In the Matter of Arbitration Between TEAMSTERS LOCAL UNION NO. 117, (Union), and WASHINGTON DEPARTMENT OF CORRECTIONS, (Employer or AHCC).	)	OPINION AND AWARD Lybecker Grievance (FMCS Case No. 06-03683) McLeod Grievance

BEFORE:	David W. Stiteler, Arbitrator
HEARING LOCATION:	Spokane, Washington
HEARING DATE:	October 11, 2006
APPEARANCES:	*For the Union:* Anna A. Jancewicz Staff Attorney Teamsters. Local Union No. 117 14675 Interurban Avenue South Suite 307 Tukwila, Washington *For the Employer:* Ronald Marshall Assistant Attorney General Office of the Attorney General Labor St Personnel Division 7141 Cleanwater Drive SW Olympia, Washington
RECORD CLOSED:	December 18, 2006
OPINION &AWARD ISSUED:	January 15, 2007

OPINION

I. INTRODUCTION

Grievant Elsie Lybecker was terminated from her position as a Correctional Officer (CO) at Airway Heights Correctional Center (AHCC) on February 24, 2006. The Union filed a grievance, which was advanced to arbitration. The parties selected David W. Stiteler as the neutral arbitrator of the dispute.

During the scheduling process, the parties agreed to ask the Arbitrator to consolidate the Lybecker grievance with a grievance filed on behalf of Carl McLeod, another CO who had been terminated at AHCC for similar reasons and whose grievance was pending selection of an arbitrator. The Arbitrator agreed to hear the two cases together.

A hearing was held before the Arbitrator on October I I, 2006, in Spokane. The hearing was orderly and both parties had the full opportunity to present documentary evidence, examine and cross-examine witnesses, and argue their positions. All witnesses testified under oath.

The parties stipulated that the grievances were properly before the Arbitrator for resolution and that there were no questions of arbitrability. They also stipulated that the Arbitrator could retain jurisdiction for 90 days following the issuance of this Decision and Award to resolve any remedial disputes, if a remedy was awarded. At the conclusion of the hearing, the parties agreed to submit written briefs in lieu of closing arguments. The Arbitrator closed the record on receipt of those briefs.

II. ISSUE

The parties stipulated to the following issue:

> Did the Employer have just cause to terminate Elsie Lybecker and Carl McLeod from their positions at AHCC, and if not, what is the appropriate remedy?

III. RELEVANT CONTRACT LANGUAGE

ARTICLE 4
EMPLOYEE RIGHTS

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4.3 Privacy and Off-Duty Conduct

Employees have the right to privacy in their personal life and activities. However, the off-duty activities of an employee may be grounds for disciplinary action if said activities are a conflict of interest as set forth in RCW 42.52 or are detrimental to the employee's work performance or the program of the agency. Employees will be required to report all arrests, criminal citations, and any court imposed sanctions or conditions that may affect their fitness for duty to the Appointing Authority or designee within twenty-four (24) hours or prior to their scheduled work shift, whichever occurs first.

ARTICLE 8
DISCIPLINE

8.1 Just Cause

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

8.2 Forms of Discipline

Discipline includes oral and written reprimands, reductions in pay, suspension, demotions and discharges.

IV. SUMMARY OF RELEVANT FACTS

The material facts are largely undisputed. AHCC is a correctional facility located near Spokane. It houses approximately 2,200 medium and minimum security offenders. There are about 600 employees at AHCC, and about 250 of those are in custody positions, primarily CO. Maggie Miller-Stout is the superintendent of AHCC, a position she has held for about six years.

Possession of a valid driver's license is a job requirement for the CO position at AHCC. A license is required even if the particular post a CO is working does not include any driving duties. According to Miller-Stout, this is so because in an

emergency situation, it may be necessary for AHCC to reassign COs temporarily to other duties that might require driving, such as perimeter patrol.

Lybecker Elsie Lybecker was a CO at AHCC for about five years. She had not been disciplined prior to her discharge. Her evaluations were satisfactory or better and she had received several letters of commendation.

In October 2005, Lybecker was arrested while off-duty on suspicion of driving under the influence (DUI). The breathalyzer test administered by the arresting officer showed an alcohol concentration of more than 0.08, the legal limit. She reported the arrest as required by the Employer's policies, and Miller-Stout was made aware of the incident. Because this was off-duty conduct, it was unclear to Miller-Stout whether there would be an employment impact so AHCC took no action at the time. Lybecker continued to work in the same position and on the same shift as before the incident.

In December, Lybecker was informed by the State Department of Licensing (DOL) that her driver's license would be suspended for 90 days effective December 19, 2005. The suspension, an administrative action pursuant to a then-new Washington law, was for driving with an alcohol concentration in excess of the legal limit.

When Miller-Stout found out that Lybecker had lost her license, she ordered a disciplinary investigation. In a December 23, 2005 letter notifying Lybecker that AHCC was considering disciplinary action, Miller-Stout said that the potential disciplinary action was due to the suspension of Lybecker's license, because that meant that Lybecker "cannot perform the full range of duties of a Correctional Officer, which includes driving a vehicle." She also reassigned Lybecker to a non-custody position in the institution's property room. AHCC did not have either an FTE or funds for the position.

Miller-Stout held a pre-disciplinary meeting with Lybecker and Union Business Agent Joe Kuhn on December 29, 2005. Lybecker provided information about the incident. Miller-Stout confirmed that Lybecker's license was suspended.

Following the meeting, Miller-Stout conduded that there was cause for discipline. She decided that discharge was the appropriate disciplinary penalty.

The decision to discharge Lybecker was subject to a fairly lengthy review process of about 70 days. According to Miller-Stout, there were several reasons for the length of the review process. This was the first incident of its kind at AHCC under the new law. The parties had only recently become subject to grievance arbitration. She wanted to insure that there was a consistent disciplinary approach taken to such incidents. The decision had to be vetted by the Attorney General's office as well as her superiors in the Department of Corrections (DOC).

The decision to terminate Lybecker was effective on February 24, 2006. At the time she was terminated, there were about 20 days left before she would have been able to apply to have her license reinstated. According to Miller-Stout, Lybecker would have been free to apply for a vacant position at AHCC once she had her license back. Lybecker had not done so at the time of hearing.[1]

McLeod Carl McLeod was a CO at AHCC from 1995 until he was discharged in March 2006. He had no disciplinary record before he was terminated. His evaluations were uniformly positive and he had received a number of letters of appreciation and letters of commendation.

McLeod was arrested on suspicion of DUI in December 2005. As in Lybecker's case, the arresting officer determined that McLeod had an alcohol concentration

[1] Her reasons for not reapplying are mired in the only significant factual dispute in this matter. According to Kuhn, after Miller-Stout announced the decision to terminate Lybecker, he met with Miller-Stout to see if there was any way to save Lybecker's job. He claims that he came away from that conversation with the understanding that Miller-Stout would not re-hire Lybecker. Miller-Stout's recollection of the conversation is different. She maintains that she did not indicate a steadfast unwillingness to re-hire Lybecker, but did let Kuhn know that supervisors had expressed concerns to her about Lybecker being re-hired, despite the fact that her evaluations were satisfactory and she had not been previously disciplined. Resolution of this conflict is not necessary.

above the legal limit. McLeod did not report the arrest within 24 hours as required by AHCC policy and the parties' contract. He was given an oral reprimand, which is not at issue in this proceeding, for not reporting the arrest within the required time.

McLeod's license was administratively suspended on February 2, 2006. Miller-Stout followed the same procedure in handling McLeod's case as she had in Lybecker's and sent him a similar letter notifying him of the potential and reason for discipline. After his license was suspended, she reassigned him to work in a non-custody position in the mail room. It also was a position for which there was no FTE and no funds.

The investigation/review process took about six weeks. AHCC terminated McLeod on March 22, 2006.

When McLeod's license was reinstated, he reapplied to AHCC and was rehired as a CO. AHCC waived some of the normal hiring procedures. However, he lost his seniority when he was terminated, was treated as a new hire, and was in a probationary status at the time of hearing.

Disciplinary Decision Miller-Stout decided to terminate in both cases because, in her view, once the Grievants lost their licenses, they no longer met the qualifications for the CO position. She considered and rejected other forms of discipline, including suspension and demotion.

She did not suspend the Grievants because suspensions have to be for a specified term. Since license reinstatement is not automatic under the law, she could not be certain that their licenses would be reinstated after 90 days.

She did not demote the Grievants because during the same time period there were two other employees who were facing potential license suspensions. She wanted to treat all four consistently, and there were not four positions available for demotion. She does not recall if there were any open positions at the time to which Lybecker and McLeod could have been demoted, and does not recall offering either employee the option of voluntarily demoting while their licenses were suspended.

The ultimate disposition of the criminal charges against the Grievants had no impact on her disciplinary decision. She did not discharge Grievants based on whether they were guilty of DUI but rather because the fact that their licenses had been suspended made them unqualified in her view to hold the CO position.[2]

Prior Cases During Miller-Stout's tenure as superintendent at AHCC, there have been at least five other cases of COs losing their driver's licenses temporarily.

Three of the cases arose before the new DUI law and under an earlier agreement between the parties.[3] In one case, the employee lost his license for 30 days. He voluntarily demoted to a position in the warehouse for the period of his license suspension. In a second case, the employee's license was suspended for one year. That employee too voluntarily demoted to a warehouse position for the period of the license suspension. In the third case, the employee's license was suspended for 30 days and he voluntarily demoted to a clerical position for that period. In each of those cases, the individuals demoted into open vacant positions.

The other two cases occurred during the same overall time frame as the Grievants'. In one case, the employee's license ultimately was not suspended so AHCC took no action. In the other, the employee's license was suspended for 90 days and the employee chose to resign. These were the two individuals that Miller-Stout wanted to make sure were treated consistently with Grievants.

V. CONTENTIONS OF THE PARTIES

Employer Grievants were dismissed because they no longer qualified for a CO position after their drivers' licenses were suspended. The Employer is not obligated to accommodate employees who do not possess required qualifications as the result of

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[2] In her letters to Grievants, Miller-Stout also referred to provisions in the Department's handbook that require employees to "positively represent" the State and to "be a good citizen, obey laws while on and off-duty. Your conduct off-duty may reflect your fitness for duty."

[3] Though the right to full collective bargaining and binding arbitration of grievances is new with the current contract, the parties have had a bargaining relationship spanning at least one prior contract term.

off-duty misconduct. Though dismissal is harsh, it is justified. The grievances should be denied and the dismissals sustained.

An employer is justified in discharging an employee for off-duty conduct where the conduct harms the employer's reputation, renders the employee unable to perform the job, or undermines the ability of the employer to direct the workforce. The parties recognized these principles in the contract when they provided that employees could be disciplined where off-duty conduct was detrimental to the employee's work performance or the agency's program. A valid driver's license is a required job qualification and the Grievants' loss of theirs impacted the Employer's ability to manage its employees and prevented the Grievants from performing all the duties of the job. Their actions impacted the Employer and harmed the Employer's reputation.

The dismissal was based on the loss of license, not on misconduct. The concept of progressive discipline does not apply because the dismissals were based on a lack of qualification.

The contract requires just cause for discipline, but does not define just cause. The Washington Supreme Court has defined the just cause standard and that definition should be applied here. Under that definition, the question for the arbitrator is whether there were facts supported by substantial evidence, which the employer reasonably believed, and which support a conclusion that the Grievants were no longer qualified for CO positions due to the loss of their drivers' licenses. The decision to discharge them was not arbitrary, capricious, or illegal.

The contract grants certain management rights to the Employer. Among those is the right to reassign employees. Due to a shortage of COs at the time, it was likely that circumstances would have required reassignment of the Grievants to posts that required driving. When the Grievants lost their licenses, the Employer could no longer reassign them to any CO position. In addition, the Employer had to assign

them to non-custody positions for which there was neither FTE nor funds. This adversely impacted the Employer's management rights to manage the budget.

These circumstances are unlike those arising with disabilities or on-the-job injuries that may require accommodation. Both situations are governed by statutory provisions that impose certain requirements on the Employer. Here, the Grievants lost their licenses, and a necessary job qualification, through their own actions. The Employer should not be required to accommodate them.

The new State bargaining law changed the disciplinary landscape. Previously, discipline was governed by merit system rules and evaluated under the standards of the Personnel Appeals Board. The parties' contract voided all prior disciplinary rules and practices, so the Employer could not consider its prior approach. The Employer was obliged to reconsider how it dealt with employees who temporarily lost their licenses. The Employer also wanted to be consistent across all its institutions. The Employer was bound to consider just cause as defined by the court, and only look at comparative situations that arose after the new bargaining law.

There is no valid claim of disparate discipline. The Employer treated the Grievants the same way it treated other employees who lost their licenses under the current contract. The examples offered by the Union, with two exceptions, occurred before the Employer was required to follow a different set of standards. And in one of the two cases, the employee was eventually dismissed; in the other, the employee resigned before any discipline was imposed.

The Employer had no feasible option other than discharge. The contract lists available types of discipline. Demotion was not an option because there were four employees facing license suspension, there were not four positions available for demotion, and replacing the Grievants would have been difficult due to a hiring freeze. In addition, the Union's claim that the Grievants should have been allowed to voluntarily demote is disingenuous because it is grieving a voluntary demotion involving a similarly situated employee. Further, neither Grievant asked to be allowed

to demote. The contract does not provide for a forced leave without pay. Suspension was not an option because it was not certain when, or even if, the Grievants' licenses would be reinstated.

Union The Employer did not have just cause to terminate the Grievants. There was no notice to the Grievants of the possible disciplinary consequences of their actions. The Employer treated the Grievants differently than similarly situated employees, and did not use progressive discipline. The grievance should be sustained, and the Employer should be ordered to reinstate the Grievants with an appropriate make whole remedy, including interest.

The contract requires the Employer to impose discipline only for just cause. The Employer bears the burden of proving that just cause existed for the discipline imposed. The appropriate evidentiary standard in a discharge case is clear and convincing evidence. Also, the reasonableness of the discipline imposed for a particular offense is a factor in evaluating just cause. The Employer failed on all counts.

There is no rule or policy that notifies employees of the disciplinary consequences of a driver's license suspension. The Employer's reliance on the class specification and job posting is not well-founded. Those documents are not rules or polices. Even if considered such, those documents do not state that they are work rules or policies nor do they advise employees that a violation may lead to discipline.

Consistent application of discipline is a necessary element of just cause. The Employer did not treat the Grievants in the same way it previously had treated employees who temporarily lost their licenses. No employee at AHCC had even been disciplined following a temporary license suspension.

The Employer's contention that it did not offer voluntary demotions to the Grievants because it wanted to treat employees equally is illogical; that is how it dealt with such cases before this. And the Employer's contention that non-custody positions were not available for voluntary demotion is without merit. The Employer

introduced no evidence to document that claim and the Superintendent did not recall for certain if positions were available. The evidence is that employees had been offered the option to demote in the past, and that offer was not made in these cases. In any event, the Employer has the authority to demote involuntarily as a disciplinary tool.

The Employer also could have suspended the Grievants. The explanation that it did not do so because of the uncertainty about their license restoration is without merit. The Employer produced no evidence that either Grievant would have been unable to satisfy the conditions for license reinstatement on the day following the 90 day suspension.

Progressive discipline is also an element of just cause. The Employer discharged the Grievants, who had good work records and no prior disciplinary history. The conduct at issue was off-duty and there was no nexus to work. Their actions were not of the type that warrant bypassing progressive discipline steps and moving to summary discharge.

The appropriate remedy is reinstatement of the Grievants to their former positions. In addition, they should be made whole with back pay and benefits, less interim earnings. The award of back pay should carry interest as this will best restore the Grievants to the position they would have been in but for the improper discharge. Since Grievant McLeod already has been rehired by AHCC, he should be treated as though he had continuous employment.

VII. Discussion and Analysis

The parties' agreement requires the Employer to have just cause for any discipline that it imposes. Whether the Employer violated that requirement by terminating the Grievants is the issue. The Employer bears the burden of establishing that just cause existed. After a thorough review of the record, I conclude that AHCC did not have just cause to discharge the Grievants. As explained below, the grievances must be sustained.

Just cause is a commonly used expression in labor relations. It is given various definitions but is generally understood to be the measure of whether an employer imposed discipline for good reason and was mindful of procedural and equitable considerations in so doing. The parties' contract does not define the term. The Employer argues that the applicable definition is the one found in *Baldwin v. Sisters of Providence,* 769 P.2d 298, a 1989 decision of the Washington Supreme Court.[4] For several reasons, I am not persuaded that applying that definition would be appropriate in this context.

First and foremost, the cited decision is distinguishable. It did not arise in a labor relations dispute under a collective bargaining agreement. Rather, it was a wrongful discharge lawsuit, based on a claim under an employer-enacted personnel policy. The employer's grievance procedure ended with the hospital administrator. The court held that it was for the employer to determine whether just cause existed for the discipline. According to the court, when the employee challenged the discharge, the burden of proof that just cause did not exist was on the employee, not the employer. Ultimate resolution of the dispute was a not a matter for mutually agreed upon binding arbitration, but for the courts. All of these factors are at odds with grievance arbitration under a labor agreement.

In addition, there is nothing in the language of the contract to show that the parties mutually intended to incorporate the court's definition. Nor is there other evidence, such as bargaining history, that establishes that the parties had the court's definition in mind when they wrote just cause into their agreement.

Finally, the parties' contract provides for binding grievance arbitration. Though new to them, the process of grievance arbitration has existed in this country for many years in both the public and private sectors. During the many years of arbitration

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[4] That definition is: "We hold 'just cause' is a fair and honest cause or reason, regulated by good faith on the part of the party exercising the power. We further hold a discharge for 'just cause' is one which is not for any arbitrary, capricious, or illegal reason and which is based on facts (1) supported by substantial evidence and (2) reasonably believed by the employer to be true."

practice, arbitrators have developed a variety of standards to determine if discipline was imposed for just cause. Such standards are widely known and accepted by labor and management, and often differ significantly from standards applied by courts or administrative tribunals. If the parties intended to vary from this common law of arbitration, they did not so indicate.

For these reasons, I will give the phrase the meaning ordinarily applied in the labor relations setting.[5] Though different arbitrators formulate the definition in various ways, these core elements are present in virtually all just cause determinations: (1) did the employer establish that the employee was guilty of the charged misconduct; (2) should the employee reasonably have known that engaging in that conduct could result in the discipline imposed; and (3) was the discipline imposed reasonable in light of all the circumstances. In addition, progressive discipline is favored under the just cause standard, but each case must be viewed on its own facts, which may warrant a departure from a progressive discipline approach.

There is no dispute that the conduct—drivers' license suspension—for which Grievants were discharged occurred. This case turns on the second and third elements listed above.

In considering those elements, two factors in particular bear on the outcome. First, the conduct for which the discipline was imposed is not behavior that a reasonable employee would know would result in termination. Second, the Employer varied, without a valid explanation, from its prior approach to handling license suspensions.

The first factor concerns notice, a critical component of workplace due process. In reviewing any disciplinary decision, a key question is whether the grievant knew or should have known that the conduct at issue would likely result in the discipline imposed. *Common Law of the Workplace,* St. Antoine, ed., 196 (BNA 1998); ***Elkouri &***

[5] This is the approach I took in a prior dispute between these parties. *Teamsters Local 117 and Dept. of Corrections (Zwick)(2006).*

Elkouri: How Arbitration Works, 6th Ed., Ruben, ed., 990–992 (BNA 2003). Based on this record, the answer to that question is clearly negative.

There are types of misconduct that are generally accepted as capital offenses for employment purposes, such as an unprovoked physical attack on another employee. Any reasonable employee would know such conduct is likely to result in discharge. However, temporarily losing one's driver's license is not conduct of that type.

For conduct that does not obviously warrant summary discharge, employees are entitled to be forewarned of the potential disciplinary consequences of such behavior. That typically is accomplished by the adoption of a rule or policy expressly prohibiting the conduct and providing for discipline. An employee may also be put on notice by the manner in which other employees have been disciplined for like conduct.

As the Employer points out, possession of a drivers' license is listed as a qualification on a CO job posting and the class specification. There is no doubt that COs at AHCC, including Grievants, knew or should have known that they needed to have a valid license. Given that knowledge, they also knew or should have known that they would face some consequences for losing that license.

None of the exhibits or testimony, however, established that a CO at AHCC reasonably would have understood at the time of these discharges that the consequence of a temporary driver's license suspension would be discharge. Indeed, the evidence established the contrary. Although possession of a valid license is a job requirement, nothing in the job posting or class specification or any other document in this record warns employees that their position would be forfeit in the event their license was suspended. Also, AHCC has not in recent history (i.e., during Miller-Stout's tenure as superintendent) dealt with license suspensions by imposing discipline, and certainly not termination.

The second factor concerns disparate discipline, both a component of workplace due process and a consideration in determining the reasonableness of the penalty imposed. It is generally understood in arbitration that there must be consistency in the penalties imposed for similar conduct under similar circumstances. *Elkouri, supra,* at 995—999; *Discharge and Discipline in Arbitration,* Brand, ed., 83–85 (BNA 1998). That did not occur in this case.

The Employer asserts that to be consistent it had to treat the Grievants and two other employees facing license suspensions the same and that this restricted its ability to consider discipline other than discharge. While the goal of consistency in the application of discipline is essential in a just cause environment, consideration must be given to the past as well as the present and future. AHCC had addressed precisely the type of conduct at issue here on at least three occasions during the last few years. In none of those occasions was the employee fired.

The Employer argues that there have been intervening statutory changes since the earlier license suspension cases: the new collective bargaining law (and subsequent contract) and the new DUI law. However, while the laws may have changed and a new contract been negotiated, the job requirement that is at the heart of this dispute—possession of a driver's license—did not change. That requirement existed before the new bargaining law and contract, and before the change in the DUI law. The Employer failed to demonstrate why these changes would require prior discipline to be ignored.

Neither the statutory nor the contract changes directly impacts the comparability of the prior cases. The employees involved in the earlier cases experienced license suspensions that differed only in length (two shorter and one much longer) from those at issue here. More importantly, neither the statutory nor the contract changes would have put employees on notice that AHCC would no longer treat license suspensions in the same way it had since at least 2000.

The Employer asserts that the zipper clause in the new contract specifically bars it from considering prior disciplinary practices. That clause provides, in relevant part, that "any past practice * * * between the parties—whether written or oral—is null and void, unless specifically preserved" in the contract.

Zipper clauses are ordinarily intended to eliminate the binding effect of unwritten practices. Such clauses tend to continue from contract to contract. To extend such a clause to comparative discipline would lead to the illogical result that with every new contract, all prior disciplinary standards would be swept away. Among the casualties would be both consistent application of discipline and notice to employees of disciplinary consequences.[6]

In addition, the zipper clause is general language, sometimes considered boilerplate. In contract interpretation matters, the rule is that specific provisions govern general provisions. The "just cause" provision is a specific provision imposing a definite obligation on the Employer. And as discussed above, questions of disparate discipline are appropriately considered in a just cause determination.

Also, in the *Zwick* case, the Employer took a position regarding prior discipline that is at odds with the position it has taken here. There, to counter arguments that it did not apply progressive discipline, the Employer relied on the fact that the grievant had been reprimanded previously for a similar offense. That reprimand, however, was imposed under the parties' prior agreement. If it was appropriate there to rely on actions taken under the old contract for progressive discipline purposes, it is equally valid here to consider such actions for comparative discipline purposes.

Another consideration is the off-duty nature of the Grievants' conduct. The general rule is that an employer does not have the right to discipline employees for

[6] This conclusion should not be read to mean that the Employer is forever locked into old disciplinary practices. An employer generally is free—subject to possible bargaining obligations—to issue a "clean slate" letter and tell employees that prior disciplinary policies will not be followed. It is, in other words, a matter of notice.

their off-duty conduct. The parties have essentially recognized that general rule in Section 4.3 of their agreement.

Like any general rule, this one has exceptions. Arbitrators may sustain discipline for off-duty conduct where the employer can establish a direct and demonstrable relationship between the offense and the employee's job, or a connection between the employee's off-duty conduct and the employer's legitimate business interests. Failure to establish such a nexus typically will result in the discipline being overturned.

Here the parties have codified three specific exceptions to the general rule in Section 4.3. They agreed that the Employer may discipline employees for off-duty conduct where such conduct violates statutory conflict of interest rules, is "detrimental to the employee's work performance," or is harmful the institution's program.

The first of those exceptions is not at issue. The question then is whether the temporary suspension of their drivers' licenses either was detrimental to the Grievants' work performance or was damaging to AHCC's operations. The Employer argued both but failed to establish either.

Though having a valid driver's license is a requirement of the job, the Employer essentially conceded that a CO could work their entire career at AHCC and never be required to drive at work. Neither Grievant was in a post that required driving as a regular job duty. The Employer offered no evidence to show that either Grievant had ever been required to drive while at AHCC.[7]

Significantly, the Employer did not prove that it was more probable than not that Grievants would have been required to drive during the period of their license suspension. That contention was based on the claim that, due to a shortage of COs at that time, it was likely that the Employer would have had to assign Grievants to posts that required driving. The contention is purely speculative. More importantly, it is at

[7] Neither Grievant testified.

odds with the record. Lybecker, for example, continued to work in her CO position for about two months following her arrest before her license was suspended, and there is no evidence that she was required to do any driving during that time.

Likewise, the Employer's claim that AHCC's operations were or would have been impacted is not supported. That claim too is speculative. There is no evidence of actual harm to AHCC's operations. Any impact flowing from the Employer's decision to reassign Grievants pending the outcome of the disciplinary investigations is self-inflicted. Given that Lybecker had remained in her CO position without having to drive for two months following her arrest, the decision to reassign Grievants might well have been unnecessary.

Further, the record is devoid of any evidence that the Employer's reputation was damaged. There is no indication that the arrests were notorious. The Employer had apparently suffered no negative consequences in the past as the result of DUI arrests of COs.

Finally, it is a generally accepted part of just cause that the fundamental purpose of workplace discipline should be to correct rather than punish. The parties have adopted, at least by implication, the principles of progressive discipline, which supports the concept of a corrective approach to discipline. Where, as here, the offense involved is not one of those recognized as justifying summary discharge, the employer is typically obliged to follow progressive discipline. The Employer did not do so.

In sum, the Employer did not have just cause to terminate Grievants because Grievants could not reasonably have known that temporarily losing their drivers' licenses would mean losing their jobs. The Employer improperly ignored its prior approach to addressing the same offense. Under these circumstances, discharge was not within the zone of reasonableness. In reaching this conclusion, I considered all the arguments and authorities raised by the parties, even if not specifically discussed herein.

Remedy The question of remedy is somewhat nettlesome. There are basically two options: a conclusion that there was no just cause for *any* discipline and a full make whole remedy; or, a conclusion that there was no just cause for *discharge* but there was just cause for discipline, and a partial remedy.

The problem with the former is that it excuses Grievants for behavior that at the least was irresponsible and at worst made them unqualified—albeit temporarily—to hold their jobs. The problem with the latter is that the logical relationship between any lesser level of discipline and the offense involved is somewhat tenuous.

A suspension equal to the length of the license suspension has some logical support, because that is the period of time that Grievants lacked a required job qualification. But it would be a bit draconian given that neither was in a post that required driving, there was no proof that either would have been required to drive any time during that 90 day period, no one has been disciplined for this offense before, Grievants have good work records, and this was apparently the first disciplinary event for either. Any other length suspension, however, would be arbitrary.

A reprimand would be less logical. It would essentially hold Grievants harmless for being unqualified for a period of time, even if the need for the qualification is more theoretical than actual.

Demotion—or its economic equivalent—for the period of the license suspension is the most appropriate choice. That course of action most closely replicates the Employer's approach to license suspensions before these cases.

The Employer is directed to reinstate Grievants to their former positions and make them whole with back pay and benefits, less interim earnings, and including a restoration of seniority. For each Grievant, the back pay award shall be reduced, for the actual number of days their license was suspended, by the difference between their respective CO pay rate and the pay rate they received during their temporary reassignments.

The Union requests that interest be awarded on any back pay awarded. Under the circumstances of this case, interest is appropriately included to make Grievants whole.[8] Therefore, the back pay award shall include interest at the current Washington statutory rate.

[8] *See* discussion and cases cited on this subject in *Elkouri* at pp. 1218-1221.

AWARD

Having fully considered the whole record in this matter and for the reasons set out in the foregoing opinion, I conclude that:

1. The Employer did not have just cause to discharge Grievants Lybecker and McLeod. Accordingly, the grievances are sustained.

2. The Employer shall reinstate the Grievants to their former positions, and make them whole as described in the Remedy section of the Opinion.

3. The Arbitrator shall retain jurisdiction for 90 days to resolve disputes concerning this Award.

4. Pursuant to Section 9.6, the Arbitrator's fees and expenses will be split equally between the parties.

Respectfully issued this 15th day of January, 2007.