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LABOR & PERSONNEL DIVISION

### ARBITRATION AWARD

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 In the Matter of the Arbitration )  
 )  
 between )  
 )  
 TEAMSTERS LOCAL 117 )  
 (Union) )  
 and )  
 )  
 STATE OF WASHINGTON )  
 DEPARTMENT OF CORRECTIONS )  
 (Employer) )  
 -----

Francisco Bushey  
 (Grievant)  
 FMCS No. 14-01995-6

BEFORE: Eduardo Escamilla, Arbitrator

APPEARANCES:

For the Employer: Valerie Petrie, Attorney


For the Union : Laura Ewan, Attorney

Date of Hearing: November 19, 2014

Place of Hearing: Connell, Washington

Date of Briefs: January 30, 2015

Date of Award: February 24, 2015

  
 Eduardo Escamilla  
 Arbitrator

## **ISSUE**

Did the Employer have just cause to discharge the Grievant, Francisco Bushey for off-duty conduct? If not, what is the appropriate remedy?

## **STATEMENT OF FACTS**

STATE OF WASHINGTON DEPARTMENT OF CORRECTIONS, (Employer) and TEAMSTERS LOCAL 117 (Union) share a collective bargaining agreement in effect at the time of the grievance. The contract contains a grievance/arbitration procedure that requires the parties to resolve their contract disputes through this process.

This matter involves the discharge of the Grievant on March 28, 2013, from the Department of Corrections, Coyote Ridge Corrections Center, Connell, Washington. The Employer discharged the Grievant for "illegal off-duty conduct" that occurred on March 10, 2013, involving a physical altercation with the Grievant's wife. This incident resulted in the Grievant's arrest and criminal charges of domestic violence. The Employer asserts that the Grievant's conduct violated the Employee Handbook that contains a CORE Competencies section which states that employees are expected to "adhere to appropriate and effective core values/beliefs and act in accordance with those values at all times." It also elaborated that the Grievant is expected to "avoid inappropriate situations and actions" and "demonstrate ethical behavior and teach its importance to others."

The Employer's discharge letter also cited the handbook that states that employees "are not allowed to engage in verbal assaults, threatening behavior or physical assault against the public." The Employer's policies (Section 850.125 Workplace Violence) states that "disciplinary action may also be taken against staff that are arrested, convicted, or issued a permanent or temporary injunction as a result of domestic violence, when such actions are determined to affect the staff's work performance or the Department's mission."

The Pasco Police Department investigated the assault. The police officer initially prepared a criminal citation of simple assault. However after speaking to his supervisors, the charges were changed to felony assault charges because of the strangulation aspect of the incident. The investigative report showed that both the Grievant and his wife displayed physical evidence of assault on their bodies.

The Grievant admitted he was involved in an argument with his wife that became heated. The Grievant and his wife had been drinking and an argument ensued when the Grievant's wife wanted to continue drinking. The Grievant does not recall that he attempted to choke his wife. He did admit slapping her as well as his wife slapping and scratching him. He does not recall threatening to kill his wife.

The Employer also presented evidence from its human resource consultant who also was a hiring recruitment officer. The HR consultant states that an officer is required to be able to possess firearms because of potential job duties. If an individual is not able to carry weapons, that individual does not meet the job's description. Federal and state law prohibits a person convicted of domestic violence to carry a weapon. An employee may use the legal system to obtain the right to carry firearms for the job. Under state law, domestic violence convictions deny people the right to carry guns. There are correction officers' positions that do not require the correction officers to carry any weapons.

The Employer admitted that some correction officers have been convicted of charges of driving under the influence and have not lost their employment status, even though they were convicted of felony charges. The Employer conceded that some employees who have been involved in domestic violence are still retained employees.

The Grievant admits to the details of the domestic violence allegations. However he maintains his loss of temper was the result of work stress created because an inmate had died in front of him. The Grievant made inquiries about taking leave under Federal Medical Leave Act. Subsequently, the Grievant entered into a domestic violence perpetrator rehabilitation program as ordered by the court. Pursuant to court order, the Grievant was not allowed to

possess fire arms during his probationary period but the court allowed the Grievant to carry weapons for purposes of his duties as a correction officer.

The Employer maintains that it had reasonable cause to discipline the Grievant. The Employer provided the Grievant an opportunity to respond to the allegations. The Employer based its decision to discharge the Grievant as a result of the Employer's investigation rather than relying upon the completion and outcome of the domestic violence criminal charges.

## **ANALYSIS**

The parties agree that the central issue in this case is whether the Employer had just cause to discipline the Grievant. Inherent in determining this issue, several well-recognized axioms of legal principles involving the determination of just cause are adopted. In disciplinary matters, it is the burden of the Employer to prove by the preponderance of the evidence that it had just cause to discipline the employee.

Firstly, Employers are endowed with the right to establish rules and policies under the general management rights provisions of the contract. They are generally within their managerial rights to establish these rules for the purpose of achieving business goals or promote the health and welfare of the employees. These rules create expectations that employees must abide by in order for continued employment. Thus, the Employer must establish that the disciplined employee violated a well-known rule that was reasonably implemented to achieve the Employer's business goals and safety and welfare of employees.

Once establishing the Employer has such a rule, it must be shown that the disciplined employee was aware of the rule and was also aware that adverse consequences would ensue if the rule was violated. Thus, the groundwork for Employers to manage its workforce through the disciplinary process of enforcing reasonable work must be established.

If an Employer believes an employee violated a work rule, it is incumbent upon the Employer to provide the employee with inherent due process rights that are incorporated in the just cause provisions of the contract. These due process rights include a fair and open investigation of the allegations against the employee; specificity of the allegations; and an opportunity for the employee to respond to the allegations. Additionally, many arbitrators also find that the timely investigation and disciplinary action by the Employer is also a requirement for due process.

Upon completion of the investigation and deliberation by the Employer of all the evidence, the Employer then has wide latitude to decide whether or not it has a reasonable basis to conclude that it had just cause to discipline an employee. Normally, the Employer's discretion may not be usurped by arbitrators nor should an arbitrator's own judgment on the degree of punishment be substituted for that of the Employer's.

#### Union's position

The Union maintains that the Grievant's discharge was without just cause as the Employer could not demonstrate any nexus between the off-duty incident and the Grievant's ability to perform his duties at work. The Employer's actions were overly harsh and inconsistent with the principles of progressive discipline as mandated by the just cause provision of the contract. The Union also alleged that the Employer inconsistently applied discipline when compared to other employees who have been involved in off-duty incidents. The Employer unfairly relied on post termination developments in the Grievant's legal case.

In the instant case, I find that the Employer substantiated the allegations that the Grievant violated the Employer's rules and policies regarding domestic violence and personal

conduct. The Employer demonstrated by a preponderance of the evidence that its policies clearly prohibit employees from engaging in off-duty conduct detrimental to the employees' obligation to carry out their duties as a correctional officer.

However, the Union maintains the burden of proof still lies with the Employer to establish just cause in discharge cases which carry a higher level of scrutiny. The Employer failed to meet its burden of proof. In discharge cases, the standard of proof is elevated to "clear and convincing evidence" of just cause rather than the preponderance of the evidence standard normally used in contract disputes including disciplinary cases.

Article 8.1 of the contract requires the Employer to have just cause to discipline employees which mandates the Employer to treat employees in a fair and consistent manner. The Union argues that the Employer failed to meet this standard as evidence by other employees with off duty misconduct who were treated differently with respect to the degree of punishment.

The Employer's policies state that "disciplinary action *may* (emphasis added by the Union) be taken against staff who are arrested or convicted." There are no policies that require or mandate immediate discharge of an employee for off duty incidents.

The Union believes that the Employer failed to conduct a careful, unbiased and thorough investigation of the incident before issuing discipline. It points out that the Employer took extraordinary steps by assigning a specific investigator which was contrary to the normal investigation process.

The Union claimed that the investigation was handled unfairly because the Employer's representative did not want to discuss the contents of the files which demonstrated the Employer's predetermined decision of discharge.

Article 4.3 states that "the Employer retains all of the Employer's right to correct or discipline an employee for off-duty conduct, which has a nexus to their employment, subject to the just cause provision of Article 8." The Union argues that the Employer failed to link the off-

duty misconduct with the Grievant's duties to perform his job. The correlation between off-duty misconduct and impact on the Employer's operations must be "reasonable and discernible not merely speculative." *Elkouri and Elkouri, How Arbitration Works*, 15 -11 (7<sup>th</sup> Ed. 2011).

Citing *Broward County Sheriff's Office*, 121 LA at 1185 (2005), the arbitrator concluded there must be a "positive and unequivocal showing" between the off-duty misconduct and legitimate public interest that is or would be detrimentally affected by it. Similarly said off duty conduct of the grievant did not materially and substantially impair his usefulness as a firefighter nor did it affect the performance of his duties or publicly reflect adversely upon its public image."

In *W.E.Caldwell Co.*, 28 LA for 34 (1957), the arbitrator noted a test for when discharge might be appropriate in response to the behavior of employees intoxicated or arrested while off duty:

1. Behavior harms company's reputation or product...
2. Behavior renders employee unable to perform his duties or appear at work, in which case the discharge would be based on inefficiency or excessive absenteeism...
3. Behavior leads to refusal, reluctance or inability of other employees to work with them...

The Union cited numerous cases in which arbitrators have held that the Employer must establish a nexus between the employee's off duty misconduct and the employee's ability to perform its duties as an employee, even in light of a higher standard of conduct because of the employee's job duties. Any assertion by the Employer that retaining the Grievant would detrimentally affect the Employer's reputation was not substantiated by any evidence of actual harm to the Employer's interest. The Employer has retained employees who were charged and convicted of other crimes such as DUIs and domestic violence but has treated the Grievant in a different manner.

The Union discounts the Employer's position that as a convicted felon, the Grievant is not allowed to possess a fire arm, which makes him ineligible to continue his employment. The Union points to the Grievant's plea agreement in which the court specifically allows the Grievant to possess and carry a fire arm as a condition of his employment. The Union argues that the

Employer has correction officer positions in which correction officers are not required to possess or carry a firearm.

The Union requests that the Grievant's termination be rescinded and or reduced to a lesser discipline and the Grievant being reinstated and made whole for his loss of wages and benefits. It also requests that interest be paid on any back pay.

#### Employer's position

The Employer maintains that Grievant was discharged for "engaging in violent and unlawful behavior towards his wife which violated the Employer's expectations, rules and policy." The facts of this case are not in dispute. Grievant was charged with felony assault in the Second Degree (Domestic Violence) and was placed into a two-year felony diversion program by the court. The discharge was appropriate in this case as the Grievant clearly engaged in conduct in violation of the Employer's policies.

The Employer believes it acted within its discretion under the just cause provision of the collective bargaining agreement to discharge the Grievant because of this off-duty misconduct, specifically relying on the Grievant's admissions that, "I placed my hands around my wife, Vanessa Bushey's neck and squeezed, strangling her and causing a loss of consciousness. I was intoxicated and have minimal memory. She and I are family/household members."

The Employer states that the general rule prohibits an Employer from disciplining an employee for off-duty conduct with noted exceptions. However when the Employer can establish a direct and demonstrable relationship between offense and employee' job or connection between the employee's off-duty conduct and the Employer's legitimate business interests, discipline can be imposed. Citing *Re Polk County, Iowa and the American Federation of State, County and Municipal Employees, Local 1868*, 80 LA 639, 642 (Madden, 1983).

The Employer maintains the connection between the Grievant's off-duty misconduct and the impact on the Employer is evident because of the Employer's unique and significant interest in improving public safety. The Employer's objective is to work in collaboration with the criminal



justice partners to contribute employee safety, to protect society, and to lead its inmate population into more pro-social life. Correction officers are expected to serve as positive role models for offenders and work to help them become productive members of society. The Grievant's off-duty misconduct is in direct contradiction to the interest of the Employer when the Grievant engaged in violent behavior and became a defendant in the criminal justice system. The Grievant's behavior of strangling his wife to the point of unconsciousness is akin to many of the crimes inmates have committed. The Grievant's conduct is an embarrassment to the Employer.

The Employer maintains that it has proved the Grievant's misconduct and that the Grievant should have known that this type of misconduct could result in discipline including discharge. The Employer relies on the Employer's Employee Handbook and Human Resources Policies and Directives. The employee handbook includes the following code of ethics which all staff is to follow:

Be an exemplary role model;

Demonstrate higher moral and ethical standards;

Adhere to appropriate and effective core values/beliefs and in act in accordance with those values at all times;

Respect the dignity and individuality of human beings;

Positively represent Washington state government to everyone you meet, because you are our best public relations agent;

Avoid inappropriate situations and actions which result in and/or present the appearance of impropriety; and

Be a good citizen, obey laws while on an off-duty. Your conduct off duty may reflect on your fitness for duty.

Furthermore, the employee handbook (Policy 850.125-Workplace Violence) states:

"Disciplinary Action may be taken against staff that are arrested, convicted, or issued a permanent or temporary injunction as a result of domestic violence, when such actions are detrimental to the staff's work performance or the Department's mission."

The Employer argues that arbitral authority requires an arbitrator not only review the facts of the case but also consider the attending factors, both mitigating and aggravating to determine if the action was fair and reasonable. *BHP Petroleum/Gasco Inc. and Hawaii Teamsters and Allied Workers Local 996*, 102 LA 321, 325 (Najita, 1994)

The Employer concluded that the Grievant's misconduct was egregious and justified termination. Because of his conduct, the Employer maintains that the Grievant lacked the integrity, judgment, and self-control necessary to be a productive employee and role model for staff and offenders. In *Minnesota Department of Corrections*, 130 LA 235, (Daly, Pagel, Lipman, 2011) the arbitrator upheld the discharge of a correction officer who engaged in similar off-duty misconduct as the Grievant. The arbitrator held that the grievant's misconduct in his case struck at the core of the department's purpose and mission and disqualified him from exercising his authority to direct others. *Id.* at 242.

The Employer, citing a Washington State Personnel Resources Board case, *Edward Golla v. DOC*, PRB Case No R-DISM-09-012, (2010), found the Board's reasoning applicable to this case. The grievant's actions "demonstrate an egregious violation of DOC expectations and standards of conduct, and undermine DOC's ability to place trust and confidence in his ability to use good judgment on-the-job. Respondent (DOC) established a nexus between Appellant's off-duty conduct and his employment with the Department of Corrections."

The assertion by the Union of disparate treatment is an affirmative defense which the Union has the burden of proving that the Employer improperly discriminated against an employee. The Employer argues that the Union failed to meet its burden. The Employer points out that the Union's evidence of disparate treatment is flawed. The three cases cited for comparison dealt with correction officers who had received lesser discipline than the Grievant for off-duty conduct. However in all those situations the misdemeanor charges for domestic violence had been reduced to non-domestic violence charges and were dismissed altogether.

The Employer maintains that all correction officers must have the ability to lawfully possess a weapon. Because of his felony conviction the Grievant is prohibited from possessing

and carrying a weapon which immediately disqualifies him for reinstatement. Even though under the Felony Diversion Agreement entered by the state and the Grievant, which allows him to carry a weapon for a purpose of his job, the Employer concludes that after the agreement expires, the Grievant will not be allowed to carry a firearm. Thus he will not be competent to perform all the essential functions of a correction officer.

### Conclusions

I have carefully considered the parties' evidence, arguments and post hearing briefs in support of their respective positions. The main issue presented by the facts is whether or not the degree of discipline was justifiable under the just cause provision of the contract. Arbitrators have been reluctant to consider themselves as the ultimate decision-maker on the degree of punishment. Arbitrators normally provide due respect to the Employer's discretion of the degree of discipline. However circumstances in cases, which contain evidence of disparate treatment, unusual circumstances, and other mitigating factors, are sufficient foundation for arbitrators to rescind, and or modify the disciplinary action.

Disparate treatment discipline of employees must be established by the preponderance of the evidence. Disparate treatment requires that the degree of discipline be the same and also the circumstances and facts of the case be equally similar. Both factors are critical in determining disparate treatment.

Initially, I find that the evidence does not support the assertion that the Employer engaged in disparate treatment based on prior incidents. The incidents which were offered as disparate treatment did not involve similar facts or same circumstances. The evidence failed to show that the Employer engaged in an arbitrary or capricious manner in administering its policies dealing with domestic violence. There is lack of evidence to show a clear pattern of how the Employer has reacted when dealing with its employees who are convicted of a felony crime.

The prior incidents highlighted as disparate treatment cases do not have the unique circumstances of this case. Firstly, the Employer acknowledged that some of the correction officers have felony convictions for DUI. However, the Employer distinguishes the two sets of

felonies that involve different intent. A felony assault carries intent to harm to another. In DUI felony conviction does not necessarily require the same level of intent. Ultimately, it is the Employer's treatment of similarly situated cases that is the deciding factor in determining disparate treatment. When no similarities exist or sufficient different circumstances exist the defense of disparate treatment against discharge lacks a foundational basis.

In the instant case, I find that the evidence was insufficient to show that the Employer acted in an inconsistent, disparate manner when dealing with employees involved in criminal off-duty misconduct.

The Union complained about the unfair pre-disciplinary investigation conducted by the Employer. I have reviewed the Employer's process in determining disciplinary action and I do not find sufficient evidence that the Grievant was treated unfairly and denied his due process rights under the collective bargaining agreement. The selection of the person to conduct the pre-disciplinary investigation is within the discretion of the Employer. Unless it can be shown there is a clear bias towards the Grievant, the Employer's right to select its investigator should be respected. In the instant case I did not find substantive evidence that the selection of the investigator was unfair.

Secondly, the Union's claim that the investigation was conducted unfairly because of comments by the investigator during the pre-disciplinary meeting with the Grievant and the Union does not amount to a bias and unfair investigation. The comments were made to the Union representative and did not have any effect on the investigation process. The Employer met its duty to openly and fairly investigate the incident and provided the Grievant an opportunity to respond to the accusations. It is difficult to understand how the investigation unfairly acquired facts to the detriment of the Grievant when the disciplinary action relied on the Grievant's admission contained in the plea agreement sanctioned by the court.

The issue then becomes whether the off-duty misconduct affects the employee's ability to perform his duties as a correction officer or has an adverse impact on the Employer's reputation in the community. The Employer maintains that it would be contrary to its objectives to have a correction officer with a felony conviction to monitor inmates with similar convictions.

But for the circumstances of the plea agreement, the Grievant could well have been incarcerated for his criminal misconduct. The incongruity of placing an individual with such a background to monitor other individuals with similar backgrounds is readily apparent. The effectiveness of such correctional officer immediately comes into question.

There is no rule that requires the discharge of correction officers for these offenses. In fact the Employer's policies state that the Employer may discharge an employee for off-duty misconduct involving the domestic violence. The policies provide the Employer with some discretion in dealing with domestic violence cases. But the policies do not require immediate discharge.

However the policies do not limit the Employer in its discretion of deciding the degree of discipline. The Employer's policies do not provide a sufficient basis to conclude that the Employer's disciplinary action is limited to corrective discipline. Rather the Employer still retains its rights under its policies and the collective bargaining agreement to discharge employees for just cause, without the use of progressive discipline.

The disqualification of employment for reinstatement because of post-discharge developments is oftentimes sufficient basis to deny reinstatement. The Employer argues that as a felon, the Grievant would not be able to carry a weapon which is part of his job duties description. Hence, the Grievant is disqualified for reinstatement.

On the other hand some courts have provided discharged employees the authority to carry a weapon for purpose of their duties. The Employer is concerned that after the plea agreement ends, it will still have an employee with a felony conviction who is not allowed to carry a weapon without any exemption as provided by the court order. The position descriptions and job duties require that employees must have the ability to carry a firearm as part of the condition of their job description.

I would find this argument to be more persuasive if in fact the Grievant carried a fire arm as part of his duties as a correction officer. However he does not carry a firearm or weapon in his normal course of duty. I believe this argument is too speculative to conclude the conviction

affects the Grievant's ability to perform his duties, and therefore is not a sufficient basis to deny reinstatement.

Even absent the applicability of this latter Employer argument, I find that the Grievant's off-duty criminal misconduct is of such severity and egregiousness to support the Employer's decision to discharge the Grievant. The act of strangulation to the point of unconsciousness demonstrates a lack of control and self discipline which are the abilities that correction officers must demonstrate in the performance of their duties. The off duty misconduct has a sufficient nexus to the Grievant's ability to perform his duties and abide by the Employer's policies.

### **AWARD**

For the above stated reasons, I find that the grievance is without merit and therefore denied.

Dated this day of 24<sup>th</sup> of February 2015.

  
Eduardo Escamilla  
Arbitrator