
In the Matter of the Arbitration
of a Dispute Between

STATE OF MINNESOTA
DEPARTMENT OF CORRECTIONS

Richard Bibeau: 3-day Suspension,
10-Day Suspension, and Discharge
Grievances

and

AFSCME, COUNCIL 5, AFL-CIO

APPEARANCES:

Ms. Laura J. Davis, Principal Labor Relations Representative, Minnesota
Management and Budget, appearing on behalf of the State

Ms. Amanda Prince, Field Representative, AFSCME Council 5, AFL-CIO, appearing
on behalf of the Union

ARBITRATION AWARD

State of Minnesota Department of Corrections, hereinafter the State or Employer,
and Council 5, American Federation of State, County and Municipal Employees,
hereinafter Union, are parties to a collective bargaining agreement providing for the
submission of grievances to final and binding arbitration before an arbitrator selected by
them. The undersigned, on October 2, 30, and 31, 2014, held hearings in the captioned
matter in St. Paul, Minnesota. The parties submitted post-hearing briefs, which were
received by December 18, 2014.

ISSUE:

The parties stipulated to the following statement of the issues to be resolved by the
undersigned.

1. Did the Employer have just cause for the three-day suspension of grievant on
January 9, 2012? If not, what is the appropriate remedy?
2. Did the Employer have just cause for the 10-day suspension of grievant on
December 11, 2012? If not, what is the appropriate remedy?

3. Did the Employer have just cause to discharge grievant on April 9, 2013? If not, what is the appropriate remedy?

PERTINENT CONTRACT LANGUAGE:

ARTICLE 16 - DISCIPLINE AND DISCHARGE

Section 1 Purpose Disciplinary action may be imposed upon an employee only for just cause.

* * *

Section 3. Disciplinary Procedure disciplinary action or measures shall include only the following:

1. Oral reprimand;
2. written reprimand;
3. suspension;
4. the motion; and
5. discharge.

If the Appointing Authority has reason to discipline an employee, it shall be done in a manner that shall not embarrass the employee before other employees or the public. Oral reprimand shall be identified as such.

When any disciplinary action more severe than an oral reprimand is intended, the Appointing Authority shall, before or at the time such action is taken, notify the employee in writing of the specific reason(s) for such action, and shall provide the Local Union with copies of any written notices of disciplinary action.

An employee who has been notified by his/her Appointing Authority that he/she is being investigated for possible disciplinary action shall be informed, in writing, of the status of the investigation upon its conclusion.

* * *

Section 5. Discharge. The Appointing Authority shall not discharge any permanent employee without just cause. If the Appointing Authority feels there is just cause for discharge, the employee and the Local Union shall be notified, in writing, that the employee is to be discharge and shall be furnished with the reasons therefore and the

effective date of the discharge. The employee may request an opportunity to hear an explanation of the evidence against him/her, to present his/her side of the story and is entitled to union representation at such meeting, upon request. * * *

BACKGROUND:

The Minnesota Department of Corrections operates MINNCOR Industries at six correctional facilities. Vice President of Operations, Lonsky, testified MINNCOR'S business objectives are financial self-sufficiency, employ as many offenders as it can, contribute to an offender's transition back into the community, and strive for profit. MINNCOR's Mission Statement provides,

“The mission of MINNCOR Industries is to provide a safe working environment within the prison system and successfully transition offenders into the community at no cost to taxpayers.”

One of the DOC facilities housing a MINNCOR Industries program is the Rush City Correctional Facility. Rush City is a Level 4 close custody facility. At that facility MINNCOR Industries produces license plates, stickers, and provides labor services to other businesses as well as providing labor for one large company. DOC offenders post for available jobs within MINNCOR Industries at each correctional facility. At the Rush City Correctional Facility there are between 1000 and 1100 offenders and MINNCOR Industries employees approximately 250 of those offenders.

The grievant, Bibeau, was employed at Rush City as a Core Manufacturing Specialist - Graphics (CMS) in charge of license plate manufacturing. He began his employment at Rush City in July 2004. There were a total of five CMSs employed at Rush City. Bibeau testified that within the MINNCOR facility at Rush City there were MINNCOR staff and corrections staff. He referenced the staff as blue shirts (MINNCOR staff) and whites shirts (security staff), with white shirts being responsible for overseeing inmate movement to and from the production floor, and tools used by offenders in the production process, but no involvement with production.

The grievant was issued a written reprimand on August 31, 2010. Lonsky testified that Bibeau was disciplined because he brought a computer “jump drive” into the facility and failed to receive prior clearance by the IT Department in violation of the

Department's policy. Lonsky said Bibeau brought in a personal "jump drive" after the facility "jump drive" had failed and, subsequently, an offender took the "jump drive" from the floor. Lonsky stated this incident precipitated the facility going on high alert because the jump drive contained private data involving aspects of the MINNCOR operation that offenders are not involved in nor have access to.

On June 29, 2011, Bibeau was given an oral reprimand for unprofessional conduct. Lonsky testified that an offender who was working as a janitor had been directed to clean a restroom, the offender went to Bibeau and complained, and Bibeau told the offender that he only needed to follow his, Bibeau's, directives. Lonsky stated that when Bibeau's supervisor confronted him about the incident Bibeau was insubordinate. Lonsky testified that he gave Bibeau the oral reprimand.

Neither the oral or written reprimand just described are in issue in this proceeding. The disciplinary actions taken against Bibeau that are the subject of this arbitration proceeding are a 3-day suspension issued on January 9, 2012, a 10-day suspension given on December 11, 2012, and his termination on April 19, 2013. Each of these disciplines was grieved by the Union and Bibeau and the parties consolidated the three grievances for hearing before the undersigned.

PARTIES' ARGUMENTS:

Employer:

The State argues that it has submitted overwhelming proof that the Bibeau engaged in each and every alleged incident of misconduct repeatedly. It notes that the grievant's three-day suspension was for two separate substantiated incidents of misconduct: sharing sensitive security information with an offender and falsifying offender timecards. It claims that all the elements of just cause have been met with regard to both incidents of misconduct and, therefore, the discipline should be upheld.

The Employer asserts that its investigators' thorough investigation concluded that the grievant did provide sensitive security information regarding when an offender would be transferred and to which facility. As a result of acquiring that information offender F assaulted another offender to avoid being transferred. It argues the grievant offered a number of species arguments to suggest he was not guilty of this misconduct. He

asserted that he did not tell offender F of the impending transfer and that offender F lied when he was interviewed by Investigator Ergen. The Employer argues that Bibeau admitted to investigators Green and Ergen that he had given the information to offender F, and at the hearing, for the first time, claimed that Green and Ergen lied when stating he had admitted to providing offender F with that information. Further, the State contends that the grievant has provided no motive for either investigator to lie under oath about what he had told them.

Regarding the second incident of misconduct giving rise to the grievant's three-day suspension, the State contends that notwithstanding Bibeau's claim that the time clocks were inaccurate and in need of repair that fact has no bearing on his signing for the incorrect time on the timecards resulting in offenders being overpaid for work they did not perform. The Employer argues that the grievant's assertion regarding the time clock(s) is a thinly veiled attempt to obfuscate his very clear misconduct and his misconduct was wholly unrelated to any time clock issues and had no bearing upon his behavior.

Regarding the incidents that led to his ten-day suspension, the State argues there can be no question that the dining hall incident involving the grievant warranted his suspension. It argues that the videotape recording of the incident clearly contradicts the grievant statement in the investigative interview and at the arbitration hearing. During the hearing Bibeau contended that the security officer who witnessed the conversation and filed the incident report lied when she wrote in her report and to investigators. The state avers that what little credibility the grievant may have had following the hearing is nonexistent after reviewing the video tape, which underscores Bibeau's very tenuous relationship with the truth.

The State also argues that any threat to the safety of others made by an offender in the prison environment is a serious and potentially dangerous matter. It asserts the grievant clearly went out of his way for and showed favoritism to an offender with whom he had no reason to engage in conversation. In fact, he also showed favoritism by failing to write a report on offender D's threat about possibly harming others, failed to appreciate the dangerous nature of offender D's threat by failing to report it, and then

denied it occurred when asked about it. Rather, it claims Bibeau asserted the security officer invented the conversation without articulating any motive for her doing so.

Regarding the incident that led to Bibeau's discharge the Employer argues that the grievant admitted sharing confidential offender financial data with offenders when he allowed them to view that information in his office on his computer screen in violation of the its Data Practice Policy. It argues that policy provides that an employee proven to have divulged such information to unauthorized persons will be subject to disciplinary action. The State asserts that, in addition, while that incident was being investigated the grievant discussed the ongoing investigation with others after being directed not to do so.

The Employer argues that it strains credibility that of the five substantiated incidents that violated DOC policy over approximately 14 months the grievant has failed to take any responsibility for his actions; never acknowledged that he did anything improper; did not claim that any incident was the result of a mistake; and perhaps, most importantly, failed to demonstrate any respect for the Employer's policies. It asserts there was nothing about the grievant's demeanor – no remorse, no apology – that would lead anyone to conclude that if reinstated his pattern of dangerous conduct would not continue to put himself and others at risk. The Employer concludes that the arbitrator should find that it had just cause for the grievant's three day suspension, ten-day suspension, and discharge.

Union:

The Union contends the State failed to complete a full and thorough investigation and is evidenced by a fellow employee admitting that he had signed the post-it note used to determine the offender pay rates as well as the widely varying reports of what was said during the unrecorded interview. The Union also asserts that the Employer engaged in disparate treatment of the grievant when it began and continued ongoing exclusive and excessive monitoring of him through OSI and disciplining him for behavior that other staff displayed without discipline. It argues that MINNCOR was aware of systemic issues with offender payrolls and was unclear with its directives and at times provided little or no notice of the change of process and practice. And, it asserts that in each case the grievant was subjective to the excessive discipline.

Regarding the grievant's three-day suspension on January 9, 2012 the Union argues that the Employer's investigation was not conducted in a fair and impartial manner. Employees who were in attendance at these meetings have reports that differ vastly as to what was said. The grievant and Union Steward Bratten both describe Bibeau's investigative interview as badgering, confusing and hostile. The Union further contends that the alleged incident of Bibeau providing offender F advance knowledge of his upcoming movement had been previously investigated, fully addressed earlier, and therefore, for the Employer to subject Bibeau to additional discipline for an incident that happened three years earlier and for which he was already disciplined, fails the test of just cause. The Union also asserts that Bibeau testified that he believed there might have been confusion over which incident OSI staff was questioning him about. Bibeau repeatedly asserted during that during the interview at no time did he state he shared secured information with an offender because in fact he had not. Lastly, the Union contends that the discipline letter given to Bibeau does not cite a security violation as a reason for discipline, and therefore, the testimony regarding this issue should be dismissed.

The Union also argues that it had no opportunity to question or verify the alleged allegation from offender F. It also asserts that offender F had been fired from MINNCOR by Bibeau, and therefore, had a reason to seek retribution against Bibeau. Further, the Union argues that offender testimony generally lacks credibility because offenders often have reason to seek retribution against DOC staff, and have exhibited antisocial behaviors, such as lying.

With respect to the second allegation leading to Bibeau's three-day suspension that he falsified offender's timecards, the Union argues that there was extensive evidence adduced highlighting the ongoing issues with time recording equipment in addition to outdated procedures. Time clocks in the shop reported different times and different months. The Employer was aware of issues with the time clock and extensively utilized the double checks in place to allow for accurately paying offenders, including the practice of utilizing movement sheets at the end of the shift by both the CMS staff and Joe Beise, as well as discussing these ongoing issues in morning production meetings on multiple occasions. The Union contends it established that there were several incidents in which

MINNCOR staff committed timecard violations and received no discipline, and that offender time cards were unsigned by staff and yet offenders received pay. Also, Union witnesses testified that they were aware of other employees committing timecard errors and not receiving discipline. It argues that once Bibeau was made aware of the error he reported that error to Joe Beise as he and other staff had done in the past. It was Bibeau's belief that this issue was settled and the error resulted in no overpayment to offender workers and no financial loss to DOC.

The Union argues that the events that took place in MINNCOR which resulted in a 10-day suspension for the grievant show that the rush work order and multiple other assignments to complete on-time resulted in confusion. It contends the Employer once again failed to fully investigate the situation. It asserts there is a question as to which signatures and offender assignment belong to whom. It claims that in fact, another staff, Mike Crego, admitted that many of the offender names were in his hand handwriting when the Local Union conducted its own investigation. Also, the Union avers that the evidence shows that other employees were utilizing post-it notes to report offender pay rates and violated MINNCOR policy and procedure. Yet, those employees received no discipline establishing that the Employer engaged in disparate treatment with respect to Bibeau. The Union also asserts that the State did not have any specific assignments of offender worker to staff at the time of its investigation and discipline of the grievant, and that this was a practice that was enacted after Bibeau's discipline.

Regarding the second allegation that gave rise to the grievant's ten-day suspension that he had inappropriate interaction with an offender in the offender dining room, is absurd and the direct result of more than 10 months of excessive exclusive scrutiny and observation by the Employer to the exclusion of other staff. The Union argues that Bibeau had gone to deliver an offender termination notice and speak with a co-worker about football tickets. When Bibeau did so, an offender demanded to speak with him and called him over. Bibeau spoke with the offender about the offender's employment issues, directed him to bring his issue to the offender's representative group, and wished him good luck. Bibeau denies the offender made any statements about a pending court action or taking any other action against staff. The Union contends evidence supports that conclusion, and the video provides no audio support to the Employer's claim.

Regarding the State's decision to terminate Bibeau because he allegedly violated its data practices policy, it argues that Bibeau was aware of the Employer's practice of posting offender hours on the bulletin board in the work area and believed that this information was not private. It contends offenders have access to this sort of financial information as workers in the Canteen, and have access to historical offender financial information in the MINNCOR work area. The workers who Bibeau showed his computer screen to had not been paid for an entire week of work. Offenders at MINNCOR often rely on that payment as their sole form of income. The Union argues this clearly has the potential to be a volatile situation and Bibeau did as he had been instructed to do and defused it.

The second allegation leading to Bibeau's termination was that he discussed the investigation with his Local Union President and OSI investigator Ergen, both of whom had been involved with Bibeau's previous disciplines and investigations. The Union asserts that Bibeau has a right to speak to any of his Local Union officers as a represented member of that bargaining unit. Further, OSI Ergen did not direct Bibeau to cease the conversation with him at any time, which would be appropriate if he believed it was a violation of policy. Bibeau did not believe he was violating any policy in doing so.

DISCUSSION:

The Employer's discipline of Bibeau is footed upon his repeated violations of Department policies that, as the State characterizes it, are in place to ensure that its staff maintains appropriate boundaries between themselves and offenders; and, that because his conduct violated those policies and failed to maintain such boundaries it posed a security risk to the facility, its staff and offenders. Determining whether Bibeau in fact committed the violations alleged by the State turns upon the resolution of a significant number of credibility issues. Bibeau either denies the incident(s) occurred, denies that he admitted to investigator(s) that he committed the acts alleged, or asserts that he did nothing wrong.

Three Day Suspension:

On January 9, 2012, Bibeau was given a three-day disciplinary suspension without pay effective January 31, 2012. Lonsky testified two allegations were investigated that

led to Bibeau's three-day disciplinary suspension. The first allegation was that Bibeau relayed security information to an offender(s) regarding future offender movement e.g. going out on a writ or being transferred. He testified the second allegation was that Bibeau knowingly approved time cards for specific offenders when they did not work the hours reflected on the timecard. Lonsky stated the Office of Special Investigations (OSI) investigated and substantiated those allegations. He testified that if an offender knows in advance when he will be going outside the facility he can let others outside the facility know this and that can create security consequences.

Lonsky testified the second allegation was that Bibeau falsified offender time cards, which Bibeau admitted doing "because it made the offender feel good". He stated that Bibeau falsified offenders' time cards by not recording when they left the work area resulting in them being eligible to be paid for time not worked. Lonsky also testified that Bibeau was untruthful during that investigation when he initially denied doing so, but later admitting he had done so.

The Rush City Incident Review Committee made up of the Warden, Human Resources, Security Captain, and himself, agreed that Bibeau shared offender movement with offenders and had also falsified offender time cards.

Both of these allegations arose from incident reports filed with the Employer on December 7, 8, and 17, 2011. On December 7th industry supervisor Kratt filed an incident report describing a conversation he had with Sergeant L regarding how offenders had advance knowledge that they would be going out on a writ. In his incident report he wrote,

"Yesterday at approximately 1245 hours Sgt. L stopped in my office In south Industry and asked if I had overheard her and R talking and I stated that I had not. Sgt. L went on to state that she and R were discussing that an offender had stated that he was going out on a writ and she was concerned that it was a security risk for offenders to know that information ahead of time. She stated that R mentioned that the offender had told him that Richard Bibeau Sr. had informed him he was going out on a writ. * * * Sergeant L had previously a similar situation some weeks ago when an offender in North Industry was going out on a writ and had told me (mike (sic) Kratt) that he would not be at work the following day. This was also when there were several offenders being laid in on ALI status and I was trying to get a handle as to why. I proceeded to the security bubble and ask Sergeant L why that offender would not be at work and she had told me that he was going out on a writ but did not understand why the offender would know that? I went back to the

offender and asked him how he knew he would not be coming to work the next day and he stated that Richard Bibeau Sr. Had told him that he was going out on a writ. I do not remember the offenders name at this time I do recall the situation of the offender knowing ahead of time that he was leaving the facility on a writ.”

On December 8th staff member R filed an incident in which R stated,

“There had been several times in the past when an offender would approach me or my former coworker L and state don’t put me on the schedule for the rest of the week because I’m going to medium. We would ask how he knew that and he stated Rick told me. We were not informed of anyone going to medium until the day they were called to pack up but evidently Rick had access to this information. The only incident that I recall an offenders name was F. He told us he was going to medium but didn’t want to go. At lunch time he assaulted an older offender in the bathroom in North Industry on the way to switch out. I am not sure of the date but it was prior to two years ago as L has been gone since September of 2009.”

The issue of whether Bibeau told offender F of his upcoming movement to a medium security facility that resulted in offender F assaulting another offender was raised with him during the Employer’s investigation. It is included within Lt. Green’s January 3, 2012, investigation report. That report states that during Bibeau’s investigative interview he acknowledged he had given an offender movement information, but did not remember the offender’s name. The interview summary indicates that Bibeau told investigators

“he could not remember the Offender’s name but the offender had acted out in order to be placed in segregation, Richard Bibeau Sr. said he remembered being talked to by Mary Akins and 2006.”;

and, “was told it was no big deal since the offender was being transferred to a lower classification facility”. The report then states that Bibeau said

“since being talked to by Mary Aikens, he has not given any other offender pending transfer information as he has ‘learned his lesson’.

The investigation report of the interview goes on to state that Bibeau knew the information could cause problems.

Bibeau, at hearing denied he gave offender F movement information as charged, And, when he was asked on cross-examination about Ergen’s investigative interview summary of his interview of him indicating that he had admitted giving the transfer information to offender O, he responded that Ergen “gave an untrue statement” in his

report. However, the investigative report of his interviews with investigators regarding that incident persuade me that his testimony, at hearing, that it was not him who gave offender F the movement information, and that there was confusion during his interview(s) regarding what incident he was being questioned about, is not credible. Foremost in reaching that conclusion is that the incident he described during his interview that he remembered involve the same offender conduct as offender F engaged in – offender being transferred and caused an incident that prevented the offender’s transfer. The likelihood that he could remember facts of an incident occurring at or about the same point in time – 2006 vs 2007 – and involving the same offender conduct, but he could not remember the offender’s strains credibility.

However, even concluding it was Bibeau who gave offender F advance knowledge of his impending transfer does not necessarily lead to the conclusion that the State had just cause to discipline him for that misconduct as part of its decision impose a 3-day suspension upon him. That is because the State did not offer any rebuttal testimony to Bibeau’s assertion that former Program Director Aikens had previously discussed the incident that he now denies involved offender F, with him. Clearly, if the issue was addressed previously with Bibeau in a conversation with Aiken, a reasonable inference to be drawn is that his discussion with Aikens, at a minimum, amounted to a counseling or at most an oral reprimand not reduced to writing. In any case, it constituted discipline of Bibeau. And, as the Union argues, it would be inappropriate and constitute double jeopardy for the State to subsequently impose additional discipline for his misconduct in that incident as part of its decision to suspend him for three days on January 9, 2012. In as much as Bibeau’s assertion has not been rebutted by the State, the preponderance of the record evidence supports a finding that Bibeau was previously disciplined for providing security information regarding offender F’s impending transfer.

Notwithstanding that conclusion, Bibeau’s statement to investigators that since the 2006/2007 incident that Aikens spoke to him about “he has not given any other offender pending **transfer** (emphasis added) information” is not the same as denying he provided offenders with notice of upcoming writs as alleged in the incident reports dated December 7, 2011. Furthermore, Bibeau did not deny he provided offenders with information regarding upcoming writs as offenders alleged and as appeared in R’s and

Kratt's incident reports. Also, Bibeau and the Union proffered no explanation for why either R or Kratt had a motive to lie about their allegations. Consequently, I am persuaded that the record evidence establishes that Bibeau did provide offenders with notice of upcoming writs that would have them out of the facility, and in doing so created a security risk to the facility, its staff and offenders.

The second allegation leading to the State's three-day suspension of Bibeau is that he signed time cards for two offenders showing them at work for a longer period than they actually worked. The investigation of that incident was precipitated by an incident report filed by Kratt on December 17, 2011 wherein he stated,

"This morning while talking with security staff assigned to North Industry Sgt. W and CO2 B I was informed that we had offenders go to pill window and two offenders did not return to work. Those offenders were W and G. I did not think too much about it until I went to get a soda at lunch and returned up the North Hallway by the metal detector and where the offender timecards are kept. There were only about six timecards in the slots and I happened to see that Mr. W and Gs cards were there. I checked to see if they had punched out at 7:50 a.m. as that is the time the security officers told me they left for pill window. I was surprised to find that both cards were signed out for out times of 3:30 p.m. and initialed by Rick Bibeau Sr."

OSI Investigator Ergen interviewed Bibeau concerning this allegation that Bibeau had signed for incorrect offender time cards. Ergen testified that in his first interview of Bibeau, he initially denied signing incorrect time cards except in the situation of offender P, but Ergen was already aware from his investigation before interviewing Bibeau that Bibeau had signed two other incorrect offender timecards. Ergen said after what Bibeau told him during that interview he went back and verified his intelligence that Bibeau had signed two other offender timecards. Ergen said he then interviewed Bibeau a second time and in that interview Bibeau stated he had signed the time cards showing the offenders "out" at 1530 hours, which Ergen said he knew was incorrect. Ergen stated at that point in the interview he gave Bibeau a Garrity warning and impressed upon him that he needed to tell the truth. Ergen said Bibeau then stated he had signed the cards showing the offenders had left work at 1200 hours. Ergen stated that he again reminded Bibeau that he was under a Garrity warning and Bibeau then stated he had signed the offenders' cards showing them "out" at 7:15, which Ergen said he knew was the correct time. Having received that information Ergen then asked Bibeau why he only signed

incorrect time cards for certain offenders, and that Bibeau responded, “to make them feel better and the time cards didn’t mean anything”.

Bibeau testified that he was aware of the error on the offender time cards on December 17th and told Joe Beise in the morning production meetings that there were errors and to make sure he used the movement sheets in calculating offender time. Bibeau stated that the offenders were paid inappropriately but were paid off the movement sheets. He also testified that there were other mistakes that other employees had made regarding offender pay. He stated the offender pay system was flawed. He also testified that there were numerous issues with the time clocks at North Industry, staff was aware of those issues, and it was discussed in morning production meetings. Bibeau also stated that after his discipline on February 15, 2012, the Employer changed its offender payroll procedures.

At hearing, Bibeau did not deny that he had signed the incorrect time cards for offenders W and G, but rather testified that he was aware of the error and told Beise in the morning production meeting that he should check the movement sheets in determining the pay for those offenders. Thus, the fact is that Bibeau did sign time cards for offenders W and G that he knew were incorrect, that he initially denied doing so in his first interview with Ergen. And, during Ergen’s second interview Bibeau initially provided Ergen with two different incorrect times that he said he had signed offenders W and G as “out” on their time cards. Only after being given a Garrity warning and being reminded he had been given such a warning did Bibeau finally admit he had incorrectly signed the offenders time cards showing them as “out” at 7:17. And, then stated he did so to “make the offenders feel better and the time cards didn’t mean anything”.

The Union also contends that it proved that there were several incidents where MINNCOR staff committed timecard violations and received no discipline and that Union witnesses testified they were aware of other employees committing timecard errors and not receiving discipline. The Union contends this evidence establishes the Employer is guilty of engaging in disparate treatment of Bibeau.

The undersigned is not persuaded the Union has established Bibeau was the victim of Employer disparate treatment. What the Union’s evidence and testimony did not establish is that the incidents of alleged timecard violations involved cases where the

employees knowingly signed for inaccurate time cards as opposed to being merely instances of an employee mistake. Further, the evidence adduced by the Union did not establish that the Employer had any knowledge of these offender time card issues and chose not to act upon its knowledge and take disciplinary action against the employees. As discussed above, Bibeau knew he was signing/approving inaccurate offender time cards and was in essence a party to a fraud upon the Employer. For these reasons the record evidence does not support a finding that Bibeau was a victim of Employer disparate treatment.

In conclusion, as evidenced by the testimony and investigation report interview summaries, there can be no doubt that Bibeau inappropriately provided offenders with movement information regarding when they would be going out on writs, intentionally signed for inaccurate offender time cards, and was not truthful with investigators in several instances during the investigation into these two allegations. Thus, the State had just cause to suspend Bibeau for three days without pay. Therefore, the grievance is denied.

Ten Day Suspension:

On December 11, 2012, Bibeau was given a 10-day disciplinary suspension without pay effective December 12, 2012. This disciplinary suspension resulted from investigation of two allegations that Bibeau had engaged in misconduct on September 21, 2012, and October 17, 2012. The Employer alleges that its investigation substantiated that on September 21, 2012, Bibeau had submitted payroll timecards for four offenders he supervised showing that they had worked five hours on PIECP jobs that paid 5 times more per hour than the DOC work they had actually performed. The consequence being that the four offenders would be paid the equivalent of 35 hours for DOC work rather than the five hours of DOC work they actually performed – this calculation was based upon the average wage of \$1/hour for DOC work compared to the average wage for PIECP work of \$8/hour.

Bibeau testified that on September 21, 2012, CMS Crego, who worked in the light manufacturing balloon area, was falling behind in production and needed other offenders working in other areas for other CMSs to help out with his production. He testified that

Crego needed help on this day for work with balloons, which paid PIECP wages. Bibeau testified that Crego needed to catch up on production and was putting his A, B, and C lines on PIECP work as well as any other offenders he could get to help. Bibeau also stated that some offenders will not switch from DOC to PIECP work and will stay at their own job if they are on advanced pay doing DOC work and will make more in wages than the base PEICP wage. Bibeau also testified that this was not the first time that there were pay issues, and regularly there were problems with offender pay at the Moose Lake facility.

It is not disputed that it is the CMS' responsibility to make payroll officer Beise aware of what work the offenders assigned to the CMS are working on in order that they be paid the correct wage rate. In this case, a post-it note was used to pay four of the offenders assigned to Bibeau for working on PIECP work rather than the DOC work they actually performed that day, which resulted in a significant overpayment of wages. When Bibeau was asked on direct examination who wrote the post-it note, he testified that CMS Crego wrote the notes below the black line on Union Exhibit 14, and also stated that he had never before seen a post-it note used for paying offenders.

Yet, on October 23, 2012, when he was interviewed by investigator Winiecki and asked about the post-it note (Union Exhibit 14) which resulted in the inmates receiving PIECP pay when they were doing DOC work, Bibeau stated at least one of the names on the note was his writing and that name was offender F. Thus, how can Crego's assertion to Spencer that he wrote the names on the post-it note, which included offenders F's name, be deemed credible in the face of Bibeau's statement to Winiecki that he recognized offender's F name as in his handwriting. This clearly calls into question the credibility of Crego's hearsay written statement appearing in Union Exhibit 14. Because Crego was not called to testify regarding his hearsay statement it will not be credited in the face of Bibeau's statement to investigator Winiecki that offender F's name appeared to be written by him. Further, while I am no handwriting expert, but to my untrained eye it appears that the same person wrote the names on the post-it note.

Thus, I am persuaded that Bibeau wrote the post-it note that resulted in the offenders being inappropriately paid PIECP wages for time spent doing DOC work.

The second allegation footing the Employer's ten-day disciplinary suspension was that Bibeau was away from his work area during his scheduled work hours and had engaged in a conversation with offender D in the offender dining room. The Employer alleges that during that conversation offender D told Bibeau that he had a scheduled court appearance for the next week and was going to be "taking down" the Associate Warden of Administration, Office and Administrative Specialist "and all them fuckers in MINNCOR". Kitchen Officer Larson observed the incident and in her incident report stated that Bibeau's conversation with offender D ended with his shaking the offender's hand and stating "god luck".

Regarding this incident, Bibeau testified that on October 17th he had terminated offender I for being out of his work area. He stated when this happens the offender loses his job, moves to a different living unit, loses privileges, and is confined to a cell. He stated on October 17th, after dropping off his termination notice at the Watch Center near the chow hall (dining room) he was looking for Officer B in order to get Viking tickets, not visit offender D. He testified that when he went to talk with Officer B, offender D was trying to get his attention and so he gave him the respect he deserved. He stated offender D was angry because the four year rule resulted in him having to leave North Industry and he ended up being a kitchen worker. Bibeau said that offender D was not making as much money working in the kitchen and wanted to get to South Industry. Bibeau testified that offender D never said anything about going to court or having ongoing legal issues. He said he told offender D that he had to bring his issue up in the offender representative group. Bibeau also testified that MINNCOR employees are not prohibited from going to areas away from their work area and that in this instance he delivered this termination paperwork to the Watch Center and was only away from his area 10 to 15 minutes dealing with offender D. He said both of those activities were work related.

When questioned on cross-examination regarding Officer Larson's allegation that offender D commented to him about suing MINNCOR staff, Bibeau testified that when he was speaking with offender D Officer Larson was 10 to 15 feet away, there were at least 80 offenders in the dining room, which is made of concrete and steel, making hearing difficult with all the noise. He also said that Officer Larson submitted a false

incident report when she said that she overheard offender D threatening to sue MINNCOR staff.

I do not find credible Bibeau's denial that offender D did not make the statements to him in the dining Hall on October 17th, as Larson alleged in her October 18, 2012, incident report. First, no record evidence was adduced establishing what, if any, motive Officer Larson had to lie about the conversation she overheard in dining room B between offender D and Bibeau. Second, I don't find credible Bibeau's assertion that his reason for going to the offender dining room was to talk to Officer B about Viking tickets. Officer B was in the hallway outside the dining room in the hallway and did not testify corroborating B's assertion that the two of them spoke about Viking tickets that day. Also, the video undermines Bibeau's credibility regarding his assertions as to why he was at the dining room after he dropped off his termination paperwork that day. More importantly, when questioned by the investigator as to why he was in the dining room he initially answered, "I have no purpose", and then added, "I may have been doing something with Officer B". If Bibeau had been there to talk with Officer B about Viking tickets there would have been no reason for him to say to the investigator that he had "no purpose" in being there, and not telling the investigator he was talking to Officer B about tickets, rather than stating "I may have been doing something with Officer B". Also, offender D, when asked by the investigator what his problem was with MINNCOR staff members AN and GS he responded that his problem with them was related to his termination and they were not letting him back in Industry, as well as his ADA issue. It is not implausible in light of the fact that offender D was admittedly upset with MINNCOR staff that he would be threatening to take action against them, as Office Larson reported, which further undermines Bibeau's credibility when he asserts Larson was lying about what she overheard.

In the undersigned's opinion this was another instance showing that Bibeau was unable to maintain appropriate boundaries between him and offenders. It was not disputed that when failing to maintain appropriate boundaries between themselves and offenders it has compromised staff and the result can be significant security risks to the facility and staff. I am persuaded that Bibeau was not forthright when responding to

investigators regarding his purpose for being in the offender dining room and not disclosing all of what offender D said to him during their conversation.

Bibeau was suspended for ten days without pay for his conduct in these two incidents. While this may seem a harsh penalty to some for his misconduct, it might have been but for Bibeau's prior disciplinary record. He had been given a three-day suspension 11 months earlier for essentially the same type of misconduct – failing to maintain appropriate boundaries between himself and offenders when he knowingly contributed to them being eligible for receiving pay they did not earn, and not being truthful with investigators when confronted about the incidents. This ten-day suspension was merely the next step in the State's progressive discipline of Bibeau. Therefore, I am persuaded the State had just cause to suspend Bibeau for 10 days without pay on December 11, 2012. Consequently, the grievance is denied.

Discharge:

On April 19, 2013, the Employer terminated Bibeau. Its letter notifying Bibeau that he was being terminated stated,

“This action is being taken due to your violation of the Department of Corrections policies 106.210 “Data Practices”, 130.223 “Personal Association between Staff and Offenders” and 103.220 “Personal Conduct of Employees” when you engaged in a conversation with offenders on March 8, 2013, in which you divulged private data and on March 26, 2013. In addition, after being given a directive not to discuss the ongoing investigation, you initiated conversations with other DOC staff regarding the investigation, potentially compromising the integrity of the investigation.

Most of the facts surrounding this incident are not in dispute. On March 8, 2013, Industry Supervisor, Janssen, filed an incident report wherein he stated that while he was in North industry in front of the offices he noticed two offenders W and L bent forward “looking over the shoulder of Bibeau in the direction of Bibeau's computer screen”.

Janssen then stated in his report that he

“moved into position so that I could see what the offenders were looking at. Rick was scrolling through the Offender Payroll Spreadsheet on his computer.”

Janssen made a mental note of what he saw, and later that day went to Bibeau's office, explained what he had seen earlier, and asked Bibeau if he “was showing offenders something on his computer screen”. Janssen wrote in his incident report that Bibeau responded, “yes I was showing them their time for last week”. Janssen asked what did Bibeau mean by “their time”, and Bibeau responded, “I was showing them the hours they worked”. Janssen then stated to Bibeau that he didn't understand what B was showing the offenders and Bibeau responded, “I was showing them the payroll”. Janssen stated in his report that he then asked, ”you were showing them the payroll document that has all the offenders personal information on it?” to which Bibeau responded, “well how else and I suppose to show them what they worked and got paid?” Janssen then wrote in his incident report,

“I explained to Rick that you could highlight the offenders name and information, print just that and show him the information or allow Joe Beise to address payroll discrepancies, but most importantly we do not knowingly allow offenders to view our computer screens regardless of what it is”.

Janssen then wrote in his incident report that he informed Bibeau going forward to make sure that he is not allowing offenders to view his computer screen and then left Bibeau's office.

MINNCOR Industry Director, Winiecki, was assigned to investigate Janssen's incident report. In his investigative report Winiecki wrote that he interviewed Bibeau on March 25th, showed Bibeau screenshots of the offender payroll spreadsheet, and Bibeau admitted to showing the offenders that document on his computer screen. Winiecki also wrote in his report,

“this document lists all of the offenders working in industry by offender OID, name, hours worked in that pay period, Rate of Pay and the total dollar amount due to them. Richard also confirmed he is not the staff person responsible for recording and maintaining the offender payroll record and if the offender did have questions Joe Beise would be the staff person to help them”.

Winiecki wrote in his report that he then went over Bibeau's training records regarding data practices and asked Bibeau if he understood that he was not to provide personal or private information on offenders to other offenders and he responded, “correct”.

Winiecki wrote in his investigation report that Bibeau, during his interview, claimed that the offender payroll used to be posted on the Industry bulletin boards. Winiecki stated in

his report that that had not been a practice since he arrived at Rush City in September 2011. On March 26th Winiecki interviewed Steve Hamann, Rush City Acting Director from June 2009 until September 2011, who told Winiecki that he did not recall ever posting the offender payroll spreadsheet and stated it wouldn't have been posted "because the information on their shows what everyone makes per hour".

On March 26th CMS Scherr filed an incident report wherein she stated,

"While I was standing in the aisle in North industry, Rick Bibeau walked past with the offender P and asked if I could help them with something in the warehouse. Once we entered the warehouse, Rick told offender P¹ to show me where the offender time sheets were. At that time, Rick hollered in a loud voice. 'Will, are you over there? I need to show you something'. Will Spencer came over to the warehouse and stood on the other side of the warehouse, where the supplies are stored for the facility. Rick then told me to open the grey cabinet where the timecards are kept and grabbed the black binders from the top shelf. I took one of the binders but he told me to grab all three. As I was doing this, he asked offender P if he had set up this cabinet and put all the boxes and binders in it and P said, 'yes'. Rick directed offender P with a hand gesture to speak towards Will as he answered. Rick then picked up one of the binders that I had placed in front of him, held it open, showed it to Will and said, 'This is what it looked like on my screen, offenders have access to this cabinet and it's not locked, I shouldn't be penalized for showing them the same thing'.

On our way back to the office, after offender P had went to lunch, I asked why I needed to be there for something like that. Rick replied, 'As a witness, I needed you and Will there to see how easy it is for offenders to get to the timecard information, P set it up and they can't say that I tampered with anything. Sorry that I had to get you and will involve'."

CMS Sherr also told investigator Winiecki during his interview of her that when she and Bibeau got to the warehouse it was locked and Bibeau used his key to open it. She also told Winiecki that offenders could not be in the warehouse without staff present.

Bibeau testified that on March 8th two offenders, W and L, came to him in his office and complained they did not get paid correctly and wanted him to look into it. He said it was a timecard issue and that one offender didn't get a week of pay and the other worked with a partner and he got less than a full days pay. Bibeau said there was an error that showed up on the spreadsheet on his computer and said he told the offenders he would bring it up to Beise, who wasn't there that morning, and get it corrected. Bibeau testified

¹ Offender P was aware of the binders' location because he had previously assisted staff in moving the boxes of binders from pallets in the warehouse into the filing cabinet.

that he worked the rest of that day until 2:15 or 2:30 when Janssen came to his office and asked him why two offenders were in his office looking at his computer. Bibeau stated that he explained to Janssen what he had done and showed him the issue with the offenders' pay, and also told them that previously, under different supervision, the document had been posted on the bulletin board where all offenders could see it and use it to check their wage payments. Bibeau also testified that money and food are the offenders lifeline, they know where every penny is, and can get upset when they are not paid correctly. He stated this can be a dangerous situation and the best way to deal with it is to talk with offenders, like he did in the dining hall and in this case. He said that by showing them the problem and explaining that he would take care of it solved the problem.

Bibeau also testified that posting of the offender payroll spreadsheets faded away without notice that they were no longer going to be posed. He said there was no training of staff to address this issue when that happened. He also testified that the spreadsheets were in the warehouse for years in three ring binders and offenders could access them when they were laying on pallets. He said offenders could pick them up and look at the binders for tax purposes.

Bibeau testified that he was not told by investigator Winiecki not to discuss the investigation with anyone. He stated he contacted OSI Ergen about three ring binders and wanted him to accompany him to the warehouse to find the binders. He also testified that Ergen never asked him to stop speaking to him about the investigation and that the reason he contacted Ergen was because he thought Ergen would be involved in this investigation because he had been involved in an earlier investigation.

Bibeau also stated that he was never told not to speak with his Union representative and that Spencer had been involved in three prior disciplines. He also denied that he ever told Scherr what she wrote in her incident report that he had allegedly said to her, and that her report was false reporting.

Bibeau's defense to the Employer's charge that he shared private offender wage information with offenders is twofold. First, he alleges that offenders had access to the information appearing on the offender payroll spreadsheet, which he let two offenders view on his computer screen in his office, and consequently, they were not shown

information they were otherwise unable to access. Second, he asserts that he was attempting to head off and keep a lid on offender anger regarding being paid incorrectly.

With respect to Bibeau's first defense, contrary to his assertion, the record evidence does not establish that offenders had access to the offender payroll spreadsheets. Investigator Winiecki, who was also Industry Director of MINNCOR at Rush City, testified that contrary to Bibeau's assertion the spreadsheets had not been posted during his tenure which began in 2011. And, his investigation also revealed that the spreadsheets had not been posted going back to at least 2009. The record evidence is that the hardcopy spreadsheets, which Bibeau showed Union President Spencer, in the presence of an offender and CMS Scherr in the warehouse on March 26, 2013, the day after he was interviewed by Winiecki, were being kept under lock and key in the industry warehouse only accessible to inmates when accompanied by MINNCOR and/or security staff. Thus, notwithstanding that the filing cabinet in the warehouse containing the payroll spreadsheet binders was not locked, the warehouse where the cabinet is located is/was locked and had to be unlocked to let offender P and Bibeau in to access the cabinet. Clearly, the offender payroll spreadsheets, which Bibeau admits he showed two offenders in his office on his computer screen, contained private offender information that was not otherwise available to offenders.

Bibeau's other defense, that he was merely being responsive to the offenders' anger over being incorrectly paid by showing them the offender payroll spreadsheet in order to prevent their anger from escalating, is not credible. Even if I were to credit his explanation about concern that their anger could escalate, Bibeau had other available options in order to be responsive to the offenders' concerns. As Janssen opined in his discussion with Bibeau upon discovering what Bibeau had done, Bibeau could have highlighted the information appearing in the offender payroll spreadsheet that pertained to the two offenders and printed that information out for them. He also could have explained to the offenders that after he had looked at the offender payroll spreadsheet, out of their presence, that he found that a mistake had been made and advised the offenders that he would get it resolved with Beise. Both of these options would have been appropriate, but instead he chose to let the offenders view his computer screen showing the payroll spreadsheet.

Also, I do not find credible Bibeau's defense to the Employer's second allegation relating that he discussed the investigation with OSI Investigator Ergen on March 26th, as well as with Scherr and Union President Spencer in the presence of an offender in the warehouse also on the 26th, the day after his interview by Winiecki when he was directed not to discuss with anyone the ongoing investigation. Bibeau claims that Winiecki never gave him such a direction, and that when Winiecki wrote in his investigative report and testified that he had given Bibeau the instruction Winiecki is lying. Bibeau also argues that it was not inappropriate to be discussing the investigation with a Union representative.

Based upon my prior experience in dealing with internal affairs investigations in other correction systems it would not be uncommon for an investigator investigating employee misconduct to inform interviewees that they are not to discuss the ongoing investigation with fellow employees. Therefore, I do not find it unlikely that Winiecki would give such a direction to Bibeau in this case. Nor is there any record evidence that persuades me that Winiecki was lying when he wrote in his report and testified that he gave Bibeau such an instruction.

Bibeau admitted to Winiecki during a follow-up interview that he had CMS Scherr let him and offender P into the warehouse and then showed Spencer the offender payroll spreadsheets. He also acknowledged that he had spoken with OSI Investigator Ergen about the ongoing investigation. Clearly, by getting those individuals involved after being directed not to discuss the investigation with anyone, he disobeyed Winiecki's direction to him. It is unnecessary to address the argument that it was not inappropriate for Bibeau to speak with Union President Spencer inasmuch as the other individuals who were present in the warehouse with him on March 26th were not Union representatives, and speaking to them about the investigation was clearly contrary to Winiecki's directive.

For these reasons I am persuaded that the State has proven it had just cause to discipline Bibeau. The only question remaining is did the Employer have just cause to terminate Bibeau. I have concluded that it did. This incident occurred on March 8, 2013, less than three months after Bibeau received a ten-day disciplinary suspension on December 11, 2012. Clearly, the Employer's prior progressive discipline of Bibeau had not had the intended effect of impressing upon Bibeau that he must maintain appropriate

boundaries between himself and offenders, and adhere to MINNCOR policies. Bibeau was clearly not getting the message that his was serious misconduct that the Employer was not willing to abide.

In the undersigned's opinion, there is no record evidence that militates in favor of discipline short of termination. Consequently, I am persuaded the State had just cause to discharge Bibeau on April 19, 2013, and thus, the grievance is denied.

Based upon the testimony, exhibits and argument the undersigned enters the following

AWARD

The Employer did have just cause for the three-day suspension of grievant on January 9, 2012. Therefore, the grievance is denied.

The Employer did have just cause for the 10-day suspension of grievant on December 11, 2012. Therefore, the grievance is denied.

The Employer did have just cause to discharge grievant on April 9, 2013. Therefore, the grievance is denied.

Entered this 27th day of January 2015.

Thomas L. Yaeger
Thomas L. Yaeger
Arbitrator