

IN ARBITRATION

**FRATERNAL ORDER OF POLICE – *
DEPARTMENT OF CORRECTIONS *
LABOR COMMITTEE (Union) ***

**and *
*

Suspension of
Four Corporals

**DISTRICT OF COLUMBIA DEPARTMENT OF *
CORRECTIONS (Agency) ***

**Barry E. Shapiro
Arbitrator**

OPINION AND AWARD

This arbitration takes place pursuant to Article 10 of the Working Conditions Collective Bargaining Agreement (“Agreement”, Joint Exhibit 1) Between District of Columbia Department of Corrections (“Agency”, “Employer”, or “DOC”) and Fraternal Order of Police – Department of Corrections Labor Committee (“Union”) to resolve a grievance filed by the Union protesting the suspensions of Corporals Ogochukwu Okorie, Pierre Nguimdo, Dexter Allen, and Kwadwo Danso (“Grievants”) for allegedly knowingly and willfully reporting false or misleading information in official Incident Reports, in violation of the District Personnel Manual (DPM) and Agency policy statements.

A hearing was held on September 25, 2018, at the offices of the District of Columbia Office of Labor Relations and Collective Bargaining. The Agency was represented by Janell N. Bell, Esq.; and the Union by J. Scott Hagood, Esq. One Joint Exhibit (JX1), 11 Agency Exhibits (EX1-6, 6A, 7-10), and 25 Union Exhibits (UX1-15, 20-29)) were accepted into the record. Lieutenant Lawrence Goodwin, Investigator Benjamin Collins, Warden Lennard Johnson, and Labor Relations and Workforce Liaison Paulette Hutchings-Johnson testified for the Agency. The Grievants, Officer William Connor, and Paulette Johnson-Hutchings testified for the Union. The witnesses were sworn

and, except for the Grievants, sequestered. A verbatim transcript (Tr. -) was taken that constitutes the official record of the hearing. The Parties submitted Post-Hearing Briefs (A/PHB and U/PHB) on December 20, 2018.

FACTUAL BACKGROUND

The incident giving rise to the disciplinary actions at issue in this proceeding occurred on the evening of September 19, 2015, at the Agency’s Inmate Reception Center (IRC). In addition to the four Grievants, Officers William Connor and Stephon Oliver were involved in the incident.¹ Connor explained, in very general terms, the process for the intake of an inmate, which includes fingerprinting, taking a picture, and doing a strip search. He testified that when inmate MB was brought to the IRC on September 19 he “was combative. He was aggressive, like towards all the, all the staff....Making threats....Oh, he’ll fuck you up. Stuff like that” (Connor Tr. 247-49; see also Nguimdo Tr 289-90). Connor explained that it is common, with combative inmates, to put them back in a holding cell to cool down before continuing the intake process, and this was done with MB (Connor Tr. 249). Grievants Okorie (Okorie Tr. 261) and Allen (Allen Tr. 297-98) also testified to MB’s combativeness. Grievant Danso testified that he had dealt with MB before, and said that he was never cooperative (Danso Tr. 307).

After processing other inmates, Connor continued, they again attempted to process MB, but he continued to exhibit “the same attitude, combative, approaching officers, balling his fists up...” (Connor Tr. 250). Connor, along with Oliver and Danso marched MB down a hallway to return him to his cell. According to Connor, “I’m walking him, and I got my hand...guiding him the direction to go, and he told me that I don’t have to touch him. So I was like, well I won’t touch you if you just keep walking....And he’s walking, and he stops. My hand touch him again and he made a threat, you touch me again I’m going to spill the shit out of you....So he’s walking and he stops, and my hand touch him, and he turns at me, like a quick turn. And I hit him....He went down and my officer brought me some handcuffs. I cuffed him up and we took him to the cell” (Connor Tr. 252-52).

The walk down the hallway was captured on video, which was footage presented by the

¹Oliver did not testify at the hearing.

Agency at the hearing (EX6). The video shows inmate MB entering a hallway at 20:30:59 accompanied by several officers. Connor is to MB's right, Oliver is immediately behind Connor, and Oliver is followed by Danso. At 20:31:01 the procession reaches the door to the Property Room (on the left), and Allen appears in the doorway. At 20:31:06 Nguimdo comes into view and starts walking down the hallway toward the group. At 20:31:08 Allen steps out of the Property Room and joins the process, ahead of Nguimdo. The procession reaches the end of hallway (where there is a cross-corridor going to the right and the left) at 20:31:17. At this point Connor throws several punches at MB, as does Oliver. At 20:31:18 Okorie comes into the camera's view, and runs down the hallway to the group where the scuffle is taking place; he reaches the group at 20:31:23. MB was then handcuffed and taken back to a cell (his return to the cell is not on the video in evidence here).

Each of the Grievants prepared a Form DCDC-1, Employee Report of Significant Incident/Extraordinary Occurrences (Allen UX3, Danso UX4, Nguimdo UX5, Okorie UX6). Each characterized the type of occurrence as a "significant incident"² Their descriptions of the incident are similar, but not identical. They all indicated that the inmate became combative while being escorted back to a cell after refusing to comply with orders from Okorie about a strip search, and was restrained and put in handcuffs. All four indicated that Lieutenant Goodwin was notified, that no weapons were involved, and that there were no injuries. All four stated that physical force was used to restrain the inmate (UX3-6). Connor also prepared a similar DCDC-1 (UX29); no DCDC-1 from Oliver is in the record.³

Each of the Grievants testified that they were not able to see punches thrown by Connor and Oliver at inmate MB. Okorie testified that while he was heading back to the supervisor's office (presumably Lieutenant Goodwin) to advise him that MB was being returned to a cell, he heard a commotion and ran back. By the time he got back to the end of the hallway, Okorie said, MB was already on the ground; Okorie testified that he did not see any punches thrown at MB (Tr 264-65; 274-75). Nguimdo testified that there were four other officers (and MB) in front of him: "So from my point of view, I couldn't see exactly what was happening in front. So when he [MB] went down

²A "significant incident" is defined in Program Statement 1280.2F, Section 9.a (EX1, UX1).

³Collins noted in his subsequent Investigative Report that no DCDC-1 from Oliver could be found (UX11 at pp. 6 and 8).

there, it happened so quick, and the next thing I saw him...on the ground” (Nguimdo Tr. 292). Allen testified that he had just come out of the door to the Property Room and then “something happened so fast and I saw inmate [MB] on the ground”; he specifically said he did not see any punches thrown at MB (Allen Tr. 299-300). Danso testified that he observed physical force used to restrain MB (Allen Tr. 308), but that “it happened so fast...all I saw was Mr. Connor on top of [MB]” (Allen Tr. 311).

Lieutenant Goodwin prepared an Official Report of Extraordinary Occurrence on September 20, after reviewing the DCDC-1s and interviewing the officers involved.⁴ Goodwin summarized the incident and his findings as follows:

After Corporal Okorie gave several direct orders to Inmate [MB] to remove his clothes, he still refuse to comply with all orders, Cpl. Okorie instructed the officers to in the process area to escort inmate [MB] back to G 113 holding cell.

As the officers were escorting inmate [MB] to the holding cell, in the area adjacent to Female R&D, inmate [MB] began to swing his arms. The Officers that were present placed handcuffs on inmate [MB] with the least amount of force.

At approximately 9:25 pm., I went to cell 113 to talk to inmate [MB] and asked him again was he ready to go through the intake processing. Inmate [MB] stated yes. Inmate [MB] was then brought out of the cell and went through the intake process without incident.

While inmate [MB] was completing the intake process, inmate [MB] reported to me, that he was hit on the mouth while the officers were placing the handcuffs on him. After inmate [MB] completed the intake Process, I escorted inmate [MB] to the infirmary to have an injury report completed and treated for any injuries.

A Disciplinary Report was served to inmate [MB] for Lack of Cooperation and Impeding an employee in the performance of duties....⁵

⁴An “extraordinary occurrence” is defined in Program Statement 1280.2F, Section 9.b; nothing in the record indicates why Goodwin regarded the event as “extraordinary” rather than “significant”; this does not appear to have any relevance to the matter being adjudicated here.

⁵The disciplinary report on MB is dated September 20 (UX8).

Goodwin forwarded his report to the Duty Administrative Officer; the Office of Investigative Services and the Union representative were also notified. Goodwin's report was subsequently forwarded to The Record by Major Walter Coley.⁶

At some point, the Agency's Office of Investigative Services began an investigation of the September 19 incident; the matter was assigned to Investigator Benjamin Collins.⁷ As stated on the first page of Collins's report, the purpose of the investigation was to "identify the facts and circumstances regarding an excessive use of force allegation made against Officers William Connor and Stephon Oliver on behalf of inmate [MB]" (UX11 at p. 1). Although, as noted, the focus of the investigation was possible misconduct by Connor and Oliver, Collins also found that each of the Grievants had failed to file accurate DCDC-1s by not reporting the use of force on inmate [MB] (UX11 at pp. 8-9).⁸

Proposals to suspend Grievants Allen (UX12), Danso (UX13), and Nguimdo (UX14) for nine days were issued on May 12, 2016; a proposal to suspend Grievant Okorie (UX15) for nine days was issued on May 27, 2016. All proposals were signed by Major Walter Coley.⁹ Each of the four notices cited the disciplinary cause as violation of District Personnel Manual Section 1605.4(b)(4) – "Knowingly and willfully reporting false or misleading information or purposely omitting material facts, to any supervisor" – and summarized the findings of the OIS investigation in identical language:

Corporal [name] failed to forward an accurate DCDC-1 report by not reporting the use of force on inmate [MB] in violation of DOC Program Statement 1280.2F, section 2,

⁶None of these individuals testified.

⁷Although not discussed at the hearing, it appears that the video footage of the incident was reviewed by the office of the Assistant United States Attorney on September 30; this office then informed OIS on March 2, 2016, that an administrative investigation could be initiated (UX11 at p. 4).

⁸The date of Collins's Investigative Report is unclear. There are two versions of the Report in the record: EX5 and UX11. EX5 is shown as having been prepared on "3/16/2016". UX11 is a version that was provided to the Union during the grievance process following the proposed suspensions of the Grievants. This version is shown as having been prepared on "3/16/2015"; this version does not include a summary of Collins's review of the incident reports and interviews of Okorie or Nguimdo that are found in EX5; it also does not contain Collins's findings with respect to Okorie, although it does contain his findings with respect to Nguimdo. The date on UX11 predates the actual incident at issue here, and must be in error.

⁹Coley did not testify at the hearing. There is no explanation in the record as to why the proposal for Okorie was issued two later than to the other three Grievants.

which states, “It is the policy of the DOC that when an extraordinary occurrence or significant incident occurs timely notification will be made and accurate reports will be submitted.” And in violation of the narrative of of the DCDC-1 report, which requires staff to, “Complete [a] detailed description of incident (if force is used, include events leading up to the use of force”

All four notices also stated that the affected officer “fail[ed] to make notification and intentionally submit[ed] an inaccurate report,” in violation of Program Statement 3300.1C Employee Code of Ethics and Conduct, Section 10 j and o.¹⁰

Each of the Grievants was told he would be suspended for nine days. The notices informed the Grievants of their right to challenge the proposed actions. While the record here contains no documentation on this point, there appears to be no dispute that the Grievants exercised this right.¹¹

Warden Lennard Johnson issued the final decisions upholding the suspensions of the four Grievants (Nguimdo (EX6A), Danso (EX8) , and Allen (EX9) on June 14, 2016; and on Okorie (EX7) on June 15). He testified that his decisions were based on his review of the video of the incident and of the Grievants’ written reports. “The reports themselves were generic in nature. There were quite a few punches being thrown and there’s nothing in the report referencing any punch being thrown....So from the perspective of omitting information it’s clear that information was omitted. And we do not want to have a code of silence. We’re here to protect, and we’re here to serve, and if everything is done as supposed to be that’s fine, but we should report what we see. Report what we see. Particularly as it pertains to uses of force. If there is an action that the inmate did, that should be documented as well, that provoke whatever happened” (Johnson Tr. 182-83).

The Union then invoked arbitration with respect to the four Grievants.¹²

¹⁰These sections were quoted in full in the notices.

¹¹Both Connor (UX20) and Oliver (UX21) were issued notices of proposed removal based on their actions on September 19, 2015; each was charged with using excessive force on inmate MB, as well as for submitting false or misleading reports (although the Office of Investigative Services was unable to locate a DCDC-1 from Oliver (UX11 at p. 6)). These removal actions are not at issue in this proceeding. Each were eventually returned to work after the Agency Director adopted the findings of a Hearing Officer that the Agency had not met its burden of proving any of the charges against them (UX26, UX27, UX28).

¹²There is no documentation in the record as to when this occurred, but there appears to be no dispute that it was timely and procedurally valid.

ISSUES

The Parties agree that the issues for resolution here are: was the discipline of the Grievants for just cause? and, if not, what should be the remedy? (Tr. 6)

ARGUMENTS OF THE PARTIES

The **Agency** argues that it had a management right to discipline the Grievants under the terms of Article 11 of the Agreement, which cites to both D.C. Code §1-616.51 and Chapter 16 of the District Personnel Manual (DPM).¹³

The Agency notes that, in addition to the requirement of Section 1605.4(b)(4) of the DPM – which makes it an offense to “knowingly and willfully report false or misleading information or purposely omit material facts, to any supervisor” – it has published its own rules regarding accurate reporting of events. Program Statement 1280.2F states that “it is the policy of the DOC that when an extraordinary occurrence or significant incident occurs, timely notifications will be made and accurate reports will be submitted” (EX4). The Agency points to the testimony of Lieutenant Goodwin, who stated that DCDC-1 reports must contain accurate detail that is “true of what happened at the event that took place”; officers are to report “only what [they have] seen, saw, what they did, and what they heard”, and it is not proper policy to leave out any details (Goodwin Tr. 60, 103-05, 61, 69-70, and 74). The principal argument presented by the Agency is that the Grievants omitted from their DCDC-1s the fact that punches were thrown at the inmate (A/PHB at p. 16).

The Agency points to the testimony of Investigator Benjamin Collins, who conducted an investigation into the September 19, 2015. Collins, after viewing the video of the incident (EX6), testified that he could see Officers Connor and Oliver punching the inmate (Collins Tr. 129); he also testified that he could see that all the Grievants were there, although he noted that Grievant Okorie was not present during the initial contact with the inmate, but appeared after the inmate was on the floor and while punches were still being thrown. He further testified that, despite his being able to see

¹³Neither the DC Code nor the DPM are in the record here. They are both, however, official and publicly available documents, and their relevance to the matter at issue here is not in dispute.

punches being thrown on the video, none of the DCDC-1 reports mentioned that Connor and Oliver had punched the inmate (Collins Tr. 135-37, 152).

In the Agency's view, the Grievants knowingly supplied incorrect information with the intention of defrauding, deceiving, or misleading the Agency. Direct evidence, in the form of video of the incident (EX6) shows the Grievants' proximity to the incident:

The video shows that, at September 19, 2015, at 20:31:18, Officer Oliver, who was standing directly behind the inmate, also began to punch the inmate about the face and upper torso as he fell to the ground. As the inmate was on the ground, the video shows, at September 19, 2015, 20:31:18, Corporals Danso, Allen, and Nguimdo began searching for handcuffs and Officer Okorie ran to the scene at 20:31:18, after the altercation began. (A/PHB at p. 12)

The Agency argues that the Grievants' claims that they did not actually see punches being thrown at the inmate are without merit. Grievant Okorie, the Agency notes, testified that he heard the commotion that caused him to run toward the group, and that when he arrived the inmate was already on the floor and he did not see any punches being thrown (Okorie Tr. 264-65). "However," the Agency states, "when looking at the video, one can reasonably see that punches were being thrown at 20:31:18, the very moment that Officer Okorie identified himself appearing in the camera's frame. When asked if there was anything obstructing his view while running down the hallway, Okorie responded in the negative" (A/PHB at pp. 12-13). The Agency notes Okorie's testimony that, when he entered the camera's view, he was more than thirty feet away from the incident, and confirmed that, based on the time stamp on the video, he arrived at the scene at 20:31:23. "While Corporal Okorie may have been alerted to the incident because of the sound of the commotion," the Agency states, "there is no way that he can accurately claim that he was more than thirty feet away from the incident when he arrived upon the scene within five seconds of hearing the commotion and running towards it. Furthermore, judging from the video, Officer Okorie could reasonably see the force used on the inmate as he ran toward the incident with an unobstructed view" (A/PHB at p. 13).

The Agency notes that Grievant Danso testified that about five seconds elapsed from the time the inmate was standing until the time he was on the floor, that it all happened fast and all he saw was Officer Connor on top of the inmate (Danso Tr. 310-11). In the Agency's view, however, the testimony of Collins refutes Grievant Danso's testimony on this point. Collins testified that, based on his review of the video, Grievant Danso had a direct view of the confrontation with the inmate

(Collins Tr. 103-05). “Furthermore,” the Agency states, “if everything happened as fast as Corporal Danso claimed, then how would he be able to testify about the length of time that it took for the inmate to fall to the floor?...If he were not an eyewitness to punches being thrown, then he would not have been able to guess about the time it took for the inmate to fall to the floor” (A/PHB at p. 15).

The Agency notes the testimony of Warden Johnson that the Grievants had all received training on report writing. He testified that the Agency’s policy is for officers to report what was seen, and to be as detailed as possible. Here, Johnson testified, the Grievants omitted material facts from their reports and the omission was purposeful (Johnson Tr. 184, 187, 191, 192).

The Agency argues that the discipline imposed on the Grievants – nine-day suspensions – was consistent with the provisions of the DPM and the Agreement. It notes that Section 1607.2(b)(4) of the DPM provides that a suspension of seven days up to removal is appropriate for a first occurrence of a charge of knowingly and willfully reporting false or misleading material information or purposely omitting material facts to any supervisor. In deciding on the discipline, the Agency took account of the *Douglas* factors, particularly Factors 1, 2, 5, and 9.¹⁴

The Agency argues that its disciplinary action was free of any substantive or procedural due process errors: it conducted a full and fair investigation (A/PHB at p. 19); the Grievants received timely notice of the charges against them (A/PHB at p. 19); and the Grievants were afforded the right to respond, and those responses were considered (A/PHB at pp. 19-20).¹⁵

The Agency asks that the grievances of the four Grievants be denied in their entirety.

The **Union** argues that the Agency has failed to show that the Grievants knowingly supplied incorrect information with the intention of defrauding, deceiving, or misleading the Agency. In the Union’s view, there is no evidence that the Grievants submitted anything other than truthful statements about the incident based on their observations, nor is there any evidence that any of the

¹⁴The *Douglas* factors derive from a decision by the Federal Merit Systems Protection Board (MSPB), *Curtis Douglas v. Veterans Administration*, 5 MSPB 313 (1980). These are what the MSPB described as aggravating and mitigating factors that should be considered in deciding on a penalty for an adverse action. The Agency notes that while there is no specific DC law or regulation requiring the use of the *Douglas* factors in disciplining DC employees, most agencies use them (A/PHB at pp. 16-18)..

¹⁵The Agency refers to responses submitted on behalf of the Grievants during the grievance process (A/PHB at p. 19); these responses were not entered into the record here, although there is no claim by the Union that the Grievants were denied the opportunity to respond.

Grievants intended to deceive or mislead the Agency. The Union points to the testimony of Warden Johnson that he does not believe the Grievants lied in their reports (Johnson Tr. 192); similarly, the Union notes, both Investigator Collins (Collins Tr. 145) and Lieutenant Goodwin (Goodwin Tr. 16-68) testified that they did not think the Grievants were attempting to mislead or hide anything. Rather, the Union notes, although the final decisions to suspend each of the Grievants were based on the claim that they had provided false or misleading information, Warden Johnson testified that the Grievants should have supplied more detailed reports, as “some credible things were omitted from the reports” in terms of what they witnessed (Johnson Tr. 191). “This,” the Union argues, “is not the charge, and it is not what the suspensions were based on” (U/PHB at p. 10).

The Union argues that the evidence shows the Grievants submitted truthful and accurate reports based on what they saw. Each of the Grievants reported the events leading to restraining the inmate; they reported that the inmate failed to comply with Grievant Okorie’s orders during an attempted strip search; they reported that the inmate became combative while being escorted to a cell. Each of the Grievants reported that physical force was used to restrain the inmate. In the Union’s view, “That was all they were required to report. It was not their responsibility, in drafting their reports, to make an assessment as to the amount of force used or determine whether the force used was necessary under the circumstances” (U/PHB at p. 11). The Union notes that Lieutenant Goodwin testified that officers are to report only what they saw, did, and heard (Goodwin Tr. 19-70).

In the Union’s view, the Agency’s contention that the video footage of the incident shows exactly what happened during the incident and that the Grievants should have reported additional details is misguided. First, the Union argues, the question is not whether the Grievants should have reported more: the question is whether they reported false information, the conduct with which they were charged. Second, the video presented by the Agency at the hearing (EX6) was dark and grainy. Thirdly, the video was taken from a bird’s eye view, and not from the perspective of each of the Grievants during the incident itself. The Grievants saw the incident play out at their eye level, from different angles in the hallway, and with other officers in front of them obstructing their view. Grievant Okorie, in particular, had to run down the hallway after the commotion had begun, and his view was obstructed by all five of the other officers present.

Finally, the Union notes, the Grievants were not charged with failing to specify the precise type of force utilized by Connor in response to the inmate’s behavior, nor were they charged with

violations of the policy on filling out DCDC-1s. In sum, the Union states, The [Agency] has not proffered any evidence that the Grievants did anything but report accurate information. (The Union notes that Connor, who actually punched the inmate, used language concerning the use of physical force similar to that used by the Grievants. He was subjected to discipline in the form of removal. An Agency hearing officer, however, eventually found that Connor had not engaged in misconduct and he ultimately received no discipline (UX27). “Such inconsistent discipline,” the Union asserts, “is at odds with the agency’s obligations under the *Douglas* factors, and with labor law in general” (U/PHB at p. 12, fn. 6).

The Union also notes that, while much of the Agency’s presentation at the hearing centered on the Grievants’ alleged failure to follow the instructions on accurate report writing under Program Statement 1280.2F (EX1, UX1), such alleged failure was not part of the charges against them, and the Agency provided no detailed explanation of what the instructions require in terms of detail. The Program Statement, the Union states, does not define what constitutes “accurate” or “detailed”. There is nothing in the record about how the Agency defines these terms, other than Warden Johnson’s testimony about what he considered “accurate” report to entail (Johnson Tr. 187). There is nothing in the record regarding the scope of the training the Grievants received on report writing, nor is there any evidence they were trained on Program Statement 1280.2F. Despite the lack of adequate notice of how the Agency defines “accurate” or “detailed”, the Union argues, the Grievants followed the policy by submitting statements that were consistent with the requirements set forth by Johnson at the hearing: they reported “what they saw as well as the who, what, when, where, how, and why factors regarding the actions taken” (U/PHB at p. 15).

The Union also argues that the Agency violated the provisions of Article 11, Section 8, of the Agreement (JX1), which requires that “Corrective or Adverse Action shall be commenced within a reasonable time after the agency knew or should have known of the act or occurrence allegedly constituting cause.” In its view, the time that elapsed between the incident on September 19, 2015, and the issuance of notices of proposed discipline in May 2016 not reasonable. In its view, the Agency knew about the incident the same day it happened, when the Grievants submitted their incident reports (UX3-6). Accordingly, the Union argues, the disciplinary actions should be reversed on procedural grounds.

As remedy, the Union asks that all four Grievants be awarded full back pay and benefits,

including applicable pay differentials. Additionally, the Union asks that Grievants Okorie and Allen be promoted to Sergeant retroactive to the date they were first eligible for such promotion, including any back pay and benefits that they would have accrued. Finally, the Union asks that I retain jurisdiction to allow it to file a petition for attorney fees.

APPLICABLE PROVISIONS OF LAW, REGULATION, AND THE AGREEMENT

From D. C. Code § 1–616.51. Policy.

...the Mayor, the District of Columbia Board of Education, and the Board of Trustees of the University of the District of Columbia shall issue rules and regulations to establish a disciplinary system that includes:

- (1) A provision that disciplinary actions may only be taken for cause;
- (2) A definition of the causes for which a disciplinary action may be taken;
- (3) Prior written notice of the grounds on which the action is proposed to be taken;
- (4) Except as provided in paragraph (5) of this section, a written opportunity to be heard before the action becomes effective, unless the agency head finds that taking action prior to the exercise of such opportunity is necessary to protect the integrity of government operations, in which case an opportunity to be heard shall be afforded within a reasonable time after the action becomes effective; and
- (5) An opportunity to be heard within a reasonable time after the action becomes effective when the agency head finds that taking action is necessary because the employee's conduct threatens the integrity of government operations; constitutes an immediate hazard to the agency, to other District employees, or to the employee; or is detrimental to the public health, safety or welfare.

From District Personnel Manual

1605.4 Although not exhaustive, the following classes of conduct and performance deficits constitute cause and warrant corrective or adverse action:

- (b) False Statements, including:

(4) Knowingly and willfully reporting false or misleading information or purposes omitting material facts, to any supervisor

From DC Dept of Corr Program Statement 1280.2F: Reporting and Notification Procedures for Significant Incidents and Extraordinary Occurrences (EX1, UX1)

2. **POLICY.** It is the policy of the DOC that when an extraordinary occurrence or significant incident occurs timely notification will be made and accurate reports will be submitted.

From D. C. Department of Corrections - Employee Report of Significant Incident/Extraordinary Occurrences – Instructions for completing form

Complete detailed description of incident (if force was used, include events leading up to the use of force)

Actions Taken (in chronological order with times listed)

Description of Weapons, if any. (Include photocopy if possible)

Describe the injuries to staff or inmates and medical attention required (if any)

If force was used, describe type, (e.g., physical, chemical agent, baton, etc.)

From Working Conditions Collective Bargaining Agreement (JX1)

ARTICLE 11 DISCIPLINE

Both parties recognize the exclusive rights of Management to discipline employees for cause, as defined in the District Personnel Manual (DPM). Discipline shall be imposed for cause, as provided in D. C. Code §1-616.51 and defined in Chapter 16 of the District Personnel Manual

Section A:

For the purpose of this Article, discipline shall include the following:

1. **Corrective Actions:** Written reprimands or suspensions of less than ten (10) days....

Section H:

1. Employees shall be notified of Corrective Actions by service of Advance Notice within 60 days after the Agency was made aware of an act or occurrence constituting cause.

DISCUSSION AND ANALYSIS

Resolution of the issues in this matter require answering two basic questions, one factual, one a matter of interpretation of applicable rules and policies:

- Did the Grievants see the punches thrown at inmate MB by Officers Connor and Oliver?
- If so, did the omission of mention of these punches from the incident reports they filed constitute knowing or willful reporting of false and misleading information, or purposeful omission of material facts, in violation of DPM Section 1605.4(b)(4)? or did they not constitute “accurate reports” as required by Program Statement 1280.2F, Section 2?

The video of the September 19 incident (EX6) was viewed several times at the hearing, and I have viewed it several times while preparing this Opinion and Award. It is extremely difficult to determine, with reasonable certainty, whether any of the Grievants was able to see Connor and Oliver punch MB. The camera is at some unknown height above ground level – I would estimate it to be at least six or seven feet, because when individuals come into the camera’s view walking down the hallway it is the tops of their heads that appear – and angled slightly downward toward the end of the corridor at some unspecified distance (there were estimates at the hearing of between 30 and 50 feet). While this camera provides a bird’s eye view of the scuffle at the end of the corridor, the Grievants only had an eye level view of the incident. The entire incident took just a few seconds, and at least some of the Grievants would have had their views obstructed by their fellow officers.

I find it unnecessary to make a positive finding as to whether or not one or more of the Grievants was able to see the punches being thrown. Even if one or more of the Grievants was in fact

able to see the punches, the Agency must still demonstrate that the failure of the Grievants to state clearly in their DCDC-1s that punches were thrown violated applicable rules and policies.

The DPM provides that corrective action is appropriate if an employee knowingly or willfully reports false or misleading information, or purposely omits material facts. All of the Grievants included in their reports that the inmate became combative and was restrained and handcuffed; they all stated that physical force was used to restrain him. The Agency has not shown that this was false or misleading, much less that it was knowingly or willfully false or misleading. The question of whether the failure to mention that punches were thrown at inmate MB constitutes purposeful omission of a material fact should be considered in tandem with the requirements of the Agency's Program Statement 1280.2F, Section 2, that accurate reports must be submitted.

The DPM simply requires that "material facts" not be omitted from reports; and the Program Statement requires only that "accurate reports" be submitted. It would be improbable, and perhaps impossible, to expect the Agency to prescribe in a form that could be readily referred to by correctional officers all the myriad details that might possibly occur during the course of a significant incident or an extraordinary occurrence, or all the details that might be considered material. Nevertheless, there must be some context within which to understand these terms and, therefore, against which to judge whether the Grievants' omission of the fact that punches were thrown at the inmate – again, only on the assumption that one or more of them in fact saw the punches being thrown – violated rules or policies. The Agency has offered no such context. The Agency's own witnesses stated their understanding of what should have been included in the DCDC-1s; but these statements were more in the nature of restatements of what the rules and policies themselves say rather than an elaboration of the meaning of the very broad terms "accurate reports" and "material facts". Lieutenant Goodwin, testified that "What mainly goes into the report is what happened, what you see, and what you know..." (Goodwin Tr. 22). When asked if it was fair to say that the Agency requires extreme detail to be included in the reports, Goodwin stated simply that employees' reports were expected to be "Accurate to the best of their knowledge...And what they seen and what they know" (Goodwin Tr. 36). When asked, on cross-examination, whether Program Statement 1280.2F indicated any level of detail that should be in a DCDC-1, Goodwin replied "No, as long as it's accurate and true of what happened at the event..." (Goodwin Tr. 61; see also Tr. 69-70).

When asked what the Program Statement means by "accurate", Warden Johnson stated simply

“Reporting what you see and being as detailed as possible, and again, we should be looking for who, what, when, where, how, and why actions taken” (Johnson Tr. 187). On cross-examination Johnson stated his belief that the Grievants had omitted material facts that they had seen, and that the omissions were purposeful (Johnson Tr. 192). He offered no explanation of what “material” means in the context of the September 19 incident, nor did he offer any explanation of why he thought the omissions were “purposeful”. Johnson testified that he had not himself taken the report writing training course (Johnson Tr. 187).

Presumably all of the Grievants received training on report writing, although only Okorie testified directly to this (Okorie Tr. 266-67); Johnson referred to Agency records showing that Allen had taken the course (Johnson Tr. 186). However, the Agency offered no information about the content of the training, particularly insofar as it might have addressed the meaning of such terms as “accurate” and “detailed”. Similarly, the Agency offered no examples of correctly written reports that might have shed some light on the matter, nor did it offer examples of other officers who had been disciplined for similar omissions from their reports. The incident report form itself states simply “If force was used, describe type, (i.e. physical, chemical agent, baton, etc.)”. The form does directly ask for the specific type of physical force used.

Warden Johnson testified that it was important to prepare accurate and detailed reports: “We don’t want situations where codes of silence” come into play (Johnson Tr. 192). This concern is fully understandable. One would expect, however, that where officers are involved in an incident in which physical force is used and wish to downplay this aspect of the incident they would overstate the threat posed by the affected inmate or understate or omit references to their own use of such force. Here, all of the participants in the September 19 incident reported that the inmate was “combative”, but they did not use any other language, much less highly charged language, to indicate that the inmate was dangerously aggressive or that he posed a serious physical threat. All of the participating officers stated clearly in their reports that physical force was used to restrain the inmate. There is nothing in the record to suggest that any of the participating officers attempted to downplay or deny the use of physical force to restrain inmate MB. Both Connor and Oliver, the two officers who actually punched MB, clearly admitted as much in their interviews with Investigator Collins (UX11 at p. 6).

The Agency has not shown that the substance of the Grievants’ DCDC-1s constituted knowing or willful reporting of false and misleading information, or purposeful omission of material

facts, in violation of DPM Section 1605.4(b)(4); nor has it shown that these were not “accurate reports” as required by Program Statement 1280.2F, Section 2.

Having found that the Agency has not shown that the Grievants’ reports violated applicable regulations or policies, I find it unnecessary to consider the Union’s argument that the disciplinary actions against the Grievant’s were procedurally defective because of the length of time that elapsed between the Agency’s knowledge of the underlying incident with inmate MB and the issuance of the proposed suspensions.

DECISION AND AWARD

The Agency has not shown that the Grievants' omission of the fact that punches were thrown at inmate MB from their incidents reports violated applicable rules or policies. Accordingly, the discipline of the Grievants – suspensions of nine days – was not for just cause. The grievances are sustained in their entirety.

The Agency shall remove references to this discipline from the Grievants' records. All the Grievants shall receive full back pay and benefits for the days they were suspended.

The record shows that in 2015 Grievants Okorie and Allen became eligible for promotion to Sergeant (UX9), but those promotions were blocked or otherwise delayed because of the suspensions on their records. The Agency shall reconstruct the chronology of the promotion process; Okorie and Allen shall be retroactively promoted to whatever dates they would have been promoted had the suspensions not been on their records; and they shall receive accompanying back pay and benefits.

I will retain jurisdiction for 30 days from the date of this Opinion and Award to consider a Union application for attorney fees.

Silver Spring, Maryland
January 25, 2019



Barry E. Shapiro, Arbitrator