging all range checks that are made. The booth officer is merely the keeper of the keys and opens the gates for the correctional employees who are performing various functions in the J-2 segregation block.

5. Booth officer duties are supportive of the range officers and other employees but they are not responsible for recording the range checks. In fact, the booth officers are not informed by the range officers of the nature of their visits to the range and are not aware of the content of their ledger. They therefore do not have an information report on the lack of range checks.

6. The review of the records demonstrates that from the grievant's point of reference, during his shift, he performed his duties per the post order. He was not responsible for or aware of the fact that the range officers had reported range checks that were not performed. In fact, the portion of the

block sheet regarding range checks was not completed until the end of the shift and it is the responsibility of the range officers to complete that section. The record reflects that the range checks for Burdett and Riffle were not recorded on the block sheet when it was picked up at 9:00 p.m. Burdett's range checks were never recorded on the block sheet.

7. The responsibilities of supervising and ensuring that the post orders are followed are clearly the venue of the supervisors who were not questioned regarding their knowledge of the range officers' activities. Indeed, the activities of the booth officer are not considered as relevant to the investigation and were not considered when determining whether the grievant violated any rules or regulations or had knowledge of any of the officers' violations of rules or regulations.

8. It is absurd to believe that the work rule requires reports when a correctional officer believes fellow workers "could be doing more." The evaluation of the performance of correctional officers is the responsibility of the supervisors on the second shift.

9. The grievant has consistently stated that he was unaware that the officers rewound the DVR tape to determine when Burdett was last on the range. The discrepancies in the witnesses' recollections of whether the grievant ran the DVR are more a result of the inconsistent methodology of questioning than in dishonesty from the grievant.

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IX. The Arbitrator's Opinion and Award

From the evidence and testimony introduced at the hearing, a complete and impartial review of the record, including pertinent contract provisions, work rules, the parties' exhibits, and the transcript of the arbitration proceeding, it is this Arbitrator's opinion that the grievant was not terminated for just cause.

In this Arbitrator's view, under the circumstances, the Employer did not meet its quantum of proof to sustain the grievant's termination in the context of the facts here. At the same time, this Arbitrator recognizes that the grievant engaged in a level of misconduct that warrants some form of discipline. Considering the record as a whole, the termination shall be converted into a suspension. The grievant shall be reinstated to his former position immediately, but without back pay, benefits, or seniority.

X. Analysis

The quantum of required proof in discharge cases for employee misconduct is unsettled. In some cases, proof beyond a reasonable doubt has been required. *Vista Chem Co.*, 104 LA 818 (Nicholas, 1995). Some arbitrators also have used a "preponderance of the evidence standard," *Wholesale Produce Supply Co.*, 101 LA 1101 (Bognanno, 1993), while others

have required evidence "sufficient to convince a reasonable mind of guilt."

Stockham Pipefittings Co., 1 ALAA ¶67,460 (1946).

Most arbitrators have justified a stricter standard of proof based on the social stigma attached to a discharge for misconduct rather than for performance reasons. The decision of Russell A. Smith in *Kroger Co.* is often cited to explain this stricter standard:

[I]t seems reasonable and proper to hold that alleged misconduct of a kind which carries the stigma of general social disapproval as well as disapproval under accepted canons of employment discipline should be clearly and convincingly established by the evidence. Reasonable doubts raised by the proofs should be resolved in favor of the accused. This may mean that the employer will at times be required, for want of sufficient proof, to withhold or rescind disciplinary action which in fact is fully deserved, but this kind of result is inherent in any civilized system of justice.

Kroger Co., 25 LA 906 (Smith, 1955). See also *Valley Steel Casting Co.*, 22 LA 520, 524 (Howlett, 1952).

This Arbitrator believes that evidence in a discharge case, especially one concerning an employee's misconduct, must be sufficient to convince a reasonable mind of guilt. In this Arbitrator's view, this means more than a preponderance of the evidence. Substantial evidence must support the employer's termination of an employee for misconduct.

Here, the main work rule violation that drove the grievant's termination is Disciplinary Rule 25, "Failure to Immediately Report a Violation of Any Work Rule, Law or Regulation." Upon analyzing the application of this work rule, the job duties of the grievant's "block officer" position must be compared to those of a "wing officer." In accordance with

the post order, effective January 7, 2005, "the block control officer will ***maintain*** all assigned documentation and logs within the cell block and make security calls." On the other hand, "the wing officer will be responsible for ***accurately logging*** all range checks that he/she makes."

Hence, based on the plain language of each officer's job descriptions, the grievant was responsible to ***maintain*** the logs within the cell block and the wing officer was responsible for accurately ***logging*** them. This Arbitrator reads the grievant's job duty thus as less responsible for assuring the accuracy of the logs than for their maintenance and security. It follows therefore that it is inappropriate on the face of the grievant's job description to hold him accountable at the termination level for the lack of entries in the log book or their inaccuracy.

In this Arbitrator's view, that was simply not one of the grievant's primary duties for which he should be held accountable for such a severe level of discipline for a first offense. This is especially true where, as here, corrections officers Burdett and Riffle indisputably failed to complete range checks in the J-2 cellblock on June 4, 2005.

The Employer here must take some ownership for this problem. Union Chapter President, Curtis Campbell, testified credibly that the administration was aware of the pervasive problem on second shift with regard to untimely range checks. Indeed, management requested that Union President Campbell speak at roll-call to second shift officers about the necessity of

making range checks and the threat of discipline for not doing so. The Arbitrator agrees with the Union's argument that this evidence demonstrates that management did not need to be notified that this was a particular post order that needed proactive supervision due to deficiencies.

In addition, the Employer apparently tolerated the officers retroactively filling out the log sheets at the end of the shift. The record here reflects that the range checks for Burdett and Riffle were not recorded on the block sheet when it was picked up at 9:00 p.m. In fact, Burdett's range checks indisputably were never recorded on the block sheet. It was therefore not entirely feasible for the grievant to have checked the log sheets to actually determine for certain as to whether Burdett and Riffle were derelict in their duty.

This Arbitrator also agrees with the Union that the *primary* responsibility of supervising and ensuring that the post orders are followed are clearly the venues of the supervisors who were not questioned extensively regarding their knowledge of the range officers' activities. In this context, however, as noted by the Union, the booth officer's duties are indeed *supportive* of the range officers and other employees, but they are not totally responsible for recording the range checks. Hence, as admitted by the Union, the booth officers' job description and actual job duties do require some meaningful maintenance and level of monitoring of the

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cellblock activity. That is precisely why this Arbitrator did not let the grievant entirely off of the hook.

And the express wording of the work rule itself, with regard to immediately reporting a violation of any work rule, law, or regulation, lends itself to some degree of certainty before an absolute obligation to report is triggered. Had the grievant witnessed a work rule violation that was clear and unambiguous and ignored his responsibility to report it, then a stronger violation of Disciplinary Rule 25 would have occurred.

But, where, as here, the grievant felt that the corrections officers "could have done something more" but did not have direct access to the incriminating evidence that would make it a certainty that they were not performing their jobs, it is patently unreasonable, in this Arbitrator's view, to punish the grievant with a termination. This would be quite different if evidence existed that the grievant was complicit with Burdett and Riffle in their misrepresentation of their duty, or in a cover-up to conceal it, but no such evidence exists.

This leads to the consideration of the grievant's discipline for violating Disciplinary Rule 24, with respect to "interfering with, failing to cooperate in, or lying in an official investigation or inquiry." The Arbitrator will not mince any words here. He does not believe the grievant was telling the truth about whether he operated the DVR recorder in the booth on June 4, 2005. Indeed, the grievant's testimony is rebutted by the testimony of Burdett,

Compton and Evans, all of whom have no reason to misstate their testimony.

But, in the end, the DVR issue is a red herring. One of the parties' joint stipulations is that, "Terri Tibbals, Regional Security Administrator (Southeast), has stated that it is permissible for corrections officers at SOCF to view DVR recordings to ensure accuracy of reports." The grievant's operation of the DVR, even if true, hardly raises any serious misconduct. And there is absolutely no credible evidence to suggest that the grievant was involved in any cover-up to protect the corrections officers' failure to log their activity.

But the Arbitrator was nonetheless troubled by the grievant's vague recollections of his activity and his testimony's direct conflict with the other corrections officers. It begs the question as to why the grievant would misrepresent this activity, but this perceived misrepresentation does not rise to any level to support an immediate termination in this context. It does, however, add further support to the Arbitrator's decision to reinstate the grievant without back pay and to consider his time off as a serious, long-term, disciplinary suspension.

With that said, this Arbitrator views this discipline as a serious disciplinary offense for which the grievant would be subject to immediate termination for any offense in which termination would be an available sanction for the first offense. The grievant's significant suspension here is

based on his failure to adequately fulfill his *supportive* responsibility with respect to the log in sheets and his inconsistent and evasive testimony about operating the DVR in the cell booth.

So the record is clear for future potential disciplines in this area, under the current job descriptions and practices, the wing officers are primarily responsible for accurately logging all range checks that they make. The block officer is secondarily responsible in his support role for the range, but he cannot be held accountable for the highest level of discipline for a first offense because he simply does not have the access and review that the wing officers have to these documents.

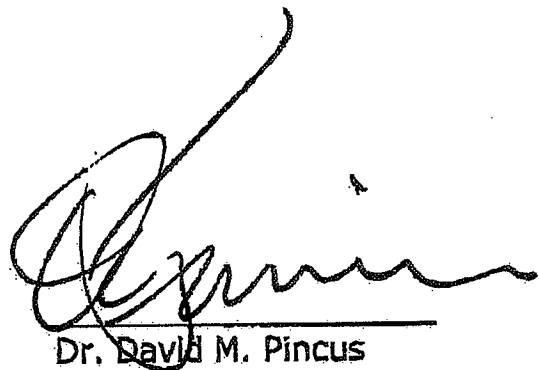
The only way a cellblock officer should be held accountable for termination on the first offense is if there is indisputable evidence that any reasonable person would conclusively establish that the corrections officers had not and were not performing their duty at the time and their failure to do so at the time would create an immediate threat to the safety of the officers or the inmates. Those in-the-moment cause and effect facts simply did not exist here with respect to the grievant's knowledge of the officers' failure to perform their range checks in a manner that would allow an inmate to commit suicide, so as to provide grounds for a termination for the first offense.

XI. The Award

The grievance is sustained in part. The grievant's termination is rescinded. The grievant is ordered back to his old position, but without back pay, benefits and seniority. Back pay is offset by any mitigating income.

This reinstatement without back pay shall be considered a serious suspension at the last level of the Employer's disciplinary policy. Any further misconduct by the grievant that provides grounds for termination for the first offense shall be grounds for his immediate termination.

June 5, 2006
Moreland Hills, Ohio



Dr. David M. Pincus