

IN THE MATTER OF THE ARBITRATION BETWEEN ) FMCS CASE NUMBER:  
TEAMSTERS LOCAL UNION NO. 117, ) 080903-04542-8  
 )  
Union ) ARBITRATOR'S  
 ) OPINION AND AWARD  
 )  
and ) GRIEVANT  
 ) DAVID MONSON  
 )  
STATE OF WASHINGTON, )  
DEPARTMENT OF CORRECTIONS, )  
Employer )

ARBITRATOR: ANTHONY D. VIVENZIO

AWARD DATE: February 19, 2009

APPEARANCES FOR THE PARTIES:

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## **PROCEDURAL HISTORY**

The Washington State Department of Corrections, McNeil Island, is hereinafter referred to as "the State," "the Employer," or "MICC." Teamsters Local Union 117 is hereinafter referred to as "the Union." Collectively, they are hereinafter referred to as "the parties." This arbitration addresses the Employer's discharge of the Grievant, David P. Monson, Ph. D., "the Grievant," noted by letter of July 10, 2008, effective July 11, 2008.

The grievance filed by the Union to contest the discharge is based upon the collective bargaining agreement between the parties, hereinafter the "Agreement" or "contract," effective for the period July 1, 2007 through June 30, 2009. The Union filed the grievance regarding the discharge on July 14, 2008. The parties thereafter agreed to dispense with the steps provided in the Agreement for processing the grievance. Following unsuccessful attempts at resolution, the Union invoked arbitration under Article 9 of the Agreement. Using the services of the Federal Mediation and Conciliation Service, Anthony D. Vivenzio was appointed as Arbitrator. An arbitration hearing was held on the Union's premises in Tukwila, Washington, on November 20, 2008. The parties stipulated that all prior steps in the grievance process had been completed or waived, and that the grievance and arbitration were timely and properly before the Arbitrator. During the course of the hearing, both parties were afforded full opportunity for the presentation of evidence, examination and cross-examination of witnesses, and oral argument. The evidentiary record was closed on November 20, 2008. The Arbitrator received timely post-hearing briefs from both parties on December 22, 2008. The full record was deemed closed and the matter submitted on December 22, 2008.

## **STATEMENT OF THE ISSUE BEFORE THE ARBITRATOR**

At the hearing the parties stipulated the issue before the Arbitrator as:

Did the Employer have just cause for their termination of David Monson on July 10, 2008, and, if not, what shall the remedy be?

The Arbitrator notes that the parties further agreed at the hearing that, for the purposes of determining just cause, the alleged facts basing the violation leading to the termination are not in dispute, leaving the appropriate level of discipline as the central focus of the Arbitrator's inquiry.

## **BACKGROUND**

The McNeil Island Corrections Center is a corrections facility operated by the State of Washington. The main correctional campus is located on an island in the southern region of Puget Sound. The campus encompasses 4449 acres, and is the site of 52 homes occupied by staff in addition to the correctional facilities. It is accessed by a ferry operated by the Department of Corrections between the island and the dock on the mainland at Steilacoom, Washington. The ferry operates 24 hours a day, seven days a week.

Among the correctional facilities at the prison are special units for inmates who have been convicted of sexual offenses, including repeat offenders. To a great extent, these inmates have been the victims of sexual crimes, and other forms of abuse, often at the hands of trusted family members. Their history requires, for their success within the inmate population, and for their eventual release into the community, that they receive specific kinds of therapies provided by specially skilled and credentialed therapists. The Grievant, David Monson, was employed as one such therapist, and spent approximately forty per cent (40%) of his time in active clinical contact with these inmates.

On March 27, 2008, an employee of the Information Security Office at the facility, who was monitoring computer use, became aware that Dr. Monson had accessed web sites featuring pornographic material and notified his supervisor. They reviewed the information in the web sites, and determined that it was the Grievant, Dr. David Monson, who was responsible for the computer activity, and not someone else who might have stolen his password or logged on to such web sites. Four of the web sites visited appeared to contain child pornography. The matter was reported to law-enforcement, as is required by state statute, RCW 9.68A .080, which makes failure so to do a gross misdemeanor. The employer conducted an investigation to determine their proceedings in this matter concerning Dr. Monson's employment. In the course of interviews, Dr. Monson did not deny that he viewed pornography, but stated his belief that the web sites he accessed did not contain child pornography. Dr. Monson's employment was terminated effective July 11, 2008.

## **PERTINENT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT AND WORK RULES**

**From the collective bargaining agreement effective July 1, 2007- June 30, 2009:**

### **Article 3 MANAGEMENT RIGHTS**

#### **3.1 Management Rights**

It is understood and agreed that the Employer possesses the sole right and authority to operate the institutions/offices and to direct all employees, subject to the provisions of this Agreement and federal and state law. These rights include, but are not limited to the right to:

F. Discipline or discharge for just cause

### **Article 8 DISCIPLINE**

#### **8.1 Just Cause**

The Employer will not discipline any permanent employee without just cause.

## **8.8 Grievance Processing**

Disciplinary action is subject to the grievance procedure set forth in section 9.2.

## **Article 9 GRIEVANCE PROCEDURE**

### **9.2 Non-Panel Grievance Processing**

**Step 3: Arbitration.** If the grievance is not resolved at Step 2, the Union may file a demand for arbitration...

### **9.5 Authority of the Arbitrator**

The arbitrator will have the authority to interpret the provisions of this Agreement to the extent necessary to render a decision on the case being heard. The arbitrator will have no authority to add to, subtract from, or modify the provisions of this Agreement, nor will the arbitrator make a decision that would result in a violation of this Agreement.

## **From the State of Washington Department Of Corrections Policies:**

### **DOC 280.100 Acceptable Use of Technology**

#### **DIRECTIVE:**

#### **I. General Guidelines**

- A. Computer hardware and Information Technology systems, the Internet, e-mail, cell phones, and all of the department information technology resources will be used for official business purposes...
- D. Anyone who uses the Department's Internet, e-mail, cellular phone, and portable computing device technology resources in a manner that violates this policy may have his/her access immediately terminated and may be subject to corrective/disciplinary action, up to and including dismissal.

#### **II. Internet**

- B. The Internet will be used for official business purposes.
  - 1. At a minimum, personal use of the Internet should:
    - a. Be brief in duration,
    - b. Be infrequent,
    - c. Not interfere with the performance of official duties,
    - d. Not disrupt or distract from conducting state business, and
    - e. Not compromise the security or integrity of state property, information, or software.

- C. The Internet or the Department's computing resources will not be used to intentionally:
  - 1. Display, view, archive, store, distribute, edit, or record nudity, erotic content, or sexual content, except in situations where the information is needed in conjunction with the duties assigned to a position.

## **DOC 800.010 Ethics**

### **II. Use of State Resources**

- A. Employees will not use state resources for personal benefit or to benefit another, except as required for official duties or as authorized by policy.
- B. Employees will follow DOC 280.100 Acceptable Use of Technology regarding use of the Internet, e-mail, cellular phones, and other technology resources.

## **POSITIONS OF THE PARTIES**

### **Position of the Employer**

The Employer states its position (in summary) as follows:

The Grievant, Dr. David Monson, made a great err in judgment, leading to his termination, when he chose to spend several hours at work on March 27, 2008, viewing pornography on his work computer, several examples of which apparently contain child pornography. The facts of this case are essentially undisputed. As a Psychologist 4, Dr. Monson supervised other psychologists and provided mental-health services to offenders, including assessing, evaluating and providing treatment, conducting individual and group therapy, and performing psychological evaluations of offenders. At approximately 1 p.m., on March 27, 2008, Dr. Monson was using his work computer when he began to research non work-related web sites to plan a trip to Paris with his wife. They had considered going on a nude cruise or visiting a nude restaurant in Paris. In the course of that search he encountered a nude picture of Paris Hilton. Dr. Monson stated that when that happened, the rational part of his brain shut off.

Over the next 3 1/2 hours, he proceeded to click on links to pornographic web sites, and did Google searches using terms such as "Paris nude," "naked Paris," "naked," and "gay sex." Four web sites, "brutalgays.net," "gaymovielist.com," "blboys.com, and" schoolboysecrets.com" that he visited for a few minutes appeared to contain sexually explicit images of boys under the age of 18.

The Department of Corrections has a policy on acceptable use of technology, limiting computer usage to official business purposes, with only limited exceptions such as brief, non-work hour access if it does not interfere with state business. The policy also prohibits the use of the Internet to view nudity, erotic content, or sexual content, unless needed as part of a person's assigned job duties. Violators may be subject to corrective or disciplinary action, up to and including dismissal. A thorough investigation ensued. Dr. Monson admitted viewing pornography, but stated he did not believe any of the web sites contained child pornography. The Employer's Director of Health Services Operations, Cheryl Strange, conducted a pre-disciplinary meeting following an investigation of the matter. Ms. Strange noted several areas of particular concern. Among them, was Dr. Monson's statement that he had been in a "unique and vulnerable" state of mind during the incident due to personal issues. She was concerned about the compromise of security that could occur when an employee in Dr. Monson's position is so vulnerable, as well as concerns about his judgment in engaging in this activity. He is a licensed professional and must exercise discretion and independent judgment in performing his work. The Employer's need for trust in his case is greater than in the case of nonprofessionals. Dr. Monson's demonstrated lack of impulse control and his lack of discretion and judgment destroyed the trust necessary for the Employer to allow him to continue as a psychologist. The

nature of the Employer's mission holds its employees to a high standard. "Core Competencies" for its employees include the following requirements:

Earns the trust, respect and confidence of stakeholders and co-workers through consistent honesty, forthrightness, and professionalism in all interactions... *Earns the trust of others by consistently being an exemplary role model*... Avoids inappropriate situations and actions which result in and/or present the appearance of impropriety. Adheres to appropriate and effective core values/beliefs and acts in accordance with those values at all times ...

Further, the Employer, as a public safety agency, is charged with a high degree of public trust. Dr. Monson's actions compromised that trust.

Dr. Monson's actions have the potential to undermine his therapeutic relationship with offenders and to endanger himself and others. If an offender perceived Dr. Monson as reacting inappropriately to pornography, relating to something perhaps traumatic for them, they can react with violence. The same offenders, sometimes violent felons, can prey upon the vulnerable, and could take advantage of his vulnerable state and manipulate him into providing the offender with contraband. The appearance of what appears to be child pornography at his terminal involved law-enforcement, sent a mixed message to constituents, and violated the trust vital to the agency. Further, his statements, evading the under age appeal of the boys pictured in some of the web sites, strains credulity.

Dr. Monson was on notice of the possible consequences of his actions. The Employer cannot continue to employ a psychologist subject to sexual impulse control issues or periods of inability to follow the agency's rules, particularly when illegal conduct may be the result. The Employer was justified in terminating Dr. Monson's employment.

## **Position of the Union**

The Union states its position (in summary) as follows:

1.) The Employer has the burden to prove by clear and convincing evidence that there was just cause to terminate David Monson. The parties' collective bargaining agreement provides that: "The Employer will not discipline any permanent employee without just cause." In a case involving the discharge of an employee, the burden is on the employer to sustain its allegations and to establish that there was just cause for the termination. In termination cases, it is appropriate for the Arbitrator to demand clear and convincing proof. That same standard should be applied in this case, especially given that the termination of a 15-year employee is at stake. Termination is effectively the death penalty in an employment case, and therefore, before the employment relationship is severed, it must be absolutely clear that it cannot be repaired. The burden of proof applies both with respect to proving the alleged violation and with respect to demonstrating the appropriateness of the penalty. *Pepsi-Cola Co.*, 104 LA 1141 (Hockenberry, 1995). Here, there is no dispute as to the alleged violation. However, the Employer has failed to meet its burden in this case as to the appropriateness of the penalty. Whether the Arbitrator applies the "clear and convincing" standard or some lesser standard of proof, the State has failed to prove that Dr. Monson's violation of the Employer's policies warrants his immediate termination. On the contrary, the weight of evidence establishes that the violation of policy was limited in duration and severity, did not impact others or his overall work performance, and did not involve intentional misconduct. When weighed against Dr. Monson's overall employment history, the offense simply does not rise to the level necessary to justify his summary dismissal, especially given that he was candid and remorseful throughout the process and demonstrated a capacity to modify his behavior.

2.) It is appropriate for the Arbitrator to consider many factors including the severity of the offense, the length of the employee's tenure with the Employer, and mitigating circumstances including the contributions that the employee has made to the Employer's operation.

It is undisputed that Dr. Monson's conduct in this case was an isolated incident. Dr. Monson testified that he had never before and never after accessed improper websites on the Internet. This fact is not only undisputed, it was confirmed by the State's "rigorous" review of Dr. Monson's Internet activity both before and after the day in question. The absence of any other activity indicates that the employee has the capacity to correct the behavior if such an opportunity is given, a conclusion strengthened by the fact that Dr. Monson did self-correct and never again accessed improper websites.

In determining whether immediate termination is warranted rather than progressive discipline, it is appropriate to weigh the offense against the employee's overall employment history. Dr. Monson has enjoyed a long and positive career with the Department. He received no other discipline, no corrective action of any significance, and only positive performance evaluations. He worked consistently for 15 years, helping to improve the mental health of inmates and supervising employees that provide that critical service.

From his immediate self-correction, to his conduct at the investigatory and disciplinary meetings, to his demeanor at the arbitration hearing, Dr. Monson has consistently demonstrated that he had no bad intent. He essentially stumbled upon the pornographic websites, and while he foolishly spent time surfing them, he did not persist beyond the day in question and he did not intentionally seek out unlawful material. The State's emphasis on the fact that Dr. Monson may have hit a website with "possible child pornography" disregards the undisputed fact that this was not his intent.

The impact of Dr. Monson's actions is minimal and speculative. The Employer failed to articulate any tangible impact to its operations or Dr. Monson's ongoing ability to contribute to the Department. Much of Ms. Strange's testimony about her decision to terminate Dr. Monson revolved around a concern that if Dr. Monson's Internet activity became known, it could impair therapeutic relationships, Dr. Monson's credibility with the staff that he supervised, and perhaps lead to manipulation by inmates. Although all of these harms are purely speculative, the most significant problem with the State's argument is that on cross-examination, Ms. Strange acknowledged that the foundation for these concerns (actual knowledge by inmates or other staff) was absent. There is no evidence that any of the speculative impacts that she articulated could occur since no staff or inmates had or have knowledge of Dr. Monson's violation.

The manner in which the Department has handled other cases in which employees have engaged in similar conduct strongly suggests that the termination decision in this case is too severe. The most significant case in this regard is that of Richard Gerren. It is significantly comparable because, like the present case, it occurred at the same facility (McNeil Island Corrections Center), involved a supervisor with a long and good work history, and involved significantly more activity than what occurred in this case. In fact, the improper use of the Internet occurred over a month, involved some 27 hours of time and over 100,000 hits. A five day suspension was imposed by the Employer in that case.

There is evidence of employer and arbitral reluctance to terminate employees for accessing (and even distributing) pornographic material through the Internet and/or email systems. *AK Steel*, 125 LA 903 (Dean, Jr., 2008); *Farm Services Agency, U.S. Department of Agriculture and AFGE, Local 3354*, 04-1 ARB 3730 (Cook, 2003); *PPG Industries*, 113 LA 833 (Dichter, 1999). In the *AK Steel* case, the employee at issue had visited some 639 websites including a number of sexually explicit

websites during a seven day period. *AK Steel*, 125 LA at 904. A scan of his hard drive revealed "eighteen (18) images depicting child pornography which were located in temporary Internet files and recovered file folders." The Arbitrator reversed the employer's decision. Critical to the Arbitrator's decision was the lack of any evidence, as here, that the grievant attempted to access child pornography sites. Witness Strange testified she did not have any personal knowledge with respect to Dr. Monson's employment history; she did not even review his personnel file to balance his overall work history against the offense.

Unlike employees who deny, minimize or fail to take responsibility for their actions, Dr. Monson was forthright from the outset, completely candid and consistent in describing what occurred, and remorseful. Importantly, he is committed to returning to work and has credibly testified that he will never use his work computer for personal matters. *Tr. at 93*. There is nothing in this case that would suggest that the employment relationship has been irreparably damaged.

3.) If the Arbitrator finds that the discharge of Dr. Monson was not supported by just cause, the Union respectfully requests the remedy of reinstatement to his former position with no loss of seniority, and a make whole remedy including back pay and benefits, less any earnings received from the date of termination (or the end of any unpaid suspension period the Arbitrator deems appropriate) to the date of reinstatement. To the extent that the Arbitrator awards reinstatement, the Union requests that the Award specify that the reinstatement be without loss of seniority, as there would be no loss of seniority if the Department had not unjustly terminated Dr. Monson.

To the extent that the Arbitrator awards back pay, the back pay award should carry interest. An award of interest does no more than restore the parties to the positions they occupied prior to the discharge. The Employer has enjoyed the use of the money it has saved as a result of the discharge and the employee has been deprived of the money.

## DISCUSSION

At the outset, the Arbitrator would like to express his appreciation for the professional manner in which the parties conducted themselves in the course of the proceedings, rendering vigorous, but courteous, advocacy.

It is well established in labor arbitration that where, as in the present case, an employer's right to discipline an employee is limited by the requirement that any such action be for "just cause," the employer has the burden of proving that the suspension or termination of an employee was for just cause. Therefore, the Employer here had the burden of persuading the Arbitrator that its termination of the grievant, Dr. David Monson, was for just cause.

"Just cause" consists of a number of substantive and procedural elements. Primary among its substantive elements is the existence of sufficient proof that the grievant engaged in the conduct for which he or she was terminated or disciplined. Though the parties have agreed that the essential facts basing the violation leading to the Grievant's termination are undisputed, the Arbitrator will draw upon them as necessary to base his award. The second area of proof concerns the issue of whether the penalty assessed by the Employer should be upheld, mitigated, or otherwise modified. Factors relevant to this issue include a requirement that an employee knows or is reasonably expected to know ahead of time that engaging in a particular type of behavior will likely result in discipline or termination, the existence of a reasonable relationship between an employee's misconduct and the punishment imposed, and a requirement that discipline be administered even-handedly, that is, that similarly situated employees be treated similarly and disparate treatment be avoided.

These considerations were summarized in what is now a commonplace in labor arbitration, known as the “Seven Tests,” by Arbitrator Carroll Dougherty, pronounced in Enterprise Wire Co., 46 LA 359 (1966):

1. Did the Employer give to the employee forewarning or foreknowledge of the possible or probable disciplinary consequences of the employee’s conduct?
2. Was the Employer’s rule or managerial order reasonably related to (a) the orderly, efficient, and safe operation of the Employer’s business and (b) the performance that the Employer might properly expect of the employee?
3. Did the Employer, before administering discipline to an employee, make an effort to discover whether the employee did in fact violate or disobey a rule or order of management?
4. Was the Employer’s investigation conducted fairly and objectively?
5. At the investigation, did the “judge” obtain substantial evidence or proof that the employee was guilty as charged?
6. Has the Employer applied its rules, orders, and penalties even-handedly and without discrimination to all employees?
7. Was the degree of discipline administered by the Employer in a particular case reasonably related to (a) the seriousness of the employee’s proven offense and (b) the record of the employee in his service with the Employer?

While these standards have been tailored to address different work places and circumstances, they serve as a useful construct for considering this case.

**1. Did the Employer give to the employee forewarning or foreknowledge of the possible or probable disciplinary consequences of the employee’s conduct?**

The Arbitrator answers this question: "yes." The Employer bases its discipline in this matter upon the Grievant’s violation of Department of Corrections Policies 280.100 and 800.010, set forth above. A fair reading of the plain language of those policies evinces a clear prohibition of the kind of conduct engaged in by the Grievant: personal use of the Internet beyond enumerated limited exceptions, involving the display and viewing of nudity, and sexual/erotic content. The policy is also clear that a violator “may be subject to corrective/disciplinary action, up to and including dismissal.” As part of Employer Exhibit 1, stipulated as to admissibility, the Grievant, in Tab F, is shown to have subscribed his acknowledgment of his responsibility for

reading, familiarizing himself with, and following the Employer's policies and procedures. Tabs G and H further confirm the Grievant's actual notice thereof.

**2. Was the Employer's rule or managerial order reasonably related to (a) the orderly, efficient, and safe operation of the Employer's business and (b) the performance that the Employer might properly expect of the employee?**

The Arbitrator answers this question, "Yes." Policy 280.100 recites that, except for personal business on an employee's own time during nonworking hours, with enumerated limitations, the Internet will be used for official business purposes only. The display and viewing of materials such as those involved here is cited as an "unacceptable use of technology." Policy 800.010 declares,

The Department has adopted a code of unfailing honesty, respect for human dignity and individuality, and commitment to professional and compassionate service. Employees will maintain high professional and ethical standards at all times, in keeping with the Department's role and responsibility to serve the people of the State of Washington and comply with governmental statutes and regulations. Employees will place the public interest before any private interest or outside obligation.

The policy goes on to require employees to follow DOC 280.100. The values expressed in terms of conserving publicly owned resources to official use, avoiding disruptive or distracting uses, are unquestionable values for a governmental employer. In the course of its presentation, the Employer raised other values/interests related to safety and mission it viewed as compromised by the Grievant's conduct. The Arbitrator finds that these policies are reasonably related to the orderly, efficient, and safe operation of the Employer's business, and to the performance that the Employer might properly expect of its employees in general, and as applied to the Employer's interests as impacted by the Grievant in this case.

**3. Did the Employer, before administering discipline to an employee, make an effort to discover whether the employee did in fact violate or disobey a rule or order of management?**

The Arbitrator answers this question, “Yes.” The descriptions of the investigatory steps taken by the Employer in this matter, contained in the record in the testimony of Peter Jekel, the Chief Information Security Officer who led the computer records search that quantified the Grievant’s Internet activity, and of Cheryl Strange, Deputy Secretary of the Department of Corrections, who supervised the investigatory and disciplinary process, and as contained in exhibits stipulated by the parties, including the Grievant’s admission to the conduct basing his termination, show a considerable good faith effort to discover and document the Grievant’s violation of its policies leading to the Grievant’s termination.

**4. Was the Employer’s investigation conducted fairly and objectively?**

The Arbitrator’s answer to this question is, “Yes.” A review of the investigatory steps and methods followed by the Employer in discovering the Grievant’s involvement in the acts leading to his termination reveals a fair and objective process, confirmed by the Grievant’s admissions and uncontested by the Union.

**5. At the investigation, did the “judge” obtain substantial evidence or proof that the employee was guilty as charged?**

The Arbitrator’s answer to this question is, “Yes.” The most direct evidence of the Grievant’s culpability in this matter is his admissions, contained in exhibits, (Er. Ex. 1, Tabs AO, A1, and A2), and in his testimony at the hearing. In sum, the Grievant testified that,

I had an open morning... my wife and I were planning a trip to Paris and I thought I would take a lunch break to look up some places to go and see in Paris. And I was trying to find the Moulin Rouge, But I didn't know how to spell Moulin Rouge and so I put in "Nude Paris" or something. "Nude Review Paris"... what came up was a link for a nude picture of Paris Hilton... I clicked on it and attached to that were all these other links to

other pictures. And I just started clicking on them, and it was amazing. I had never seen Internet pornography before... I found myself getting drawn into it... it just went progressively... Every picture that came up had all these other links... My wife had mentioned a coworker of hers who had gone on a nude cruise to Fiji.. and I did go and look to see if there were nude cruises on the river in Europe... I still hadn't found the Moulin Rouge... and so I was thinking, my wife had told me that she had heard that adjacent to the Moulin Rouge was a nude restaurant... so I put in something about "nude restaurant, Paris." And it took me to this gay bar in Paris and more clicks to more stuff, and I found myself just getting drawn in. I had never seen anything like this, I mean all this gay pornography, and then it got into fisting, you know. Inmates had told me about fisting, but I'd never seen anything like that... I was stupefied. I just kept clicking on this stuff. And the four web sites that they referred to as possible child photography, I was being pretty indiscriminate at this time. I was just clicking on things. And they just came up. I had no inkling of anything being child pornography. I know one, I remember, was called schoolboys.com, or something like that. My thoughts were, you know, college frat party... I thought it was common sense you can't Google illegal child pornography on the web, or else the police would... find these people and arrest them. I had never had any thoughts that I would even encounter child pornography. When these specific web sites came up, they all had disclaimers, too, saying something about the actors portrayed are over the age of 18... or legal, or whatever. And they were the type, too, when you click on them, like a whole bunch of pictures would go up and you would have to click on each individually to get out of them... And so the majority of that three minutes was spent getting out of those web sites... at that point I thought... this is all very stupid I shouldn't be doing this. I need to get out.

In his statement, obtained in the course of this investigation on May 6, 2008 (Er. Ex.1, Tab A2), the Grievant states:

A nude picture Paris Hilton appeared on the screen. I had a reaction to her picture. The rational part of my brain shut off. I kept clicking on the links, clicking and clicking. Some of the links popped up in layers up to 15 deep and I had to click them shut in order to get rid of them. I could've gotten out of it but this big "temptation thing" kept pulling me back in. The links I viewed contained adult pornographic material. Some was homosexual in nature but none contained child pornography. I do remember some material about a bar in Paris for homosexuals, but no material about men and boys. I have no recollection of any animation or cartoon-like material. I went into "brain-dead" mode and did not control myself. This went on for several hours. I'm sorry. I made a big mistake.

His amended statement on May 20, 2008, adds the following:

I input the following words into Google for search purposes: cruises optional, sex therapy, Paris nude, Paris nude restaurant, naked Paris, naked, lesbians, gays, gay sex. I used the "I'm feeling lucky" button on many occasions to speed my searches directly to the sites for which I was looking. Through the sites the searches produced I linked to

other sites such as gagreport.com, nakiwiki.org, lesbianstepsisters.com, gaybeef.com, gayfirsttime.com, brutalgays.com, blboys.com, schoolboysecrets.com. I spent a considerable amount of time looking at sites with Paris Hilton and many other actresses in sexually provocative poses. Some of the sites I visited contained photos of persons that look younger than 18 years old. It is my belief that when the person looks younger than 18, but in actuality is older than 18 years of age, this is not child pornography. The sites I reviewed are easily accessible. I did not do anything special to access the sites as it is my belief the sites are legal and persons portrayed on the sites are over 18 years old.... I was not trying to locate child photography. My intent was to review adult pornography.

These admissions followed an investigation instituted after an employee assigned to Internet Security detected the Grievant's usage in the course of regularly monitoring a 24 hour log history. The investigation produced a series of reports that showed "anomalies" indicating inappropriate use. An analysis was made to recreate the path of actions that had caused the "anomalies," to understand how the event took place, and to archive the material that might be relevant (Jekel, Tr. 28-30). The reports are contained in Employer Exhibit 1, Tab A3. The archived pictorial material is contained in Employer Exhibit 1, Tab A4.

Upon a review of the product of the Employer's investigation as contained in testimony and exhibits, including the Grievant's admissions, the Arbitrator finds that the Employer satisfied its burden of proving that on March 27, 2008, the Grievant committed the acts, searching for and viewing pornographic material on computer equipment assigned to the Grievant by the Employer, for which the Employer administered discipline consistent with the Agreement and the Employer's policies. The Arbitrator makes this finding regardless of whether or not some of the accessed material may have in fact constituted "child pornography." The Arbitrator makes these findings by whatever standard would be applied, preponderance of the evidence, clear and convincing evidence, or beyond a reasonable doubt.

**6. Has the Employer applied its rules, orders, and penalties even-handedly and without discrimination to all employees?**

The Arbitrator answers this question, “Yes.” An employer’s failure to administer discipline in a nondiscriminatory fashion, that is, to engage in disparate treatment of employees, is an affirmative defense that must be proved by the Union by a preponderance of the evidence. At the hearing, the Union elicited testimony and produced exhibits concerning inappropriate Internet usage on the part of two other employees, Richard Gerren (Un. Ex. 1), a carpenter supervisor, and Andrew Andring (Un. Ex. 2), a Correctional Sergeant. Mr. Gerren’s conduct (viewing graphic erotic content for more than 21 hours) resulted in a 5 day suspension. Mr. Andring’s conduct resulted in a demotion.

Having reviewed the exhibits and testimony regarding the comparison cases proffered by the Union, the Arbitrator is not persuaded that they are sufficiently analogous in nature and quality of conduct and circumstance so as to provide apt comparisons. Neither employee functioned in a therapeutic setting, with its attendant requirements and sensitivities, akin to that of the Grievant. Further, the employees’ level and kind of supervisory authority and autonomy is not comparable. The Grievant was, given the nature of his duties, ministering in a therapeutic role to offenders, monitoring staff, supervising subordinates, and enforcing the Employer’s policies, appropriately held to a higher standard of conduct by the Employer. The essential functions of the Grievant’s position, set forth in the Position Description included in Employer Exhibit 1, Tab A6, lists:

Perform work duties in close contact with and among large groups of confined offenders who live in crowded spaces, who may have a history of violent behavior, and who may be aggressive and/or confrontational toward other offenders and staff.

The Grievant was a licensed professional, charged to exercise discretion and independent judgment in fulfilling the Employer's mission in a manner so as maintain the Employer's continued trust.

The Arbitrator finds that the Union has not carried its burden of proof in establishing that the Employer's termination of the Grievant was disproportionate to discipline administered to other of its employees in comparable circumstances.

**7. Was the degree of discipline administered by the Employer in a particular case reasonably related to (a) the seriousness of the employee's proven offense and (b) the record of the employee in his service with the Employer?**

The Arbitrator answers this question, "Yes." In the course of the hearing, the Employer, through credible testimony and exhibits, detailed areas of concern that it felt underscored the seriousness of the Grievant's offense, to the point of overcoming a consideration of his term of service.

The Grievant's candor in cooperating with the Employer's investigation, albeit after the fact of discovery, is noted. His disclosures of being in a "uniquely vulnerable" state of mind contributing to his inability to control himself create legitimate concerns considering his employment as a psychologist who provides "direct clinical services for the general population" of offenders as a mental health professional in a prison setting where security is essential. The Director of Health Services Operations for the Department of Corrections, Cheryl Strange, noted valid reasons in her termination letter and in her testimony. She testified that her prime concern in this matter was the safety and security of the staff, the inmates, and the public. Dr. Monson's descriptions of his vulnerability, of his state of mind before and during the events leading to his termination, gave the witness concerns that that vulnerability had the tendency to compromise the safety of the facility. Incarcerated offenders can look for vulnerabilities in staff and prey on

them. For example, if an offender had knowledge of his wrongful conduct, he might have blackmailed the Grievant to obtain contraband, a weapon, a cell phone, or something used to escape. To the extent that he also had influence in individual offender treatment planning, an offender might have blackmailed Dr. Monson to obtain drugs. The witness was worried that because of the way the Grievant described his sudden loss of control, a loss of control could happen again. Ms. Strange also considered the Grievant's conduct in connection with the therapeutic services he offered offenders, who are themselves often victims of trauma and sexual and physical abuse. For an offender to believe that Dr. Monson is hearing their most intimate secrets as a human being while looking at pornography undermines the needed trusting therapeutic relationship with offenders. In fact, an inmate could become violent under the right set of circumstances, for example, if they thought that Dr. Monson was making fun of them, or enjoying a piece of pornography that to the offender was very traumatic, thus endangering Dr. Monson. The witness also considered the meaning of the conduct for the Employer as a public agency. As part of a transparent government, the Employer regularly receives requests for public disclosure, often from inmates who are curious about disciplinary actions against staff. Inmate family members are another constituency whose confidence and trust need to be maintained. An additional concern was that Dr. Monson's conduct could be a basis for liability to an inmate or a third party claiming harm arising from the scenarios outlined above. Though there is no knowledge that these hypotheticals may have occurred, the witness felt there was too great a risk in continuing the Grievant's employment. Another major factor considered was Dr. Monson's role as a supervisor, and therefore role model, to staff that must respect his authority and not undermine him. When she considered the range of disciplinary options, the only one that addressed Ms. Strange's primary area of concern, the security and safety of the facility, Dr.

Monson, and staff, was termination. Demotion would have placed him in a position of devoting substantially more time to direct therapy, and would not have addressed the issues that might have presented as discussed above. (Strange, Tr. pps. 63-74), (Er. Ex. 1, Tab A0). The Arbitrator finds the factors considered by the Employer in its decision to terminate the Grievant compelling, and gives greater weight to concerns of risk here than he might in other cases involving another class of employee in another setting.

The Arbitrator expresses some confusion over the Grievant's position that he did not intend to access child pornography on the one hand, and his statement that "when the person looks younger than 18, but in actuality is older than 18 years of age, this is not child pornography" on the other hand. The Arbitrator notes that the trigger of such depictions is the underage appearance of the models, and a "surfing" searcher assumes the risk of their access and display. Regardless of this, the Arbitrator does not find the prong of the Employer's case involving child pornography, as developed, as indispensable to the disposition of this case. This is consistent with the Employer's position as stated in Employer Exhibit 1, Tab AO, the letter of July 10, 2008 from witness Cheryl Strange to the Grievant, wherein she states,

Regarding the matter of your access of possible child pornography on March 27, 2008, to date, there have been no formal determinations by the Pierce County Sheriff's Department on the matter. As such, the basis for my decision will not include a presumption that the materials accessed were unequivocally child pornography.

The Arbitrator finds that the offense as proved by the Employer was very serious, meriting termination, without regard to the Grievant's intention or length of viewing child pornography he accessed, and regardless of the result of any referral to law enforcement. The Grievant expressed a clear intent to access adult pornography, depicting heterosexual and homosexual encounters, and did so for over three hours before arresting his actions. The Employer has presented evidence sufficient to satisfy the Arbitrator that these actions violated

reasonable Employer policies in a manner that severely violated the requirements and expectations of an employee in the Grievant's position as a clinician and supervisor, and that has irreparably broken the trust necessary to the continuation of an employer/employee relationship.

In arguing that termination is too severe for this offense, the Union provides some arbitral authority in support of its position, notably AK Steel, 125 LA 903 (2008), Farm Service Agency, 04-1 ARB P. 3730 (2003), and PPG Industries, 113, LA 833 (1999). While decisions by other arbitrators rendered in other cases dealing with other industries are generally viewed as not binding precedent in the manner that cases reported in the public legal system's reporting services serve as "stare decisis" authority, they may sometimes serve as guides. That said, the Arbitrator does not find these cases sufficiently on point so as to resolve the issue of termination in favor of this Grievant. AK Steel involved an employee ( a 28 year old Electronic Services Technician who spent 80% of his time in data analysis) engaging in a web search in a wholly different industry and working environment that inadvertently turned up child pornography. He had not used search words such as "teen," "pre-teen," or "Lolita," words found by that arbitrator to be key to such searches, who believed the grievant may have been totally unaware of their presence. Also, the element of child pornography, as has been stated, is not indispensable to this Arbitrator's decision. In Farm Service Agency , the context possessed nothing similar to the duties, responsibilities, of sensitivities incumbent upon Dr. Monson, a supervisor and clinician in a secure, sex offender corrections unit. The same must be said of PPG Industries, which arose in a coatings and resin manufacturing plant. In the course of reinstating the grievant there, Arbitrator Dichter also noted that there are unquestionably situations where termination may be appropriate regardless of the usual mitigating factors, such as an employee's long tenure, or lack of prior discipline. This Arbitrator finds that to be the case here.

This case has been vigorously and ably argued by the Union, and it is not without considerable thought that the Arbitrator finds as follows: Upon consideration of the whole record, the requirements of the position and duties held by the Grievant, the sensitivity of the mission of the Employer, the Department of Corrections, the characteristics and needs of the inmates in the Grievant's charge, and of his fellow staff and employees under his supervision, by any standard that could be applied, whether by preponderance of the evidence or by clear and convincing evidence, the Arbitrator finds that the Employer has met its burden of proof in this matter and that the discharge of the Grievant was not without just cause.

### **CONCLUSION**

Based upon all of the evidence surrounding the conduct of the Grievant, David Monson, the traditional tests of just cause for discipline, and the record as a whole, the Arbitrator finds that the termination of his employment was not too harsh a penalty under the circumstances, and was imposed for just cause. The Arbitrator will enter an award consistent with the above analysis and conclusions.

<b>IN THE MATTER OF THE ARBITRATION BETWEEN</b>	)	<b>FMCS CASE NO:</b>
	)	
<b>TEAMSTERS LOCAL UNION 117</b>	)	<b>080903-04542-8</b>
<b>Union,</b>	)	
<b>and</b>	)	<b>ARBITRATOR'S AWARD</b>
	)	
<b>STATE OF WASHINGTON</b>	)	<b>GRIEVANT:</b>
<b>DEPARTMENT OF CORRECTIONS,</b>	)	
	)	<b>DAVID P. MONSON</b>
<b>Employer.</b>	)	

Having heard or read and carefully reviewed the evidence and arguments in this case, and in light of the above discussions, FMCS Grievance No. 080903-04542-8 is denied:

The Employer had just cause to terminate the employment of the Grievant, David Monson on July 10, 2008, consistent with Articles 3.1 and 8.1 of the collective bargaining agreement between the parties and associated work rules.

RESPECTFULLY SUBMITTED this 19<sup>th</sup> day of February, 2009.

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Anthony D. Vivenzio, Arbitrator