STATE OF IOWA

BEFORE THE PUBLIC EMPLOYMENT RELATIONS BOARD

89 MAY 15 AM 11:37
PUBLIC EMPLOYMENT RELATIONS BOARD

MELVIN BROWN, Appellant,	)	
and	)	88-MA-09
IOWA DEPARTMENT OF CORRECTIONS, Appellee.	)	ADJUDICATOR'S DECISION

CLOSED HEARING

APPEARANCES:

For the Appellant:
Michael L. Jankins
Attorney at Law
Des Moines, Iowa

For the Appellee:
Lorenzo D. Creighton
Labor Relations Bureau
Iowa Dept. of Personnel

JURISDICTION.

Pursuant to section 19A.14, Code of Iowa (1987) and 621 Iowa Admin. Code chapter 11, Melvin Brown [Brown] appeals from a 10-day suspension from his position as a Correctional Supervisor I at the North Central Correctional Facility, Rockwell City, Iowa, issued on May 2, 1988. A closed hearing of Brown's appeal was held before the undersigned on October 18, 1988 at the offices of the Public Employment Relations Board [PERB] in Des Moines. The hearing was reported by a certified shorthand reporter and the parties were given full opportunity to present evidence and arguments, and to file written briefs.

FINDINGS OF FACT.

The North Central Correctional Facility [NCCF] is a medium

security adult correctional facility of the Iowa Department of Corrections, located in Rockwell City, Iowa.

Appellant Brown is one of a number of supervisory employees designated as a "Correctional Supervisor I" [CSI] at NCCF. He has occupied that position since approximately July, 1982.

NCCF is staffed by 63 em[illegible] who work one of three daily shifts: midnight - 8:00 [illegible] 8:00 a.m. - 4:00 p.m. and 4:00 p.m. - midnight. Each s[illegible] manned by "Correctional Officers" [COs], as well as by a[illegible]st one CSI.

John Ault is the superintendent of NCCF, having assumed that position in July, 1986. The institution's correctional security manager is Terry Hawkins, employed at NCCF since July, 1982, whose responsibilities include the supervision of CSIs such as Appellant Brown.

During March, 1988, Brown was assigned to the midnight - 8 a.m. shift. The testimony received at hearing indicates that certain routines are followed by the NCCF staff at the end of one shift and the commencement of the next. It appears that the oncoming shift assembles for roll call in a meeting room on the floor below the shift supervisor's office, and that following roll call and the making of any required announcements, the staff disperses to their assigned posts, relieving the prior shift personnel.

Certain COs who are assigned to a particular inmate living unit, or who have been assigned to serve as the shift's "AO" [Activity Officer], must secure keys prior to assuming their

stations. These keys are either provided to them by the CSI in charge of their shift, or are obtained from the officer being relieved. When keys are secured from the officer being relieved, the oncoming CO gives his "key tag" to the prior shift's officer and receives in exchange the keys used by the prior shift. The CO being relieved then places the on-duty officer's key tag in a central location and retrieves his or her own key tag, so that the officer in possession of a particular set of keys is always readily ascertainable by reference to the key tags present at the central location. The exchange of keys typically occurs in or around the shift supervisor's office at the conclusion of the oncoming shift's roll call.

The shift supervisor's office is a relatively confined space, approximately 10 feet wide and somewhat greater in length. In late March, 1988, it contained, at a minimum, a desk and desk chair for the use of the shift supervisor, a double-width file cabinet of four-drawer height and a shorter cabinet upon which a coffee brewer/dispenser was situated. The file cabinet and shorter cabinet were located next to each other, and were arranged in relation to the desk in such a way that a aisle of approximately 2 1/2 - 3 feet existed between the cabinet fronts and the side of the desk, which aisle must be negotiated in order for one to move behind the desk and be seated or obtain items from the desk's drawers.

The 4:00 p.m. - midnight shift on March 30, 1988, was staffed by COs who included Mike Williamson [Williamson], a NCCF employee

since 1962, and by CSIs David Kramme and Beverly Goodwin, individuals who have held those positions for approximately six and 15 1/2 years, respectively. The following shift [midnight - 8:00 a.m. on March 31, 1988], was staffed by COs who included Milton Ringgenberg, Corliss Leners, Charles Teyen and Warren Gordon, and by CSI Brown.

Following the oncoming shift's roll call in the meeting room below, certain COs and CSI Brown ascended the stairs to the shift supervisor's office to secure keys for their use during their shift. Although the testimony of the witnesses at hearing is not consistent concerning the individuals who were simultaneously present in the office at the conclusion of the oncoming shift's roll call, it is apparent that at least CSIs Kramme, Goodwin and Brown, and COs Williamson and Ringgenberg were simultaneously present in the office for a time.

Kramme, Goodwin and Williamson were awaiting the arrival of the oncoming shift when at least Brown and Ringgenberg came to the supervisor's office. Williamson had served as the prior shift's AO, and Ringgenberg was to fulfill that role during the oncoming shift, necessitating an exchange of Williamson's AO keys for Ringgenberg's key tag, as described above. Kramme was waiting for Brown's arrival so that a key exchange could take place between them, and Goodwin was standing in the vicinity of the office's doorway, waiting to walk to the parking lot with Williamson once his exchange with Ringgenberg had taken place.

According to Brown's testimony at hearing, the required

exchanges took place uneventfully, the only unusual thing occurring when he passed Williamson, who was standing in the aisle between the desk and the cabinets, and bumped the spigot on the coffee dispenser, causing the release of hot coffee onto Brown's own leg.

Williamson and Goodwin, however, testified that after his arrival in the supervisor's office Brown assumed a position to the immediate right of Williamson and intentionally shoved Williamson with his left arm/shoulder. According to their testimony this shove was not of such force that it knocked Williamson down or even created an audible sound, although it interfered with Williamson's balance sufficiently that it moved him slightly to his left. Both further testified that following this contact Williamson looked at Goodwin, who raised a finger to her lips, indicating her advice to Williamson that he say nothing about what had just occurred.

Neither Kramme nor Ringgenberg were aware of any physical contact between Brown and Williamson at the time such contact is claimed to have occurred. Kramme testified that although he saw no shove occur, and although he would have been in relatively close proximity to Brown due to the cramped quarters, he could have easily failed to observe the type of contact which allegedly occurred. Ringgenberg, the other individual who was clearly present in the office at the time of the alleged contact, testified that if a shove occurred during the course of his exchange with Williamson he too might not have been aware of it, since the exchange involves his locating his key tag and the removal of his belt so that he can attach the just-acquired keys and a radio to

the belt and put it back on. According to the testimony of Williamson and Goodwin, the contact occurred while Ringgenberg was digging in his pocket for his key tag to deliver to Williamson.

Brown maintains that at least three other COs were present in the supervisor's office at the time, and called COs Gordon, Teyen and Leners as witnesses at the hearing, all of whom testified they saw no physical contact between Brown and Williamson on the date in question. Gordon, however, also testified that although he passed through the office after roll call on the way to his post, neither Brown nor Ringgenberg had yet reached the office. Similarly, Teyen testified that while he did pick up his keys from the office after roll call, the keys were simply lying on the desk, so he took them and left the office prior to Brown's arrival. Leners is unsure of whether he stopped at the supervisor's office or not, and if he did, whether Brown or Williamson were even there at the time. Leners acknowledged that if he were assigned to one of the living units during that shift he would have secured keys from the office after roll call, and I find, on the basis of Appellant's Exhibit I (the shift's schedule for March 18 - 31, 1988), that Leners was, on the morning of March 31, assigned to living unit 3 South, and thus did secure keys to that unit from the supervisor's office. The presence of any other individuals in the office at the time, however, has not been established.

Following the exchanges in the shift office, Kramme, Williamson and Goodwin left the office and the facility, using the "walk through" to the facility's control center in order to reach the

lot where their vehicles were parked. As they were leaving Kramme heard Goodwin comment about Williamson being shoved by Brown, and was told by an agitated Williamson, once they reached the parking lot, that he had been shoved by Brown and was filing a grievance.

Although the record is less than clear in this respect, Williamson apparently reported the alleged shove by Brown to the local union's president, Don Geerdes, later on March 31, 1988. The record indicates that Geerdes then contacted Superintendent Ault and advised him of the allegation. Ault arranged a meeting for later that afternoon, which was attended by Ault, Williamson, union representative Marlene Brown and a union steward, Kim Courter. At that meeting Williamson advised Ault of his version of what had occurred, and of the individuals present (himself, Brown, Kramme, Goodwin and Ringgenberg).

Ault directed Williamson to prepare a report of the incident, and later in the day requested a report from Goodwin. He also asked Goodwin to request a report from Kramme. On the following day Ault contacted the Iowa Department of Personnel [IDOP] concerning the situation, advised IDOP of his receipt of Williamson's report, and was told to collect statements from all individuals present at the alleged incident. Before leaving for the day Ault received Goodwin's report and discussed it with her.

That evening Ault telephoned Brown, advised him of the allegation which had been made and asked him to prepare a report which they would discuss the next morning at the conclusion of Brown's shift. Brown telephoned Ault back later that evening, and

was provided with particulars concerning the exact date and time of the alleged incident. Ault also encountered Kramme that evening at another location, and directed him to prepare and submit a report concerning Kramme's observations, if any.

The following day Ault reviewed Brown's report with the appellant, whose statements to Ault were essentially consistent with his testimony at hearing, although there is no evidence that Brown then advised Ault of the presence of individuals other than himself, Williamson, Kramme, Goodwin and Ringgenberg. Ault testified that he advised Brown that the allegations, if substantiated by the ongoing investigation, could result in disciplinary action being taken. Later that day Ault spoke with Ringgenberg and secured his statement concerning the events of early March 31, which statement was consistent with Ringgenberg's testimony at hearing.

Ault subsequently drafted a memo to Hawkins, who had been on vacation on March 31, and turned the investigation over to him, asking him to complete the investigation and make recommendations as to what action, if any, should be taken.

Hawkins reinterviewed the individuals who had provided statements to Ault, including Brown, and secured another, more detailed, statement from Ringgenberg. Hawkins testified that he also interviewed other possible witnesses mentioned by Brown, although those potential witnesses provided no concrete information concerning whether the physical contact alleged had in fact occurred or not.

Based essentially upon the statements of Williamson and Goodwin, Hawkins concluded that the alleged intentional physical contact had in fact occurred, and that such action by Brown had violated rules 1 and 29 of NCCF's General Rules of Employee Conduct.[1] Having subscribed to the versions related by Williamson and Goodwin, which directly contradicted Brown's, Hawkins also concluded that Brown had violated General Rule 9[2] by providing untruthful information during the course of the investigation.

Hawkins, noting that in February, 1987, Brown had received a five-day suspension for, among other things, giving false information, imposed a 10-day suspension without pay, commencing May 4, 1988. This suspension was communicated to Brown in a letter of suspension from Hawkins dated May 2, 1988, for which Brown signed, acknowledging receipt, on that date. The evidence also indicates

---

[1] I find that Brown received a copy of those rules and acknowledged their effective date of July 10, 1987, on June 28, 1987. (Employer's Exhibit 9).

Rule 1 provides that all NCCF employees shall "[c]onduct themselves in a manner that creates and maintains respect for the Department of Corrections. In all their activities, personal and official, they should be mindful of the high standards of behavior expected of them."

Rule 29 provides: "At all times employees shall treat each other, inmates, guests, visitors, and the public with fairness, courtesy, and respect. Employees shall not show favoritism toward or discrimination against any person. All harassment, including that based on but not limited to sex, race, religion, national origin, physical or mental disability, age, organizational affiliation, or criminal history, is strictly prohibited."

[2] Rule 9 provides: "Employees are required to cooperate fully and honestly in any institutional inquiry, investigation, or hearing."

that Brown was, on that date, provided with copies of his own written statement, together with copies of the statements of Goodwin and Kramme, and the two statements of Ringgenberg.

The allegations made by Williamson on March 31, 1988, were not the first evidence of conflict between Williamson and Brown. The record is replete with evidence of the bad blood which exists between these two individuals. Although detailed recitation of their past allegations and counter-allegations would serve no useful purpose, it is noted that Brown has alleged at least three prior incidents during 1987 and 1988 in which he claims he was the victim of intentional bumping by Williamson, and Williamson has complained of at least two prior incidents where he was allegedly bumped by Brown. All of these complaints were brought to the attention of Hawkins and/or Ault, although none of the alleged bumping incidents were witnessed by other individuals, and none resulted in the imposition of any discipline. Another Williamson complaint, dealing with Brown's alleged harassment of him and Brown's writing of a "Clarification of Expectation" to Williamson's personnel file, resulted in the filing of a prohibited practice complaint with PERB.[3]

During his investigation of both Brown's and Williamson's allegations concerning a bumping incident in January, 1988, Hawkins advised both individuals that should further similar incidents

---

[3] That complaint was resolved by a Consent Order/Agreement signed by, inter alia, Williamson and Brown, on April 6, 1988, which provided that all communications between those individuals would be directed through another individual, Jerry Burt.

occur, they should speak out to the other at once. Both were reluctant to do this, Williamson testifying that he told Hawkins he didn't want to confront Brown because he was uncomfortable and intimidated by Brown, and Brown indicating that he would confront Williamson only if a third person was present. [See Employer's Exhibit 14.]

It is apparent that neither Williamson nor Brown took Hawkins' direction to confront the other, at the time it was given, as a superior's order, but rather they appear to have understood it as a suggested procedure, regardless of how it was intended by Hawkins. Hawkins did testify, without contradiction, that both Brown and Williamson understood, after the January, 1988 allegations were made, that intentional bumping or shoving incidents were inappropriate workplace behavior and would not be tolerated.

In short, the record fully substantiates Brown's characterization of his relationship with Williamson as "terrible".

Both Brown and Williamson have experienced difficulties with other co-workers in the past. The record reflects an incident where Williamson fought with a co-worker off the NCCF grounds, and another incident, also away from the worksite, where a co-worker took a swing at Williamson. The record does not disclose that any individual was disciplined as a result of either incident.

Brown has been the subject of a group grievance concerning his allegedly-improper behavior during a search of his person when

reporting for duty during June, 1985,[4] and of another grievance filed in October, 1986, concerning Brown's alleged favoritism in assigning COs to interinstitutional trips and his alleged falsification of records concerning the making of such assignments.[5]

CONCLUSIONS OF LAW

Section 19A.14, Code of Iowa (1987) provides that PERB hearings on appeal of decisions to discipline merit system employees shall be conducted in accordance with PERB rules and the Iowa Administrative Procedure Act (chapter 17A, Code of Iowa), and that decisions in such cases

> . . . shall be based upon a standard of just cause. If the public employment relations board finds that the action taken by the appointing authority was for political, religious, racial, national origin, sex, age or other reasons not constituting just cause, the employee may be reinstated without loss of pay or benefits for the elapsed period or the public employment relations board may fashion other appropriate remedies. . ..

This provision clearly provides PERB with authority to make a de novo determination of whether just cause existed for the discipline imposed. The issue for my determination is thus whether

---

[4] Investigation of the grievance resulted in a conclusion that Brown's conduct during the search was unprofessional and in violation of the facility's security practices, and was the basis for a five-day suspension without pay.

[5] Investigation of the grievance resulted in finding that Brown had intentionally falsified records and had made false or malicious statements concerning other employees, and resulted in the imposition of another five-day suspension without pay. Brown appealed this suspension to PERB, and the suspension was sustained by adjudicator's decision issued June 19, 1987. See Brown vs. Department of Corrections, 87-MA-24. Brown's attempted appeal to the Board was subsequently dismissed due to its untimely filing.

just cause existed for the Department of Corrections' suspension of Brown from his position as Correctional Supervisor I at the North Central Correctional Facility on May 2, 1988, or whether such suspension was instead for one of the prohibited reasons specified by section 19A.14.

In determining whether just cause exists for the imposition of discipline by an employer, arbitrators and PERB adjudicators have examined a number of factors, including:

1. Whether there was a full and fair investigation before the decision to discipline the employee was made;

2. Whether the reasons for the discipline were adequately communicated to the employee;

3. The employee's employment record, including years of service, performance and disciplinary record;

4. Whether progressive discipline was followed, or is not applicable under the circumstances, and

5. The existence of mitigating circumstances which would justify a lesser penalty.[6]

Having reviewed the record and the respective arguments of the parties, I conclude that the decision to discipline Brown was made only after the conclusion of an adequately full and fair investigation of the facts by the employer. The record is clear that before Hawkins made the determination to impose discipline both he and Ault had interviewed Williamson, Brown, Goodwin, Kramme and

---

[6] See, e.g., Hyatt Hotels Palo Alto, 85 LA 11, 15 (Oestreich, 1985); Wessling v. Iowa Department of Transp., 87-MA-10 (Adjudicator's Decision).

Ringgenberg, and had reviewed their written statements.[7]

The day after Williamson's allegations were called to his attention, Ault contacted Brown, advised him of the allegations, and requested a report concerning Brown's recollection of events which had transpired. Ault met with Brown on April 2, 1988, received Brown's report, and discussed the situation with him. Similarly, Hawkins met with Brown following Ault's assignment of the investigation to him, but before the decision to discipline had been reached. I conclude that Brown was thus given a full opportunity to respond to the allegations made against him.

Brown argues that since he was afforded no adversarial hearing during the course of the investigation and prior to the imposition of discipline, the investigation was violative of his right to due process of law. The only authority cited by the Appellant in this respect, however, is Ault's opinion that due process constitutes a component of just cause, and that due process requires a hearing. I am not persuaded by this "authority" that just cause requires a pre-disciplinary adversarial hearing, at which an accused employee is entitled to counsel and the right of confrontation. Such protections are afforded an employee should he elect to challenge an employer's imposition of discipline as Brown has done in this case, and I decline Appellant's invitation

---

[7] The record also establishes that Hawkins, after his interview with Brown, interviewed other potential witnesses who had not previously been contacted by Ault, but who Brown believed might have information favorable to him. The record is, however, unclear as to exactly when these interviews took place.

to conclude that just cause cannot exist without the conduct of an adversarial hearing before discipline is imposed.[8]

Nor can I conclude that just cause does not exist due to a failure to communicate the reasons for the discipline to Brown. To the contrary, I conclude that the Appellant was adequately advised of the reasons for the discipline which was imposed.

Brown cannot seriously maintain that he was unaware that bumping or shoving incidents were considered inappropriate or that discipline would be imposed upon the perpetrator if such incidents were found to have occurred. While admittedly drawn in broad terms, NCCF's General Rules of Employee Conduct requiring employees to conduct themselves in a manner which creates and maintains respect for the Department of Corrections, and requiring that employees avoid the harassment of others and instead treat others with courtesy and respect, are not so vague that they failed to put Appellant and other employees on notice of the type of conduct which the rules prohibit. Additionally, the rules themselves specifically provide that "[f]ailure of an employee to follow these

---

[8] Nor do I accept Appellant's argument that Hawkins' failure to "reenact" the alleged incident requires a conclusion that a full and fair investigation was not conducted. The record establishes that Hawkins is familiar with the location where the incident is alleged to have taken place, and common experience indicates that the relatively minor nature of the physical contact alleged to have occurred, and its short duration, might easily have escaped the notice of persons present who were not viewing Brown and Williamson at the precise moment of the alleged shove, despite their close proximity to those individuals. I conclude that the failure to reenact the alleged incident does not make the investigation which was conducted less than complete or objective.

rules shall result in appropriate corrective measures being taken. The degree of discipline that may result in any given instance shall be determined in light of the security impact, culpability, past performance, and discipline record, length of service and other pertinent facts."[9] Brown unquestionably had notice of these rules and of their effective date, as found above.

Further, Appellant was aware that bumping and shoving was considered to be impermissible and to be grounds for the imposition of discipline on the basis of his discussion with Hawkins following the incidents which both he and Williamson alleged occurred in January, 1988. Hawkins' testimony that he met with both Brown and Williamson following the lodging of their respective allegations, and that both Brown and Williamson clearly understood that shoving incidents were inappropriate and would not be tolerated, is uncontroverted.

Nor can Brown claim that he was without fair notice that untruthful statements made in the course of an institutional inquiry or investigation were grounds for discipline. General Rule 9 is clear and unambiguous in requiring cooperation and honesty in such situations, a requirement well known to Brown by virtue of his prior discipline for, inter alia, allegedly making false statements concerning other employees.

Finally, it is clear that once the decision to discipline was made, the reasons for such action were adequately communicated to

---

[9] Employer's Exhibit 1, p. 1.

the Appellant. The letter of suspension authored by Hawkins (Employer's Exhibit 6) summarizes the investigation which was conducted, sets forth Hawkins' conclusions as to what in fact occurred and details the rules which Hawkins concluded had been violated. Brown received and signed for a copy of the letter on May 2, 1988.

I thus conclude that Brown knew that the behavior he was found to have committed was inappropriate and the proper subject of discipline, and that the reasons for the imposition of discipline were adequately communicated to him.

The remaining factors typically considered in a just cause determination (employment record, whether progressive discipline was followed and the existence of mitigating circumstances justifying a lesser penalty) are relevant only if an infraction has occurred. Just as prior bad acts cannot generally be used to establish the guilt of a defendant in a criminal case, the existence of a prior disciplinary record should not be considered in determining whether an alleged rule violation or offense has in fact occurred.

While I have previously concluded that an adequate investigation was made by the employer prior to a decision to discipline, and that the reasons for the discipline were communicated to Brown, I have not yet addressed the question of whether there is cause to believe that an infraction in fact took place, a determination I believe I am required to make in view of the de novo nature of this review. Put another way, although I have concluded that an

adequately full and fair investigation was conducted, is there adequate evidence for a conclusion that Brown in fact committed the act alleged? This I perceive to be the true fighting issue in this case.

The employer's conclusion based upon its investigation, and its position in this appeal, is that Brown intentionally bumped and shoved Williamson in the shift supervisor's office on the morning in question. Without doubt, the testimony of Goodwin and Williamson supports such a conclusion. On the other hand, Brown denies that any intentional physical contact took place, and testified that he is unaware of even any incidental contact. The testimony thus presents an irreconcilable conflict.

Just as courts and juries are required to do when faced with irreconcilably conflicting testimony, I must judge the credibility of the witnesses on the basis of their interest, bias, motives, strength of memory, demeanor at hearing and a number of other factors, for the key issue in this case turns upon a credibility contest between Brown on one side and Williamson and Goodwin on the other.[10]

---

[10] I do not find Brown's argument to the effect that because Ringgenberg and Kramme were unaware of any physical contact, no such contact could possibly have occurred, to be persuasive. The nature of the physical contact alleged, and demonstrated by Goodwin at hearing, is of such mild impact and of such a brief duration that I find it entirely possible that others in the immediate vicinity could have been unaware of the contact if it occurred, especially if their attention was not firmly and continuously fixed upon Brown and Williamson. Both Kramme and Ringgenberg testified that they could have failed to observe the contact alleged, if it occurred, and I thus decline the Appellant's invitation to conclude that their failure to see or hear the shove requires a finding that it did not occur.

These witnesses' credibility must be judged in a context which includes other facts which have been established, such as the deplorable state of the relationship between Williamson and Brown. Williamson has received at least one clarification of expectations letter from Brown, which spawned the filing of the prohibited practice complaint previously mentioned, and has characterized Brown's treatment of him as "harassment". Williamson candidly acknowledged at hearing that he harbors hard feelings toward Brown as a result of their relationship. It requires no clairvoyance to recognize that Williamson may possess a distinct bias against Brown, and may thus be motivated to falsify information which could be detrimental to him. Additionally, even though Williamson may not be the individual most directly affected by the outcome of this case, he still possesses an interest in its outcome for if it is determined that his allegations concerning Brown's behavior were fabricated, he too could be subject to discipline for violation of NCCF General Rule 9.

Similarly, Brown's employment has not been made any easier by Williamson's existence. Williamson's allegation's of prior bumping incidents by Brown were certainly not welcomed by him, and Williamson's role as chief steward in the filing of grievances, apparently including the group grievance which ultimately resulted in Brown's receipt of a five-day suspension in 1987, have not escaped Brown's notice. Additionally, Brown is the individual most directly interested in the resolution of this matter, a fact which should also be considered in judging his credibility.

Also affecting my view of Brown's credibility is his testimony at hearing concerning how he first acquired knowledge of Williamson's allegations that something had transpired between them on the morning of March 31, 1988. In as apparent attempt to bolster his argument that the employer's investigation was not adequately or fairly conducted, Brown initially testified that he first learned of Williamson's allegations more than a week after the alleged incident took place. (Tr. pp. 257-58). However, when confronted on cross-examination with his own written report of the occurrences of March 31, dated and signed by Brown himself on April 2 and received by Ault at 7:36 a.m. on that date (Employer's Exhibit 14), Brown's version of how he acquired knowledge of the allegations changed. Brown then testified that he heard of Williamson's allegations from an officer who had been at the control center on the morning of March 31, and who had allegedly heard Williamson, Goodwin and Kramme talking as they left the facility. Brown steadfastly refused to directly contradict Ault's testimony concerning their two telephone conversations on the day following the alleged incident, testifying instead that he simply had no recollection of such contact, or even of preparing his report.

I am troubled by what thus appears to be, at a minimum, a case of selective memory by Brown. On the one hand, he claims specific recall of details of the shift change on the morning of March 31, down to individuals who were present while both he and Williamson were in the room and of his burning his leg with coffee when brushing against the office's dispenser. On the other hand he

denies any recollection of being telephoned by Ault, of calling him back for more details, or of writing his report of April 2, 1988. Further, his assertion that he first heard of the allegations through the facility's grapevine, information clearly responsive to a direct question by his own counsel (Transcript, p. 257, lines 22-24), was forthcoming only when Brown was confronted with documentary evidence which contradicted his earlier testimony. Brown's testimony thus establishes either a lack of candor or a weakness of memory, and must be taken into account in judging his credibility on the key issue of whether an intentional shove took place.

Unlike Williamson and Brown, however, the record contains nothing to indicate any bias, interest, prejudice, significant lack of memory or other factor adversely affecting the credibility of Goodwin, the only other individual who claims to have observed the alleged bump by Brown. True, the record does reflect that on March 31, 1988, Goodwin's eyesight in her left eye was impaired to some extent by a cataract which subsequently received surgical attention, although the record also reflects that Goodwin never experienced any difficulty performing her job assignments due to her eyesight, even before her surgery. I do not believe that Goodwin's reliability has been adversely affected by this testimony or by any other impeachment attempt made by Appellant's counsel.

Consequently, having scrutinized the demeanor of the witnesses at hearing, and having considered a number of factors concerning the credibility to be afforded their testimony, I conclude that

the credible evidence in the record establishes that Appellant Brown did in fact intentionally bump Williamson in the NCCF supervisor's office on the morning of March 31, 1988, and that the employer thus had just cause to conclude that Brown had engaged in a violation of NCCF's General Rules of Employee Conduct.

Having concluded that an infraction has occurred does not, however, end the inquiry. Three other factors (employment record, whether progressive discipline was followed and the existence of mitigating circumstances) which focus on the appropriateness of the discipline imposed, should also be considered. Having done so, I cannot conclude that any such factor requires a vacation or modification of the 10-day suspension from which Brown appeals.

Brown has been employed as a CSI at NCCF since July, 1982, and although the record does not contain abundant information concerning his job performance, the two annual evaluations which were entered into the record reflect an employee whose overall performance is well above the level of mere competence (See Employer's Exhibits 10 and 11). This generally-favorable characterization is tempered somewhat by a correction memorandum of August 5, 1985 (Employer's Exhibit 4), and by Brown's disciplinary history, which reflects a five-day suspension in July, 1985 (See footnote 4), and a five-day suspension in March, 1987 (See footnote 5), in which Brown was also found to have made false statements and record entries.

The concept of progressive discipline, embodied in the rules of the Iowa Department of Personnel,[11] has clearly been followed by

[11] See 581 Ia. Admin. Code section 11.2 (19A).

the employer in the instant case. The purpose of progressive discipline is to correct an employee's behavior, rather than merely to punish.[12] It is apparent that the employer, having twice before imposed five-day suspensions, had reason to believe that a more severe penalty was necessary in order to correct behavior which it found had not been corrected by its prior disciplinary actions. The 10-day suspension imposed in this case is not so inordinately severe under the circumstances that an adjudicator should modify it as violative of the concept of progressive discipline.

Nor do I find that mitigating circumstances which would justify a lesser penalty exist. Were this a civil action by Williamson for damages arising from the bump by Brown, a jury would, I believe, be justified in considering the frankly trivial nature of the physical contact which occurred as a mitigating factor, and in awarding only token damages. The thrust of this case, however, deals not with the damage to Williamson's person or feelings, but instead with the employer's authority to enact and enforce work rules reasonably related to the orderly, efficient and safe operation of its facilities. I conclude that rules governing the conduct of employees of a correctional facility which require decorous behavior and complete candor are indeed reasonably related to the performance of the facility's function, and that the insignificant physical consequences of Brown's action is not a mitigating factor which should be relied upon to reduce the progressive discipline which has been imposed.

---

[12] Wullner v. Iowa Department of Corrections, 87-MA-16 (Adjudicator's Decision).

Having reviewed each of the arguments raised by the Appellant, whether expressly discussed herein or not,[13] I conclude that Appellee Iowa Department of Corrections has established just cause for its 10-day suspension of Mel Brown issued on May 2, 1988 and effective May 4, 1988.

---

[13] Both at and following hearing, Appellant has maintained that the employer's failure to discipline Williamson for his failure to confront Brown immediately and in person when the shove occurred established unequal application by the employer of its work rules, a factor which Appellant maintains should be considered in a just cause determination. Such a factor has been considered by certain arbitrators in making just cause determinations [See Grief Bros. Cooperage Corp., 42 LA 455 (Daugherty 1964)], and it is undisputed that disobedience of a lawful order of a supervisor constitutes a violation of NCCF's rules (See Rule 26).

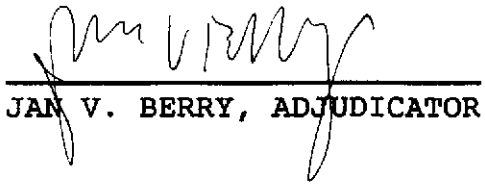
While the record is clear that Hawkins told both Williamson and Brown that the victim of any future bumping incidents should immediately confront the aggressor, the record is less than clear that either Brown or Williamson took this as a direct order from a supervisor, rather than mere advice. If Brown at that time considered it a direct order, I find it difficult to believe he would have risked an immediate charge of insubordination by telling Hawkins that he would follow the order only if a third person was present, as he claims he did (See Employer's Exhibit 14, p. 2). Williamson's testimony to the effect that he took Hawkins' instruction as mere advice, rather than a superior's order, is uncontroverted, and his unrebutted testimony that he received contrary instructions from the Iowa Department of Personnel, which was already involved with the relationship between Williamson and Brown due to the previously-filed prohibited practice complaint alleging harassment by Brown, appears to explain his otherwise-unusual failure to confront Brown in the presence of at least three other witnesses.

I consequently decline Appellant's invitation to conclude that the employer's failure to discipline Williamson for a less-than-clear violation of NCCF Rule 26 establishes inequal application of the employer's rules and requires a conclusion that just cause does not exist for Appellant's discipline based upon a violation of separate and distinct institutional rules.

AWARD

The appellant's appeal is denied.

DATED at Des Moines, Iowa, this 19th day of May, 1989.



JAN V. BERRY, ADJUDICATOR

copies to :

Michael L. Jankins
2323 Grand Avenue
Des Moines, IA 50312

Lorenzo D. Creighton
c/o William C. Snyder
Labor Relations Bureau
Iowa Department of Personnel
Grimes State Office Building
Des Moines, IA 50319