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LABOR & PERSONNEL DIVISION

IN ARBITRATION  
BEFORE ARBITRATOR WILLIAM B. GOULD IV

In the matter of

NO.060315-02555-7

TEAMSTERS LOCAL UNION NO. 117,

Union

For the Union,  
Tracey A. Thompson, Senior Staff Attorney

For the Employer,  
Kari Hanson, Assistant Attorney General  
Shane Esquibel, Assistant Attorney General

vs.

DEPARTMENT OF CORRECTIONS,

Employer,

(Michael Olsen Termination)

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I. INTRODUCTION

This case arises out of the dismissal of Michael Olsen as a custody and corrections officer Two (CO 2) at the Department of Corrections Stafford Creek

Correction Center (SCCC). Hearings were held before the Arbitrator in Olympia, Washington on August 25 and October 17, 2006. At the hearing both sides, the Department of Corrections (DOC), hereinafter to be referred to as the Employer, and Teamsters Local Union No. 117, hereinafter to be referred to as the Union, were given a full opportunity to present evidence in the form of testimony and exhibits and to examine and cross examine witnesses. As I noted at the hearing, I was impressed by the civility, courtesy and able presentation of counsel for both sides in this proceeding. Briefs were filed at the conclusion of the hearing on December 5, 2006. At the hearing on August 25 the parties agreed that the issue before the Arbitrator is as follows:

Did the DOC have just cause to terminate Michael Olsen? If not, what is the remedy?

## II. FACTUAL BACKGROUND

Stafford Creek Corrections Center (SCCC) operates a nearly 2,000 bed facility under the auspices of the Washington State Department of Corrections (DOC). SCCC houses intensive management offenders, who are, in the Employer's words, "some of the worst offenders in the prison system." The Center employs approximately 600 individuals.

The grievant, Michael Olsen, commenced employment as a correctional officer (CO) at SCCC on February 1, 2001. Around January 2005, Olsen's position changed from the graveyard shift in G Unit to the day shift as the minor control officer. The minor control officer performs a vital safety function at the institution, operating the main entrance to the secured perimeter at SCCC. This position is the SCCC's first line of

defense against unauthorized entry and last line of defense against unauthorized exit from the facility. The officer insures that no contraband enters the facility.

Until the incident in question, the grievant had never been the recipient of any disciplinary or corrective action. In 4½ years of employment he had always had positive performance evaluations.

In March 2005, CO James Osborne entered the office of Superintendent Douglas Waddington and stated that he was about to resign. Osborne explained that he was addicted to prescription drugs and needed to leave in order to seek treatment. Superintendent Waddington knew that Mr. Osborne had had ongoing substance abuse problems. Osborne did not testify at the hearing but Waddington testified that Osborne had "gone missing a couple of times when nobody knew where he was. When he came into work, many times he looked a mess and you could smell kind of almost a filth about him at times ...." Attempts had been made to rehabilitate Osborne in the past and to remedy his substance abuse problems.

In the meeting between Waddington and Osborne, Osborne stated that he had purchased Vicodin and Valium—both prescription medicines—from the grievant in the parking lot at SCCC and while passing through minor control. Osborne also identified five other staff members who, he alleged, had been purchasing prescription drugs from Mr. Olsen, including George Kozak, Tamara King, Charla McMillian-Kozak, Clarence Presswood, and Joshua Lenss. Superintendent Waddington asked Corey Whaley, an internal investigator at SCCC to commence an investigation of these accusations. He viewed this with great concern for as he explained at the hearing:

"Offenders pay a lot of attention to what staff do and how they do it. If there's offenders that are picking up on staff doing

something illegal and inappropriate, even if it's with other staff, that opens up doors for compromise.  
"If an offender keys into this, he can use that against that staff person to leverage things that he may want carried in, whether it's some of the same prescription medications that the employees are purchasing or money or cell phones or any host of different items."

Waddington stated that this kind of matter was particularly important because of the potential for an inmate "blackmailing" staff, and thus posing a threat to the safety and security of the facility because the staff member might be more loyal to the inmate than the Employer.

Whaley, after his meeting with Waddington, interviewed Osborne to get more information and characterized him as "emotional", "quite sincere" and "honest." Whaley said that Osborne had told him that he had been receiving Vicodin, Valium and Viagra from Olsen at minor control, the parking lot, and at his home. Whaley said that Osborne had told him that Olsen obtained large prescription bottles of medication from what he believed to be Olsen's trips to Canada or from a surplus of personal prescription medications. Whaley said that Osborne told him that he was trying to do something "good for a change." However, Olsen testified that he had loaned Osborne money which Osborne had refused to pay back and that matters between them had been "tense" as the result of discussions about this subject.

Whaley then interviewed Kozak with Michael Gleason, an investigator with the Intelligence and Investigations Unit. When Whaley confronted Kozak with Osborne's allegations against Olsen, Kozak stated that he had purchased Vicodin, Valium and Viagra from Olsen at minor control through the access drawer, in the parking lot and at Olsen's home. Kozak stated that Piukkula had given him Vicodin which Piukkula said he

had received from Olsen. Kozak and Olsen testified that Kozak had either purchased or traded for a car from Olsen which went bad, i.e. it blew a head gasket.

But, as with Osborne, the Employer's representatives discounted any grievance against Olsen as the basis for the statement given. Both Whaley and Gleason testified at the hearing that they viewed Kozak as truthful in their interviews. Subsequent to the interview, Kozak was placed on paid administrative leave pending an investigation. Waddington then met with Kozak, indicating that his job might well be in jeopardy and Kozak resigned on May 21, 2005.

Subsequent to interviewing Kozak, the abovementioned individuals Tamara King, Charla McMillian-Kozak, Dave Piukkula and Clarence Presswood, and Joshua Lenss all denied receiving medications from Olsen. However, King was interviewed twice and the investigative reports indicated that she was inconsistent in recounting her contacts with Olsen, an inconsistency which she denied. Lenss denied even knowing Olsen.

Waddington and Whaley then interviewed Olsen himself. This interview was, in Olsen's words, "very tense" and accusatory. Waddington queried Olsen on why all of these individuals would say such things, and the same "type" of things and why they would lie about it. In fact, only Osborne, Kozak and King (in her first interview) had implicated Olsen. In any event, Olsen denied the allegations of misconduct. At the conclusion of this interview Olsen was asked if he would agree to have his car searched and he consented. This search turned up three empty prescription bottles, one of which contained a set of earplugs. Olsen claimed that he used the empty prescription bottles for animal calls and gun parts when he went hunting.

As noted above, Whaley and Gleason also interviewed King twice who, in her initial interview, stated that she had purchased pain medication from Olsen a couple of times outside of work, identifying them as 222s an over the counter codeine-based medication available in Canada. In the first interview King stated that the drug could be Vicodin but she was not sure. She then requested a second meeting with Whaley and Gleason and refused to sign the notes prepared by them on the basis of the first interview and denied stating that the 222s were a codeine-based drug and that certain "oblong yellow pills were generic Vicodin." She denied stating that Olsen had told her that he received the drugs from Canada and denied receiving any pills from Olsen other than a "caffeine pill." King stated that the two interviewers had written her statement down incorrectly.

Piukkula, a friend of Olsen who socialized with him outside of work, denied that he had been selling or that Olsen had been selling drugs to staff. The interview with him was difficult, the Employer characterizing him as at times "uncooperative". At the hearing, contrary to Union assertions, Piukkula testified that he had seen prescription medication in Olsen's home.

At the hearing there was considerable dispute about the nature of the investigation, the Union claiming that Olsen had been treated as guilty until proven innocent. The parties also were in dispute about whether some of the alleged incidents i.e. the selling of the alleged purchase of drugs at minor control could have been part of a videotape of the surveillance camera placed there. Another dispute emerged over testimony relating to a proposed control buy. The Employer had asked Osborne to buy drugs from Olsen so that he could be caught selling prescription drugs. But Osborne was

unwilling to do so. No such suggestion was made to Kozak and when the Union questioned why Whaley did not ask Kozak to participate in a control buy he stated that it was not "viable". But Whaley explained:

The elements necessary to control such a thing, as far as time and assuredness activity would take place, were not present like they were with Osborne, where Osborne had an ongoing current history, the best we could tell, George Kozak did not fall into those conditions because the only pill he told me he was buying was the Viagra one and it was taking place like at his home, and therefore, it wasn't happening on the premises of Stafford Creek, as with Osborne.

However, then Whaley appeared to testify that Olsen had provided drugs to Kozak on Employer premises according to the information which he had compiled.

### III. CONTENTIONS OF THE PARTIES

The Employer states that the just cause standard in this case is "whether there existed substantial facts, which the Employer reasonably believed and which support the finding of misconduct and the punishment imposed, resulting in a decision that is neither arbitrary, capricious nor illegal." The Employer states that under this standard the findings of misconduct on the part of the grievant are well supported by the record.

The Employer states that both Osborne and Kozak admitted to purchasing prescription drugs from the grievant, Olsen. Both individuals corroborated each other as to the types of drugs they purchased---Valium, Vicodin, and Viagra---and corroborated one another with regard to the location where they purchased the drugs, i.e. the parking lot and while passing through minor control. The Employer notes that the grievant had a prescription for Valium and Vicoprofen---and notes that Vicoprofen is "essentially the same drug as Vicodin," both containing the addictive narcotic hydrocodone. A second

prescription bottle for the drug Hydroc (with "Vicodin") was found in Olsen's car during the search. States the Employer:

It is highly unlikely that both Osborne and Kozak would be able to guess as to the type of medications for which Olsen had prescriptions. Further it is likely that Osborne and Kozak believed that they were purchasing Vicodin from Olsen even if they were actually purchasing Vicoprofen, because the additive [sic] substance Hydrocodone was the same in each drug and because the "Vicodin" is more common.

The Employer also emphasizes the fact that Osborne and Kozak put their employment at risk and, in fact, lost their jobs—they knew that they were in peril as the result of the statements and thus had no motive to get the grievant in trouble. States the Employer about Osborne's confession: "The confession was completely unsolicited and wide ranging."

The Employer stresses its claim that the interviews with various witnesses and potential witnesses were not threatening or coercive and that there simply was no other way to test the claims other than through the interview process, rejecting, for instance, the idea of a drug test for Piukkula.

Regarding claims that other employees were implicated by Osborne and Kozak, the Employer points out that no one corroborated the testimony with regard to the others, whereas Kozak corroborated the testimony on Olsen. States the Employer: "The DOC thus had strong evidence from two of Olsen's co-workers, neither of whom had any credible motive to lie and both of whom, in fact, had strong reasons not to admit they had purchased drugs from Olsen."

The Employer states that when Olsen sold prescription drugs to Osborne and Kozak he violated the Drug and Alcohol Free Workplace Policy 807.005. The Employer



points out that it is a felony for any person to sell a so-called "legend" drug—that is, a drug which can be dispensed by prescription only—except upon the prescription of a physician. All the drugs here required a prescription.

The Employer states that the dismissal here is reasonable and appropriate because the evidence, in its view, supports the proposition that Olsen engaged in misconduct. In this connection, the Employer emphasizes the fact that the grievant, through such misconduct, opened himself and the facility up to compromise because an offender can leverage things from those whom he knows there is something important to reveal. This would imperil the security and safety of the entire facility. Moreover, the Employer also emphasizes that prescription drugs at work may impair ability to effectively perform jobs and therefore are inappropriate on this basis as well.

The Employer concludes by emphasizing the fact that misconduct was committed; (1) that two individuals voluntarily reported purchasing drugs from Olsen; (2) that these individuals had nothing to gain and everything to lose by doing so; (3) that individuals were reporting their own misconduct and ultimately lost their positions through resignation; (4) the dismissal is supported by the testimony.

For its part, the Union states that the Employer has not met its burden of proving "beyond a reasonable doubt" that it had just cause to terminate the grievant. The Union's position here is that where the allegations involve criminal conduct the Employer has the burden of providing evidence on the basis of criminal standards i.e. "beyond the reasonable doubt". States the Union: "Requiring proof beyond a reasonable doubt in cases involving allegations of sale of controlled substances is appropriate because it is far better to err in favor of the accused when reputation is at stake."

Accordingly the Union argues for a beyond a reasonable test on the ground that this is essential to defending against accusations which are so damaging to the grievant's reputation and "stigmatizing".

Regardless of the standard employed, the Union contends that just cause was not in evidence in this case because the Employer relied upon "hearsay testimony, statements from known substance abusers, and statements that are contradicted by the credible testimony of other witnesses." In this connection, the Union points out that the Osborne testimony is hearsay and that arbitrators have given "little weight" to such testimony even when it is admitted into evidence, as it was in the instant case. The reason, as the Union notes, is the inability to cross-examine, test the memory and credibility of the witness and for the Arbitrator to observe demeanor and judge credibility on that basis. Moreover, the Union notes that Osborne, who did not appear at the hearing, was a known drug and alcohol abuser. The Union states that the hearsay evidence contradicts the direct evidence in this case. The grievant, Olsen, of course, testified that he did not provide prescription medications to any employee other than a sample of Levitra given to Kozak at Olsen's home.

Also, the Union notes that Osborne named others who were cleared of misconduct. States the Union: "Were Mr. Osborne's statements to management true and reliable with respect to Mr. Olsen, then truly they were true and reliable with respect to the other employees he accused." Moreover, the Union characterizes Osborne's reaction to the suggestion that he engage in a "controlled buy" from Olsen as "hysterical" and indicative of falsehoods. Indeed the testimony of Whaley was to the effect that he, Osborne, was "very alarmed by this" idea and that, as a result, Osborne "went off the

wagon for a while ..." The Union states that the reason for this "irrational response" was that Osborne would have been exposed as a liar if he had participated in an attempted buy. Moreover, the Union notes that Osborne was already "off the wagon" at this time.

The Union also notes that Osborne had a motive to harm Olsen i.e. the fact that he owed Olsen money which was not repaid and about which they argued. Moreover, the Union emphasizes that his continued substance abuse made him an unreliable person and thus an unreliable witness to whom credibility could not be given. And, finally, regarding Osborne, the Union notes that he was not a witness and therefore given the fact that there was no confrontation, cross examination or opportunity to observe his demeanor, his statements cannot be considered as credible—particularly where a dismissal is involved.

The Union notes that Kozak also is an admitted alcoholic and substance abuser. The Union also notes the discrepancy in the quantity of pills received from Kozak's testimony and that of Whaley when he interviewed Kozak. The same is true for the question of whether Kozak received medications from Piukkula. There were also contradictions between the interviews of Ms. McMillian-Kozak and Kozak on the question of whether he received pain medication. Accordingly, the Union states that Kozak has made contradictory statements which cannot be reconciled and his testimony should be viewed as suspect and not "considered". Again, the Union points to the fact that Olsen sold Kozak a defective car as a motivation for his testimony against Olsen.

The Union also states that the investigatory process did not accord Olsen due process which is an integral part of the just cause standard. It points to testimony by a number of witnesses which characterize Whaley's posture as "over aggressive." The Union states that Whaley did not document all aspects of the investigatory process i.e. the

interviews with Lenss or Machovisky. The Union states that no assurance was provided that a shop steward was in the room during investigatory interviews and that "no employee was provided with a Union witness unless they absolutely demanded it."

Also the Union states that no attempt was made to get a copy of Mr. Olsen's prescription medications or to consider them when provided, and that there was no consultation with a physician or pharmacist to discuss the color and size of pills to determine whether the prescription of Vicoprofin would say "Hyrdoc" on the bottle. The Union states that drug enforcement persons in Canada were not contacted even though Canada seemed to be a focus of the investigation and that Whaley did not talk to any of Olsen's direct supervisors to determine his credibility. The Union emphasizes the fact that Whaley did not ask Kozak to engage in a buy even though he asked Osborne to do so, stating that it wasn't "viable with Kozak. That's all I can say."

The Union emphasizes the fact that Waddington dismissed the idea that either of these two individuals would have any vendetta or reason to harm Olsen as illustrative of bias against him. Finally, the Union states that Olsen's work history was disregarded and the substance abusers who accused him made unsubstantiated allegations against five other workers.

Accordingly, the Union seeks reinstatement, a make whole remedy including back pay and benefits less earnings received and interest.

#### IV. OPINION

I am of the view that the grievance must be sustained. There is no just cause under the circumstances of this case for the Employer to terminate the grievant. But, for reasons enumerated below, there is just cause to discipline the grievant. Moreover, in all candor, I am troubled by this case and the fact that intuition makes me skeptical about much of the grievant's position. I am particularly troubled by the fact that both Kozak and Osborne seem to identify pills which were the same or identical. I believe that there is more here than the record reveals. But, as an Arbitrator, I am confined to the evidence before me. Thus, notwithstanding my misgivings, the state of the record is such that I do not believe that the Employer has made its case to terminate. It carries the burden through a preponderance of evidence under any standard and that burden has not been met in this case.

What is the just cause standard in this case? I do not agree with the Union on the applicable standard. It would be ironic indeed if a higher standard than preponderance of evidence i.e. beyond a reasonable doubt, would apply where the allegation involves more serious misconduct—and this is an allegation of serious misconduct. Granted, a finding against the grievant might well stigmatize him—but it most certainly would not be dispositive in any subsequent criminal prosecution. I reject the Union's position on the relevant standard. Similarly, I reject the Employer's good faith standard enunciated, as it is, outside of the collective bargaining context.

Regarding the Union position, if ever a beyond reasonable doubt standard should not apply it is in this particular setting where security and the potential for compromising

security employees by offenders is so considerable. The facility itself makes a preponderance of evidence standard—a standard which applies in most just cause cases—peculiarly appropriate.

For the Employer, the problem here is that the principal witnesses against the grievant are extremely unreliable. In the first place, Osborne was not produced. Moreover, all testimony about Osborne leads me to believe that he would have been an unreliable witness had he been produced. In any event, hearsay evidence ought not to be a critical element in the resolution of this kind of case in the arbitration forum.

I do not understand why the Employer did not draw adverse inferences from the unwillingness of Osborne to do a control buy—and I do not understand what the Employer meant by the idea that a control buy by Whaley was not "viable". If he was receiving this medication on the Employer's premises, as the Employer testimony implied, surely the proposal for a control buy could have been made—just as it was made regarding Osborne. No adequate explanation is put forward on this matter.

Second, Kozak's history with drugs does not inspire confidence—just as is true of Osborne. Moreover, I am troubled by some of the discrepancies between his testimony and the information contained in Whaley's interviews with him and others. That said, however, I do not place Kozak in the same category as Osborne who, after all, was not produced as a witness. And, in support of the Employer's position, as noted, both of them seemed to have associated Olsen with the same drugs. This seems to me unusual and more than coincidental and raises suspicion about the grievant's testimony. Yet I do not think that this factor alone suffices to establish guilt, let alone just cause for termination.

I am not sure what to make of the Union's point that others implicated by Osborne were not found guilty of misconduct. It seems to me that the Employer has acted consistently by taking action only against Olsen because the accusations against him were corroborated (but not corroborated in this hearing) and those against others were not. I am of the view that the Employer acted consistently and responsibly in not penalizing others. A principal difficulty for the Employer's case is that it did not corroborate Kozak's testimony about the grievant's on premises conduct in this hearing.

Again, I am troubled by the fact that the Employer relied upon Kozak but did not propose a controlled buy---the very thing that it had proposed to Osborne. I find the Employer's reliance upon testimony about lack of viability unconvincing.

Turning to the Union arguments again, I find that there are other parts of its position which I reject. Particularly, I find the Tamara King investigative reports harmful to the grievant. While the investigators may have been aggressive, as the Union argues, the allegations were extremely serious---and I do not believe that the investigators were untruthful in their testimony.

The first King report indicates that she stated that she purchased prescription medication from Olsen a couple of times away from the workplace. She then contradicted this in her second interview, maintaining that the first investigative report was erroneous and did not recite what in fact she had said. But, in my judgment, the important point here is that King sought the second interview. This indicates to me that she was dissatisfied or uneasy about what she had said the first time around without any consideration or review of what had been written about that interview. From this request for another interview

with the investigators, I infer that she sought to change her statement because, upon reflection, it did not suit the grievant's position.

Accordingly, I credit her first statement--and the fact that she felt the need to change it leads me to believe that the first statement is the accurate one. Whaley and Gleason said she was more credible in the first interview and that the first statement more accurately reflected what King had told them. Moreover, that statement tends to jibe with Piukkula's observations about Olsen's prescription medications at his house. Again, considering all these circumstances, I credit the first statement.

Olsen then violated the Employer's Drug and Alcohol-Free Work Place Policy--but the only convincing evidence contained in the King testimony is that he dispensed drugs off duty. This, itself, is serious because it can impair the performance of employees and contravenes the Employer's policy. But, in my judgment, it is not as serious as the distribution in the workplace, as Olsen and Kozak alleged, because it does not present the immediate prospect for compromising employees through conduct of the offenders. Thus, the grievant's conduct testified to by King serves as a basis for discipline and the denial of back pay. But it is not a basis for termination under the just cause standard in this case.

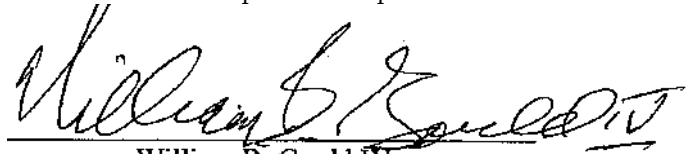
Finally, on the issue of on premises conduct, I do not subscribe to the view that the Employer had a better way of making a factual determination about the charges brought by Kozak and Osborne through surveillance cameras because, as it was explained, the tapes had been erased. I also accept the Employer's position on their unwillingness to establish a test by urinalysis. If the Employer had no procedure or policy in effect for such tests, it would have been foolhardy for such a proposal to have been acted upon or to be undertaken at the Employer's own initiative.



Accordingly, for the reasons stated above, the Employer did not have just cause to terminate Olsen. However, violations of the Drug and Alcohol-Free Work Place Policy serves as a basis to deny back pay under the circumstances of this case because discipline was appropriate. Thus, the grievance is sustained and Olsen is to be reinstated without back pay within 48 hours of receipt of this Opinion and Award.

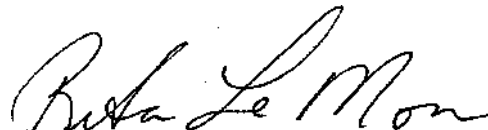
V. AWARD

The Employer did not have just cause to terminate the grievant, Olsen. Accordingly, Olsen is to be reinstated within 48 hours of receipt of this Opinion and Award without back pay.

  
William B. Gould IV  
Arbitrator

Dated February 20, 2007



  
Rita Le Mon  
Notary Public