

IN ARBITRATION BEFORE
MICHAEL E. CAVANAUGH, J.D.

WASHINGTON FEDERATION
OF STATE EMPLOYEES,)
)
Union,) ARBITRATOR'S DECISION
) AND AWARD
and)
) AAA No. 75-390-00310-09
)
STATE OF WASHINGTON, DEPT.)
OF SOCIAL AND HEALTH SERVICES)
(Western State Hospital),)
)
Employer.)
)
(Robert Bolander Grievance))

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I. INTRODUCTION

Grievant, employed as an on-call security guard at the Center for Forensic Services (“CFS”) Unit of Western State Hospital,¹ was notified by the Department in late January 2009 that his services would no longer be required. While conceding that the

¹ The CFS Unit at Western State houses inmates who have been found not guilty by reason of insanity or who are mentally unfit to stand trial.

Department need not have contractual just cause to dismiss a non-permanent, on-call security guard, the Union nevertheless alleges that the dismissal violated the parties' Agreement because it was in retaliation for Mr. Bolander's Union activities—specifically, his active participation in protesting the alleged unfairness of a process leading to the hiring of four permanent security guards.

At a hearing held in Tacoma, Washington on April 1 and 2, 2010, the parties had full opportunity to present evidence and argument, including the opportunity to cross examine witnesses. The proceedings were transcribed by a certified court reporter, and I have carefully reviewed the transcript in the course of my analysis of the issues. The advocates filed simultaneous electronic post-hearing briefs on May 7, 2010, and with my receipt of the briefs, the record closed. Having carefully considered the evidence and argument in its entirety, I am now prepared to render the following Decision and Award.

II. STATEMENT OF THE ISSUE

The parties stipulated that the issue to be decided should be stated essentially in the following form:

Did the Employer discriminate against Robert Bolander in violation of Article 2.1 of the parties' 2007-2009 CBA when it terminated him from his on-call employment as a security guard at Western State Hospital? If so, what remedy?

Tr. at 7-8.

III. FACTS

Security guards at the CFS Unit provide security around the clock for criminally-committed patients. A staff of permanent officers is supplemented by on-call security guards, scheduled as needed to replace guards who are ill or on vacation or otherwise absent. In addition, guards escort patients who must be transported outside the facility for

court appearances or medical appointments, including emergencies. On-call guards are typically scheduled in advance for known vacancies, but a need for additional guards can arise unexpectedly. Consequently, the Department depends upon on-call security officers to be available for work on short notice, at any time of the day and any day of the week.

Grievant Robert Bolander owns recreational property in Randle, Washington near Mt. Rainier. Prior to being hired at Western State in November 2007, Grievant and his family spent nearly every weekend at their Randle property, and when he was interviewed for the on-call guard position, Grievant readily disclosed that fact.

Nevertheless, the Department hired him. Within a few months, however, day shift supervisor Karen Amaral spoke with Grievant after hearing about complaints from other officers that Mr. Bolander was saying that he had a “deal” with the Department limiting his obligation to work on weekends.² During this conversation in the Spring of 2008, Amaral said that she would work with Grievant where possible to give him some weekends off, but that there were “no guarantees.” Tr. II at 9. Amaral suggested that Mr. Bolander speak with lead Manny Iyulores about a schedule that might include two weekends off per month,³ and Grievant believed he had come to an understanding with the Department to that effect. His subsequent performance evaluation in November 2008 did not include any criticism concerning his availability for work.

Nevertheless, Amaral perceived that Grievant continued to be unhappy when scheduled to work on weekends, and she also testified that some fellow officers expressed the futility of calling Mr. Bolander for last minute on-call work, saying things

² Amaral testified that in the hiring interview, she had made clear to Mr. Bolander—and believed that he understood—that he was being considered for an on-call position which, by its nature, included any and all shifts and did not exclude weekends and holidays. Tr. II at 7.

³ Before Mr. Bolander could meet with his lead, however, Iyulores was removed from that position for poor performance. Therefore, no such meeting ever took place.

like “don’t call him, he’s not going to show up.” Tr. II at 66. Officer Regalado agreed with Amaral’s assessment of the situation. Tr. at 167. Other officers, however, including lead Willie Hill and former lead Clint Wyatt, testified that Bolander was a reliable officer who responded to last-minute calls as often as the other officers. Tr. at 55; 69.⁴ Grievant also explained that if he was already at his property when called, it was often the case that an on-call guard who lived closer could make it to work long before he could, and if he was operating equipment at the time of the call, he might not hear his cell phone ring. Under those circumstances, by the time he retrieved the message, someone else might have already agreed to work the available slot.

In any event, in late 2008 and early 2009, Supervisor Amaral informally counseled Grievant in connection with several incidents. On December 18, 2008, Amaral posted a revised schedule necessitated by an unexpected absence over the coming weekend. When Grievant learned he had been scheduled to work December 20-21 (i.e. over the weekend), he slammed his fist on the table in the control room and loudly exclaimed “this is fucking bullshit!” Tr. II at 32. When Amaral asked if there was something they needed to discuss in private, Grievant initially said no, then went outside to smoke a cigarette and to calm down. A few minutes later he returned inside to speak with Amaral. Grievant explained to her that he had specifically asked for that weekend off several months earlier because of a planned family gathering at his property. Apparently, Amaral had failed to note his request on the calendar, which was her usual method of keeping track of officer unavailability. Following their discussion, Amaral

⁴ The evidence suggested that Mr. Bolander might have received more calls than his fellow on-call officers. That is so because the form for keeping track of such matters listed the on-call guards alphabetically, and the calls tended to be made in the order the officers were listed on the form. Thus, it is difficult to tell whether Grievant, if in fact he declined more on-call opportunities than his colleagues, did so because he was called more often than they were as a result of being the first officer listed.

changed the schedule and gave Grievant the weekend off. Mr. Bolander perceived that Amaral had recognized her mistake and had given him the weekend consistent with his request some weeks earlier. Amaral testified, by contrast, that she gave him the weekend off because she was unsure how he might be affected by his anger at being required to work, i.e. she was not certain that she could rely on Grievant to be “professional and courteous” if he “clearly wanted to be someplace else and not at work.” Tr. II at 35.

On January 5, 2009, Security Supervisor Amaral filled out a “Confidential Reference Inquiry” regarding Mr. Bolander in connection with the competitive process for hiring four permanent security guards in CFS. A number of on-call guards, including Grievant, had indicated interest in being considered for those positions, and on December 8, 2008, Facilities Manager Christine Campbell had requested a “reference” with respect to Grievant. In response to that request, Amaral described Grievant as an “on-call” applicant [who] wants weekends off, holidays off, wants day shift.” Exh. E-9. She marked his reliability and attendance each as “fair,” and checked the “no” box in response to the question “Would you rehire this applicant?”

On January 12, 2009, a staff nurse asked Mr. Bolander to photo-document the status of the medical condition of a patient’s leg and thigh. Based on his prior training in the military, Grievant believed that the patient had a serious bleeding condition and needed to be taken to the ER immediately. He expressed that opinion to two RN’s and another member of the medical staff, allegedly in front of the patient. The nurses apparently took offense that Security was telling them how to do their jobs. Grievant testified that he was merely responding as a “human being,” realizing that the patient needed prompt medical attention, and he was upset because the nurses simply “didn’t

care.” When the incident was reported to her, Supervisor Amaral was concerned that a security guard was acting outside the scope of his authority. She testified that she told Grievant that his only proper role in that situation was to take photographs as requested “and do whatever it is the nursing staff asked him to do and certainly not to get into their business because he would not have appreciated it had the nursing staff come down and told us how we’re supposed to run the doors or perform security.” Tr. II at 40.

A few days later, on Thursday January 15, 2009, a patient ripped the fire sprinkler out of the ceiling of his room causing a flood. Grievant responded with others to create a dam to isolate the flooding and to call maintenance to respond to the scene to turn off the water. Grievant took a couple of photographs, which were allegedly blurry and of little use, but because he was soaking wet (which is why the photos were not of high quality, according to Grievant) and because it was the end of his shift, he left work without taking any witness statements or making other notes. Officer Regalado, who came on at the shift change, was unhappy about being left with the duty of writing an incident report without the proper informational resources. In addition, most of the potential witnesses were no longer on site because of the shift change. Grievant testified that he had been unable to take notes or statements because everything was wet, and he could not stay to complete the report himself because he had been instructed not to complete reports on overtime. In addition, Grievant testified that he was scheduled to work again eight hours later, and it would have been a violation for him not to have at least eight hours off between shifts. Amaral spoke with Grievant about the incident on January 22, 2009,⁵ telling him that

⁵ Apparently, the lapse of a week between the Thursday, January 15 incident and Amaral’s discussion with Mr. Bolander on the following Thursday was occasioned, at least in part, by the fact that Amaral did not work weekends, the Monday following the incident was a holiday, and Grievant was not scheduled to work

security guards do not leave without filing a proper incident report. Grievant testified that he responded “We do it all the time.” Tr. at 114.

Also on January 22, a number of security guards, including Mr. Bolander, met with supervisors and managers, as well as Union representatives, to discuss the on-call officers’ dissatisfaction with the hiring process for permanent security guards. When the successful candidates were announced, two of the positions had been awarded to relatives of the assistant to Facilities Manager Christine Campbell, even though each of them had less time in the on-call security guard position than Grievant and several other officers. Permanent officers Willie Hill and Ragland wrote an e-mail in protest of a “corrupted process,” sent to management on January 13, 2009, and several on-call officers, including Grievant, signed a separate paper labeled “Sign if You Care” which had been posted in the CFS Unit. *See*, Exh. U-5.⁶ Although Grievant testified that he had been advised not to say anything during the meeting on January 22 in order to avoid potential retaliation, Grievant actively participated, speaking out about the fact that during his interview, Christine Campbell had walked out for twenty minutes or so, yet apparently scored him low on that portion of the process. Tr. at 111.

Later in the day on January 22, Security Director Kathy Davies met with Amaral in her office. Grievant testified that Davies “glared at him,” both as she entered Amaral’s office and as she left. Tr. at 113. Shortly after Davies left the area, Amaral told Bolander that she wanted to meet with him the following Monday, but she would not say why. Tr. at 115. Grievant arranged for Union representation at the Monday meeting, but there was

on Wednesday. Thus, there was no opportunity for Amaral to meet with Grievant on a number of the intervening days.

⁶ There is some dispute about whether management saw the separate document that had been signed by the on-call guards until the processing of this grievance, but for reasons that that will appear during my analysis of the issues, I need not resolve that dispute.

no discussion. Rather, Ms. Davies simply gave Grievant a termination letter, refusing to provide an explanation of the reasons the Department had determined that he should be separated. Exh. J-5. During the processing of the resulting grievance, management representatives conceded that there was no derogatory performance information in Grievant's file, and took the position that his position had been eliminated because the hiring of four permanent guards reduced the need for on-call security staff. *See, e.g.* Exh. J-3 at 2.⁷

At the hearing, however, the Department's asserted justification for the separation focused on Grievant's alleged lack of "availability" in December 2008 and January 2009, in addition to his outburst on December 18, 2008 when Amaral scheduled him to work the following weekend. The Department also presented testimony about the incidents of January 12, 2009 (failure to file an incident report) and January 15, 2009 (exceeding the scope of his authority by "diagnosing" a patient's condition and attempting to interfere with the judgment of the nursing staff). In addition, the Department pointed out that Ms. Amaral had formed a judgment about Mr. Bolander's continuing employment as early as January 5, 2009 (when she checked the "no-rehire" box on the reference request from Christine Campbell), and that Amaral had independently spoken with Director Davies during January 2009 about separating Mr. Bolander because of lack of "availability" in December and January, as well as his attitude toward her.⁸ At some point, Human Resources Administrator Susan Thomas met with Davies and Western State COO Dale

⁷ As will be described in more detail later, however, the Department filled Grievant's on-call position with another on-call officer shortly after his separation.

⁸ Amaral's testimony was unclear as to the precise date that she recommended to Davies that Bolander be separated, other than that she had continuing discussions with Davies during the month of January regarding all security guards, including Bolander. Tr. II at 47.

Thompson to discuss the proposed separation of Mr. Bolander. Tr. at 151.⁹ According to Ms. Thomas, no one mentioned Grievant's participation in the meeting. Rather, management's concerns centered on Mr. Bolander's alleged lack of "availability." Tr. at 152-53. With respect to the lack of a reason for termination in the separation letter, Ms. Thomas testified "this is the normal termination appointment letter that we give" and "we don't give a reason for separating on-call or nonperm-appointment employees, ever." Tr. at 154.¹⁰

After discussing the situation with Ms. Thomas, COO Thompson and Director Davies consulted with the appointing authority, CEO Connie Wilmot, who made the ultimate decision to separate Mr. Bolander. According to Ms. Wilmot, Thompson and Davies said that there was an issue with Grievant's availability in that "he wasn't always available when called. It seemed he frequently wanted to not work on weekends." Tr. at 212. In addition, Ms. Wilmot recalled that "they shared concerns they had about his conduct, specifically towards Ms. Amaral and towards some of his coworkers." *Id.* Based on this information from Thompson and Davies, CEO Wilmot agreed that Mr. Bolander's on-call appointment should end. Tr. at 207.

Additional pertinent facts will be developed in the course of the analysis that follows.

⁹ Again, the timing of this meeting is unclear. Ms. Thomas testified that the meeting occurred a few days after the meeting between management and the security guards, but that seems potentially inconsistent with the testimony that Ms. Amaral told Grievant on January 22—the day of the labor-management meeting—that she wanted to meet with him the following Monday for what turned out to be the delivery of his notice of dismissal.

¹⁰ The record does not contain a specific rationale for the Department's policy of not giving a reason for the separation of an on-call employee, other than that the Agreement does not require it.

IV. DECISION

Unlike a dispute governed by concepts of just cause for discipline, in which the Department would shoulder the burden of proof, the burden of proof here rests with the Union to establish that Mr. Bolander was discriminated against because of his Union activities.¹¹ The appropriate quantum of proof required is a preponderance of the evidence, i.e. evidence sufficient to say that it is more likely than not that the Department was substantially motivated by a desire to retaliate against Grievant because of his active participation in a protest against what a number of officers perceived as a corrupt hiring process. In considering whether the Union has met this burden, I have found it helpful to utilize an analysis similar to the shifting burdens of production and persuasion applicable to claims of statutory discrimination, i.e. to first evaluate whether the Union has presented facts that, if unexplained, would support an inference of retaliation against Mr. Bolander. If so, the analysis then proceeds to a determination of whether the Department has articulated facts that, if believed, would establish a legitimate, nonretaliatory reason for the separation. If the Department has articulated a legitimate reason for its actions, the ultimate question is whether a preponderance of the evidence establishes that the Department's asserted justifications are merely a pretext for retaliation. The Union bears the burden of proof on this final question—did the Department separate Mr. Bolander in order to retaliate against him for his Union activities?

The Union strenuously argues that the timing of the separation—following immediately after the Union-management meeting at which Grievant protested the hiring process—readily supports an inference of causation. In addition, the Union points out that

¹¹ There is no dispute that Article 2.1 prohibits discrimination against employees for Union activities, and that on-call employees are protected by that prohibition as well as regular employees.

the Department initially refused to give *any* reason for the dismissal, and that when the Department finally did explain its rationale during the grievance process, it gave a reason that lacks credibility. That is so, says the Union, because although the Department claims it did not need as many on-call security guards because of the recently completed addition of four permanent officers, it nevertheless filled Mr. Bolander's slot with another on-call officer shortly after his separation. Moreover, the Union contends, the Department continued to utilize on-call security officers at a substantial level in the period immediately following Grievant's separation. Therefore, it cannot be the case that the Department dismissed Mr. Bolander—but no one else—because it expected its need for on-call staff to be reduced following the hiring of permanent staff. Moreover, the argument continues, if the Department had actually been motivated by concerns regarding Grievant's performance deficiencies—as the Department contended at the hearing—Director Davies would have taken action sooner. Instead, even though the incidents of concern described by Ms. Amaral all occurred prior to the labor-management meeting, Ms. Davies took no action on those concerns until immediately after she had observed Mr. Bolander speak out during the meeting on January 22, 2009. *See*, Union Brief at 19.¹²

At the first stage of the analysis, I find that the Union has established a *prima facie* case of retaliation. I reach that conclusion based on the apparent temporal proximity between the January 22, 2009 meeting and the actual separation,¹³ as well as the

¹² The Union's argument does not explain, however, why Ms. Davies would be motivated to retaliate against Mr. Bolander because he had criticized the conduct of Christine Campbell during the hiring process.

¹³ I am less influenced by the Department's initial refusal to provide a reason for the separation. Although the Department's witnesses did not articulate a specific justification for the policy of not giving a reason, I would not find it unusual for an employer to refrain from offering a justification for an on-call separation

appearance, at least, of a somewhat shifting rationale in support of the Department's decision.¹⁴ Nevertheless, at the second stage, I find that the Department has articulated a legitimate justification for its decision—specifically, that Mr. Bolander was perceived as not responding fully to the Department's last-minute needs (an essential element of an on-call position), and that within a few weeks prior to the separation, he had been profane in his reaction to a scheduling decision by his supervisor. The Department also notes that during that time frame, Grievant arguably failed to meet his obligation to prepare an incident report—or at least to provide sufficient information to the officer coming on shift so that officer could complete the report. In addition, the Security Department had received a complaint from several nurses that Grievant had exceeded the bounds of his authority and questioned their medical judgment in front of a patient. These reasons, if they in fact motivated the Department, would be legitimate and nonretaliatory.

The crux of the analysis, then, is the third stage, i.e. whether a preponderance of the evidence establishes that the Department's purported justifications for the separation are simply a pretext for retaliation. In evaluating that question, it is not my place, as it would be in a matter governed by principles of just cause, to determine whether the Employer has accurately described Grievant's alleged deficiencies. Nor is it my place to evaluate whether the commonly accepted procedural aspects of just cause have been complied with—elements including providing Mr. Bolander with clear notice of the

out of fear that if it did so, it might be creating a "practice" that could potentially undermine the express contractual provision that it need not have just cause to dismiss an on-call employee.

¹⁴ I describe the rationale as "somewhat shifting" because, although it is true that the Department's Step 1 response prominently featured the justification that "filling the five permanent Security Guard positions reduced WSH's need for non-permanent service," Exh. J-3 at 2-3, the Step 1 response went on to note concerns about Mr. Bolander's availability, including the fact that "he was often at a property that is two hours' travel away from WSH." *Id.* Thus, it would not be entirely accurate to say that the justification offered by the Department at the hearing had never been raised earlier in the process.

Department's expectations and the consequences of failing to meet them, as well as imposing discipline in a "progressive" manner, i.e. choosing forms of disciplinary penalties designed to rehabilitate, not simply to punish. That is so because management misjudgments are not prohibited by Article 2.1, and that contractual Article does not establish a standard of generalized "fairness" in dealing with employees. Rather, it is *intentional* discrimination and/or retaliation that the parties have determined should be considered a violation of Article 2.1. Therefore, once I have determined, as I have here, that the Department's proffered justifications are not so flimsy as to be wholly unworthy of belief, the question is not (as the Union seems to argue) whether management's view of Grievant's shortcomings has been fully established by the evidence, nor whether dismissal was a "fair" response to those perceived performance deficiencies. Rather, the question is whether a preponderance of the evidence establishes that management did not *in fact* separate Grievant from employment because his supervisors in good faith *believed* him to be deficient in those respects.

Responding to the question of intentional retaliation, the State argues that the ultimate decision maker, CEO Wilmot, had no specific knowledge of Grievant's participation in the labor-management meeting. Therefore, the argument continues, she could not have retaliated against Grievant on that basis. There is an established principle of discrimination law, however, often labeled the "cat's paw" theory, which holds that an employer will not be shielded from liability by the fact that the ultimate decision-maker was unbiased if that decision-maker acted on the basis of discriminatory or retaliatory information provided by a lower-level manager. I find that analysis persuasive, and here, if Ms. Wilmot had received and acted upon information from Director Davies and COO

Thompson that was intentionally retaliatory, her lack of awareness of the retaliatory motive would not excuse the Department's actions. There is insufficient evidence to convince me, however, that either Mr. Thompson or Ms. Davies¹⁵ intended to retaliate against Grievant. Instead, the preponderance of the evidence establishes that they were acting squarely upon the recommendation of Supervisor Amaral.

Nevertheless, the cat's paw analysis would appropriately apply if the Union had established that Ms. Amaral had been motivated by retaliation. Unfortunately for Mr. Bolander, however, the evidence is inconsistent with that theory. I note, for example, that Ms. Amaral had developed sufficient dissatisfaction with Mr. Bolander's availability on January 5, 2009—*more than two weeks prior to the labor-management meeting*—that she indicated she would not rehire him for the on-call security guard position.¹⁶ Thus, as early as January 5, 2009, and perhaps earlier, Supervisor Amaral had formed a judgment that she would rather not have Mr. Bolander working for her.¹⁷ As noted in the prior

¹⁵ Had Ms. Campbell been involved in the decision to separate Grievant from employment, the retaliatory inference might well be stronger. That is so because in the January 22, 2009 meeting, Grievant had directly criticized the conduct of Ms. Campbell during his interview for a permanent security guard position, and the crux of the officers' dissatisfaction with the results of the process was that two on-call officers who had a family relationship with Ms. Campbell's assistant received preferential treatment. But the evidence established that Ms. Campbell was not a participant in the January 22 meeting, and there is no evidence that she participated in the separation process in any way.

¹⁶ The evidence convinces me that Supervisor Amaral, whether fairly or not, had decided to seek Mr. Bolander's separation because of her view that he was insufficiently motivated to help her when she needed a last-minute replacement, and/or because of the perceived morale problems he apparently generated with some co-workers by jealously guarding his time at the Randle property. His profane outburst on December 18, 2008 likely was a consideration as well, and perhaps to a lesser extent, the report incident on January 12. Again, if this were a just cause case, an arbitral evaluation of the fairness and correctness of these views would be appropriate. Here, however, such an analysis would exceed the limits of my authority.

¹⁷ The Union suggests that Ms. Amaral's concerns about Grievant's availability should be discounted because in the January 5 reference she marked his "reliability" and "attendance" as "fair" rather than "poor." Union Brief at 15. Amaral testified, on the other hand, that she graded Grievant as "fair" because he was reliable when actually scheduled, but did not respond as she thought he should when called in for extra shifts. Tr. at 73. I find no inherent inconsistency between the exhibit and Ms. Amaral's testimony, and I note that even if there were some inconsistency, it would not advance the Union's theory of the case. That is so because the event for which Grievant was allegedly subject to retaliation occurred several weeks *after* the reference.

footnote, that timing is inconsistent with Mr. Bolander's theory that he was retaliated against for participation in the labor-management meeting. Moreover, Ms. Amaral, while a supervisor, is a member of the Union and a member of the bargaining unit. Nothing in the record would support a conclusion that, despite being a member of the bargaining unit, Ms. Amaral was motivated in any way to retaliate against Mr. Bolander because of his protest concerning the hiring process for permanent security guards.

In sum, the evidence fails to establish that Mr. Bolander's Union activities were a motivation for his separation from an on-call position with the Department. Therefore, the grievance must be denied.

AWARD

Having carefully considered the evidence and argument in its entirety, I hereby render the following AWARD:

1. The evidence fails to establish that the Department discriminated against Grievant Robert Bolander because of Union activities; therefore,
2. The grievance must be denied; and
3. Consistent with the terms of their Agreement, the parties shall bear the fees and expenses of the Arbitrator in equal proportion.

Dated this 4th day of June, 2010



Michael E. Cavanaugh, J.D.
Arbitrator