

In the Matter of the Federal Mediation and Conciliation Service
Arbitration Between

TEAMSTERS LOCAL UNION NO. 117,)
)
) Union,)
and) FMCS 120321-01971-6
)
STATE OF WASHINGTON)
DEPARTMENT OF CORRECTIONS) ARBITRATION DECISION
) AND AWARD
) Employer.)
)
(In Re Gustavo Meza Termination))
)

BEFORE: Lawrence E. Little
Arbitrator
7790 NW Wildcat Lake Road
Bremerton, WA 98312

REPRESENTING Daniel A. Swedlow
THE UNION: Senior Staff Attorney
Teamsters Local Union No. 117
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REPRESENTING Susan Sackett Danpullo
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HEARING HELD: Walla Walla, WA
September 24 and 25, 2012

Introduction

This arbitrator was selected under Article 9.4 of the parties' Collective Bargaining Agreement, and the arbitration held under the rules of the Federal Mediation and Conciliation Service (FMCS).

In regard to arbitrability, the parties stipulated that this grievance is properly before the undersigned arbitrator for a final and binding decision.

The hearing was transcribed and a transcript was timely received by this arbitrator. The parties further stipulated to exhibits, certain facts, and the issue, as will be noted below. They also stipulated to the submission of post-hearing briefs-- which were both timely received and the hearing record closed on November 21, 2012.

This grievance concerns the termination of Gustavo Meza (Grievant) on December 6, 2011 from his position as a Correctional Officer (CO) at the Washington State Penitentiary (WSP) located in Walla Walla, Washington, for allegedly:

"On October 26, 2011...introducing and distributing contraband in the form of an orange colored pepper substance to offenders in Fox Unit.

On October 29, 2011...found in unauthorized possession of numerous DOC [Department of Corrections] uniforms and property in your personal vehicle.

On October 29, 2011...found using offender property for personal use."

Issue

Was the termination of Gustavo Meza for just cause; and if not, what is the remedy?

Relevant Contract Provisions

The parties stipulated that Joint Exhibit 1 is the applicable Collective Bargaining Agreement (CBA) effective July 1, 2011 through June 30, 2013. Relevant sections are as follows:

Article 3 - Management Rights - paragraph 3.1:

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.

8.2 Forms of Discipline

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

8.3 Investigation Process

A. The Employer has the authority to determine the method of conducting investigations, subject to the just cause standard.

Article 9 - Grievance Procedure

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 in the case being heard. The arbitrator will have no authority to add to, subtract from, or modify any of the provisions of this agreement, nor will the arbitrator make any decision that would result in a violation of this Agreement. The arbitrator will be limited in his/her decision to the grievance issue(s) set forth in the original grievance unless the parties agree to modify it. The arbitrator will not have the authority to make any award that provides an employee with compensation greater than would have resulted had there been no violation of the Agreement....

9.6 Arbitration Costs

The expenses and fees of the arbitrator, and the cost (if any) of the hearing room will be shared equally by the parties.

Position of the Parties

Union

The union argues that the Grievant was not really terminated for any of the three reasons (giving the hot sauce to inmates, possessing the address book, or having the extra uniforms), but rather because the Acting Superintendent of the penitentiary who issued the letter of termination "chose not to believe him when he said he didn't pass hot sauce to offenders."

The union argues that the Grievant did not pass hot sauce to inmates, rather that he placed the hot sauce in a refrigerator that inmates had access to, and that the cell where hot sauce was later found was not searched within a reasonable time. Furthermore, they argue that the investigator was suspect as he mistrusted the Grievant because he spoke Spanish to the inmates, and that the Acting Superintendent admits the possibility that the hot sauce was not passed by the Grievant to inmates.

The union also argues that the employer has not demonstrated the required just cause, and because this discharge

case involves allegations of dishonesty, the employer must prove the allegations to the "beyond a reasonable doubt" standard rather than the lesser standard of "clear and convincing evidence." Lastly, they argue that as to the allegations concerning the uniforms and the address book there must be proof of dishonesty and misuse, which there are not.

Employer

The DOC argues that the Grievant had attended the relevant training, was aware of the policies, and knew that contraband is anything an inmate is not allowed to have, which included homemade hot sauce. They argue that evidence of the Grievant passing the hot sauce came from a series of witnessed events and testimony: the testimony of the Grievant confirming at least the possibility of his passing something to inmates, testimony of the Grievant preparing baggies, a video of a tier check showing the Grievant stopping at three cells, the testimony of a CO observing the tier check saying he saw the Grievant passing something to inmates during that tier check, and that the baggie later found in an inmate's cell appeared to be the same baggie the Grievant had prepared.

Furthermore they argue that the Grievant was aware that he should not have had that many uniforms in his car.

They also argue that "of greatest concern...was that Meza appeared to be dishonest [and] ...just kept deflecting responsibility for everything." They argue that ethics and integrity is a core competency of the Grievant's job, which he violated, and that considering his prior discipline, dismissal was warranted.

Background

At the time of his dismissal, Gustavo Meza had worked as a CO at the WSP for five years. The WSP has approximately 2200 inmates, with a custodial staff of about 700 and a total staff of about 1100. At the time of the incidents there were three

levels of units where inmates were housed, medium, close and maximum. The Grievant was assigned to Fox Unit, a close supervision unit where there were two COs assigned to each of two sides of the unit and two COs assigned to the booth, in addition to a sergeant. A booth CO controls the various doors within the unit. In addition there are shift lieutenants, correctional unit managers and supervisors, and also correctional counselors.

Testimony was introduced concerning the gang affiliation within WSP in general, and within the Fox unit specifically. Gang membership was noted to be nearly 50% of the total prison population, and about 54 members of the "Surenos" gang live in the 198 bed capacity Fox unit.

Testimony was also introduced that before the days in question in October of 2011, the Grievant, who speaks both English and Spanish, had informally acted as a translator. Other testimony was presented that there was tension between COs in the Fox unit based on the fact that the Grievant often spoke to inmates in Spanish. COs testified that this bothered them because they couldn't understand what was said. Implied in some testimony was concern that the Grievant, prior to the incidents in question was doing favors for the Surenos, an allegation that the Grievant strongly denied. The Grievant testified that he had taken some actions that might have been misconstrued as favoritism towards the Surenos, such as providing them with toilet paper.

In addition, testimony was offered concerning infighting among the COs. Some of the testimony was to the effect that the Grievant would call other COs derogatory names and try to provoke them. Contrary testimony was to the effect that COs disliked the Grievant, and collectively sought to find something to pin on him.

As noted by testimony introduced by several witnesses, the Grievant had attended the regular core and periodic training required of COs. In addition a "New Employee Policy Acknowledgement" form signed by the Grievant in October of 2006 was introduced, which among other provisions noted that "Washington State Law prohibits the trafficking of contraband with inmates of adult correctional facilities." It also noted that "...Employees and their automobiles are subject to search when there is a reasonable suspicion...to believe criminal action has occurred, is occurring, or is imminent." In other testimony other COs noted a policy entitled "Employee Relationships/

Contacts with Offenders" (Offender Contact Policy) which provides that "Department staff...will not engage in the transmission of...articles of property for or to offenders...except as authorized as part of their official duties."

Testimony noted that if there was favoritism among one staff member and an inmate it would make it hard to trust the "...people that you work with." A CO testified concerning the Offender Contact Policy that, "...inmates don't get gifts. They have to go through the proper channels to get those...So would giving somebody a candy bar, even though they could buy it in the commissary, be considered a violation of that policy?...Yes."

Testimony from the then Acting Superintendent explained the context:

"... Any time there's an introduction of contraband to the facility, regardless of what it is, my biggest concern for our staff here is, okay, so I bring in hot sauce, and I give it to an offender, okay, what happens is, you know, we talk about this being compromised, so the offender says, hey, you know, bring me some more of that. Okay. So he ends up bringing more. And the next thing you know, habanero sauce turns into drugs or turns into something illegal, which is truly contraband for both the staff and offender to have or staff member, whatever.

My concern about that is, is once you get compromised and you get pulled into that, they manipulate you to a point to where they start owning you. Now we lose control. Then what you have, and I've seen it a lot of times here, a staff member concerned about losing their job, so they're bringing all this contraband in, which puts everybody in this room in jeopardy as far as safety."

The parties agreed that on October 26, 2011, the Grievant brought homemade hot sauce to the WSP and gave some of it to another CO. The Grievant claims that he then placed the remainder of the hot sauce in a refrigerator in a break room. The Employer claims that the Grievant passed the hot sauce to at least one inmate when he stopped by cell doors on what appeared to be a "tier check."

A CO testified that he saw the Grievant near the beginning of their mutual shift that day, at about 6AM. That CO further testified that somewhat later he saw the Grievant in the break room and he had a sandwich bag with the orange powder substance

in it, and that the grievant was wearing purple gloves while handling the substance. In further testimony that CO noted that he sneezed and the Grievant then asked him if he would like some of the substance as it would "...clean out my nose because it was hot." The Grievant denied making that statement.

According to the testimony of another CO, essentially verified by the testimony of the Grievant, at about 9:30 in the morning the Grievant asked her if he could borrow some scissors, and she later noticed that he was cutting up a plastic garbage bag. She further testified that she asked him why he was making baggies and he replied that he was doing it "for me."

Thereafter according to testimony of the CO who had sneezed, referring to his incident report, at about 10AM he heard the Grievant apparently asking him, "Do you want to see Weber's eyes water?" That same CO noted in testimony that Weber is a high ranking Sureno gang member who was in the unit at that time.

The investigator appointed by the Acting Superintendent testified that when he asked the Grievant about any conversation with that CO, the Grievant stated that he couldn't remember speaking to the officer, but that he did remember showing the hot sauce to the CO. When the investigator asked the Grievant about the statement about "...seeing Weber's eyes water...", the investigator noted that he then responded, '... His word against mine.'

According to the CO who both parties agree received hot sauce from the Grievant that morning, apparently he received it in the 10 o'clock or 11 o'clock timeframe. That CO testified that he received the hot sauce in a clear, see-through plastic bag.

Thereafter in accordance with the testimony of another CO who was in the control booth in the Fox unit, he saw the Grievant go up the stairs in the inmate cell area and stop at three cells. Cameras captured the movement of the Grievant up the stairs and stopping in front of the three cells. A video of camera sequences at approximately 11:15 AM were introduced into evidence, and played while testimony was being taken. According to the testimony of the control booth CO, he saw the Grievant reach into his pocket and pass something through the gap in the door of the three cells. Furthermore that CO claimed that he turned on the speaker each time the grievant stopped at the cells, and overheard conversations, most of which were in Spanish. He noted that he heard one inmate say, "the hot stuff,

you know, that's what I've been waiting for is hot stuff, bring it on."

That booth CO claims in testimony that he had a better view from the booth than that of the camera. However, extensive testimony concerned the absence of a clear view of what, if anything, was passed by the Grievant into the cells.

Further testimony by the CO who had been asked by the Grievant for the scissors indicated that she saw the Grievant during lunch time knock on the window in the pantry area in order to get an inmate's attention, and then she heard that inmate state in English, 'man, I burped, that shit burned my f-- -- nose.' The Grievant denies that such a statement was made.

According to his testimony, a cell search was ordered by the correctional unit supervisor (CUS) for Fox unit. He testified that based on viewing the video sequence he believed he saw the Grievant reaching in his pocket and passing something into a cell. Based on that conclusion he ordered that cell searched.

The Grievant in testimony disagreed, and at first claimed that he didn't pass anything through to the inmates at whose cells he stopped in front of for what the video shows are period of about 30 seconds or more for each of three. The Grievant's testimony was that:

Q. Did you pass anything to the inmate?

A. No. Not to my recollection, no, I did not.

Q. Well, is it possible that you passed something to the inmate?

A. It's possible, yeah.

Q. ... What would you have possibly passed an inmate, if you passed anything?

A. A kite [a message] or their timesheet.

The investigator testified that when he asked the Grievant whether he had passed anything to the inmates at the three cells, when he stopped in front of them, the investigator stated that the Grievant denied passing anything. The investigator claimed in testimony that the statements of the Grievant during the investigation indicated deception.

law enforcement agent, so if it's in the wrong hands and people are doing wrong things with it, it can be bad.

The Grievant noted that some of those extra uniforms and those that he had in his locker were for his cousins who also work at WSP. The Grievant's cousin, who also works at WSP as a CO, testified that it was difficult to obtain uniforms and that it was easier to go around the regular process. However he did acknowledge that there was a certain number of uniform pieces that were supposed to be issued to each correctional staff, the number being three short sleeve shirts, three long sleeve shirts and three pants.

The Acting Superintendent who issued the termination letter to the Grievant testified that he considered the investigation and the Grievant's past discipline, and focused on the appearance of dishonesty that he perceived in the Grievant, especially during the investigation and pre-disciplinary meeting that he had with the Grievant, apparently on November 9, 2011.

His testimony focused on his perception that the Grievant and his representative at the meeting were not being truthful and were "deflecting."

He testified:

A. ... so here's the bottom line. The contraband in question is the habanero sauce. It got into the facility by way of Mr. Meza. That we know, that he brought it in. It ended up in a cell. Who's responsible for that is still to be determined, based on whoever you talk to. However, it was brought in.... What if the inmate got sick? What if the inmate died and it was all because of this stuff that he brought in? Who's responsible for it?... My belief was that Meza brought the item in. I have a staff member that seen him putting it in a portion of these baggies or whatever it is. I have an officer that was given one of those.... I do care about the uniforms.... I get concerned about the uniform ending up in the wrong hand, whether it's an offender that we control here or whether it's somebody in the public. And it's a security item to me, and we like to keep control of that the best we can.... Any time there is an introduction of contraband to the facility, regardless of what it is, my biggest concern for staff here is, okay, so I bring in hot sauce, and I give it to an offender, okay, what happens is you know, we talk about this being compromised, so the offender says, hey, you know, bring me some more of that. Okay. So he ends up

bringing more. And the next thing you know, habanero sauce turns into drugs or turns into something illegal, which is truly contraband for both the staff and the offender to have or staff member, whatever. My concern about that is, once you get compromised and you get pulled into that, they manipulate you to a point where they start owning you. Now we lose control.

Later the Acting Superintendent noted on cross examination:

Q. All right. If Officer Meza had admitted that he gave the hot sauce to the offenders, would you still have terminated him?

A. Just that by itself?

Q. Yeah. If he said, I gave the hot sauce to the offenders?

A. Probably not.

Q. Okay. And so, therefore, your primary reason for terminating him is because you believe that he lied about that, right?

A. I believe, yes, but I think by us entering into a just cause with habanero sauce and then having it, you know, bringing up the uniform piece and then some property issues and then all this to deflecting or lying, which I would constitute [sp] as an integrity or ethical issue, came forth.

Discussion

Just Cause

Article 8.1 of the parties' negotiated agreement requires just cause for such discipline.

Two phrases provide condensed and helpful guidance to define the term, "just cause:"

"Just cause' [equates] to 'fair shake' Hiram Walker & Sons, 75 LA 899, 900 (Belshaw, 1980)

"...management 'must have a reasonable basis for its actions and follow fair procedures.'" Beatrice Foods Co., 74 LA 1008, 1011 (Gradwohl, 1980)

Cited in Elkouri & Elkouri, "How Arbitration Works," Sixth Edition, 2003, at page 932.

Most especially where the parties' agreement requires just cause (as here), the employer bears the burden in a discipline case, "to show by reliable and material evidence that [the] charged misconduct occurred, that [the] penalty assessed by [the] employer was commensurate with [the] seriousness of [the] offense, and that due process elements were observed in the taking of discipline." Chevron Phillips Chem. Co., 121 LA 1386 (Eisenmenger 2005).

More detail is provided in a time-honored guide to just cause, commonly called the "Seven Tests:"

- 1) Did the employer give 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 the orderly, efficient, and safe operation of the company's business?
- 3) Did the employer, before administering discipline to employee, make effort to discover whether the employee violated or disobeyed 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 evenhandedly and without discrimination to all employees?
- 7) Was the degree of discipline administered by the employer reasonably related to (a) the seriousness of the employee's proven offense and (b) the record of the employee's service?

Grief Bros. Cooperage Corp., 42 LA 555, 557-59 (Daugherty, 1964); See Brand & Biren, "Discipline and Discharge in Arbitration," Second Edition, 2008, at pages 33-34.

For additional focus, directly applicable to our situation, Brand & Biren refer to an article by arbitrators Adams and

Nolan, "Toward a Theory of 'Just Cause' in Employee Discipline Cases," (1985):

For just cause to exist, discipline must further one or more of management's three legitimate interests: rehabilitation of a potentially satisfactory employee, deterrence of similar conduct, and protection of the employer's ability to operate the business successfully. (at page 35)

After examining what is appropriate regarding the burden of proof, a review of our facts under the Seven Tests, with additional emphasis on the three legitimate interests, will be helpful.

Burden of Proof

As noted in Elkouri & Elkouri, Sixth Edition, 2010 Cumulative Supplement, page 347-8:

Under a 'just cause' standard, employers are usually required to prove the elements of an offense for which an employee has been disciplined or discharged by a preponderance of the evidence. The 'clear and convincing evidence' standard is applied by many arbitrators in cases where the offense of which the employee is accused is seriously criminal, especially opprobrious, or shameful so as to stigmatize the employee and likely to prevent the employee from obtaining other employment. Those arbitrators often expressly reject the 'beyond a reasonable doubt' standard.

Citing Consulate Healthcare of Cheswick, 127 LA 1336 (Franckiewicz, 2010); et al.

To the same affect is the conclusion on the burden of proof noted by Brandon & Biren at page 325-326:

There are conflicting opinions about the appropriate burden of proof that employers must carry when imposing discipline for dishonesty. While the burden of proof for discipline cases has traditionally been proof by a preponderance of evidence, there is a developing trend to require a higher burden of proof in cases alleging conduct that would constitute a crime or be deemed an act of moral turpitude... What arbitrator considers it appropriate to apply a

heightened burden of proof, the 'clear and convincing evidence' standard, not proof beyond a reasonable doubt, seems to predominate. In Albertson's LLC [123 LA 1349 (McCurdy, 2007)], the arbitrator observed that the clear and convincing standard is appropriate for discharge cases 'for conduct that is potentially subject to criminal prosecution.' He noted that the arbitral forum is not a criminal court and labor lawyers are not trained in criminal law, so the 'beyond a reasonable doubt' standard suggested by the union was not appropriate.

In our situation none of the three underlying charges are clearly criminal in nature. The passing of the hot sauce if proven would be a violation of policy and an ethical breach. No evidence was presented of an incidence of a criminal prosecution of a CO for passing something similar to hot sauce to an inmate. The use of the address book cannot be considered a potentially criminal act. The possession of the extra uniforms could be a possible criminal violation, but only if some form of intent to use them as escape paraphernalia, or other illegal distribution, was established.

Thus the burden of proof varies in our situation depending on the charge. To establish that the Grievant passed the hot sauce to an inmate, the burden of proof on the employer is the preponderance of the evidence. To establish that the Grievant possessed more uniforms than policy provided, again the burden is the preponderance of the evidence. However, to the extent that the employer seeks to establish that the Grievant was dishonest by extensively lying to the investigator and the Acting Superintendent, or seeks to establish that the possession of the extra uniforms was a crime, those allegations must be established by clear and convincing evidence.

Reasonableness of the Management Rule

The first question when looking at our facts under the above-noted Seven Tests for just cause, and the three legitimate employer interests, comes from looking at the second test (Was the employer's rule or management order reasonably related to the orderly, efficient, and safe operation of the company's business?) together with one of the three "legitimate

interests"-- protection of the employer's ability to operate the business successfully.

Both the formal and informal policies concerning not passing contraband of any kind to inmates and the possession of uniforms appear to clearly relate to the orderly, efficient and safe operation of the prison, and the protection of the employer's ability to operate the "business" successfully. The Acting Superintendent and several COs testified that passing anything not authorized to inmates sets up the potential for compromising the CO, and ultimately the entire WSP. To the same affect is the possession of the excess uniforms, which testimony established could create a problem if they surfaced in the community, as well as within the WSP, as potential escape paraphernalia. The inmate address book, and the miscellaneous items, such as batteries, found in the Grievant's car, while additional items of concern for the prison, do not seem to rise to the same level and likely cannot alone be said to significantly adversely affect the WSP.

Due Process

The second question is whether due process was provided. Looking at the Seven Tests, four of them apply to due process:

- 1) Did the employer give the employee forewarning or foreknowledge of the possible or probable disciplinary consequences of the employee's conduct?

In our case, the Grievant had attended the initial training for COs, and the update training. He noted:

Q. And you had the basic training that all correctional officers have?

A. Yes.

In addition he testified regarding his knowledge of the consequences if he passed hot sauce to an inmate:

Q. You know it would be wrong to pass the hot sauce to an inmate, correct?

A. Correct....

Q. Okay. But that there would be disciplinary action, you just don't know what the result of that would be?

A. Right.

He also testified that he had more uniform items than he was supposed to have:

Q. Now, you're supposed to have ten shirts---I mean, supposed to have six shirts, correct?

A. Six shirts, right.

Q. And you said sometimes you've had as much as ten shirts, correct?

A. Right.

Q. So that would just be four more than you're supposed to have, correct?

A. Supposed to have or have?

Q. Ten more than you're supposed to have.

A. Right.

However, whether or not the Grievant was on prior notice of the seriousness of the charged offenses, is another question. In the decision of City of Bremerton, 121 LA 915 (Reeves, 2005) the employer failed to communicate the seriousness of the fraternization offense and many employees didn't recall the rule being discussed. In our situation the informal understanding concerning the uniforms did not carry a specific understanding of what would constitute a violation, or if a violation occurred what the penalty would be. Also, the passing of the hot sauce was clearly understood as a violation, but the severity of the violation was unclear, as will be discussed under the sixth test.

However, in the Employee Relationship/Contact with Offenders policy it is noted that:

Violations of the provisions of Policy 850.030 may result in corrective or disciplinary action, up to and including dismissal.

It is clear that the Grievant had full knowledge that passing the hot sauce was a violation and that having the excess uniforms was inappropriate. It is also clear that he had a basic awareness that the passing of the hot sauce was a serious offense.

- 2) Did the employer, before administering discipline to the employee, make an effort to discover whether the employee violated or disobeyed a rule or order of management?

As part of that process the employer identified the Employee Relationship/Contact with Offenders policy, its Ethics Policy, and the employee handbook acknowledged by the Grievant in his New Employee Policy Acknowledgement. The employer put particular emphasis on provisions in the employee handbook which noted:

...Tells the truth and is honest in all dealings...Avoids inappropriate situations and actions which result in and/or present the appearance of impropriety...Does not misrepresent self...Uses public resources appropriately.

The pre-investigation efforts to discover whether the Grievant violated or disobeyed rules began with the examination of the regular video recordings within Fox unit which picked up the movement of the Grievant when he did what he referred to as a "lazy tier check," as well as the other recordings of his movements in the break area, and the observations of the other COs who testified.

In addition, the employer conducted an investigation and then the Acting Superintendent reviewed the report and met with the Grievant prior to issuing the dismissal letter.

- 4) Was the employer's investigation conducted fairly and objectively?

The union raises several due process issues, that due to a faulty investigation the employer cannot show just cause.

A fair investigation requires management to keep an open mind regarding the guilt or innocence of the employee. In re City of Sandy Ore., 129 LA 669, 679 (Calhoun, 2011). A full and fair investigation requires a good faith effort to interview all key witnesses. Vancouver Police Officers Guild, 2005 WL 1659628 (Landau, 2005)

The Acting Superintendent appointed the investigator who testified at the arbitration hearing. The investigator had conducted about a hundred investigations at the WSP over the past four years, about twenty of which were investigations of staff members. The scope of his investigation was initially the allegation of the passing of the hot sauce, and in doing so he reviewed the incident reports from the various COs and then reviewed the videos, and interviewed witnesses.

One challenge to the investigation was that the investigator did not interview inmates. The Grievant, by way of the testimony of the union's director of corrections and law enforcement, argued that she [the director] had never seen a case involving contraband in the hands of inmates where the inmates were not asked where they got the contraband.

While the investigator was asked whether he generally interviews inmates, and replied that he does so "at times...", the investigator noted in testimony that:

A. It's a double-edged sword for me to interview an inmate, especially in a staff misconduct type. If I don't interview the inmate, I get beat up for not interviewing him. If I do interview him, I get beat up for taking an inmate's word. The other piece of this goes into security threat group politics. Security threat group or gang Surenos refuse to talk to intelligence investigation staff, adamantly refuse.

A. ...in fact, there's a green light, an alleged green light, on investigative staff at this period of time by the Surenos.

Q. What does that mean?

A. That if they see us, they're to assault us, and if they don't assault us, then they're supposed to be assaulted themselves.

The second objection to the investigation was that the notes of the investigator were not adequate, as they were neither a formal statement prepared after the interview and then reviewed by the person interviewed, nor a list of questions and the written notes of the answers that in turn is reviewed and acknowledged by the person interviewed. That union official argued:

A.I have never seen someone produce their investigative notes and try and say that that was the document of the

conversation and suffices as their statement for a signature.

While the Employer in affect correctly replied that nothing in the investigative process requires either of those specific types of statements, the absence of a concise signed statement detailing the interview in detail weakened any collaboration of the way the investigator characterized some of the Grievant's statements as evasive or deceptive. Sometimes the investigator in his testimony focused on--and drew negative conclusions from--simply different phraseology: for example, the use of the phrase "didn't" vice "did not," or that he didn't answer repetitive questions in the same way, or that he phrased his answers in ways such as "his word against mine" or "I cannot explain what they saw." In addition, those observations which formed part of the basis for finding deception, were not clearly found in any contemporaneous notes.

However, the investigator has extensive, related experience, and in this case interviewed thoroughly after viewing the various camera footage in conjunction with the written incident reports from the COs, and appeared to handle the searches incident to the interview of the Grievant appropriately. An example of his apparent credibility comes from his restraint when the Grievant initially refused the car search. Instead of ending the interview and adding a ground for dismissal for failure to allow the search, he gave the Grievant time to discuss the matter and reconsider.

In addition the Acting Superintendent conducted additional interviews after the completion of the investigation and held a meeting with the Grievant.

As noted in such arbitration decisions as Bruno's Supermarkets, 118 LA 1451, 1456 (Abrams, 2003), even with some mistakes an investigation can be considered adequate. Typically those decisions finding an inadequate investigation have been where the grievant wasn't interviewed or given an opportunity to be heard (Penn Window Co. 120 LA 298, 305 (Dissen, 2004)) or where there was no investigation at all (Fraternal Order of Eagles, 1636, 115 LA 1645 (Levine, 2001)).

With the caveat that some of the characterizations of the investigator concerning the veracity of the Grievant were not clearly established, viewed in its entirety the investigation was conducted fairly and objectively.

5. At the investigation did the "judge" obtain substantial evidence or proof that the employee was guilty as charged?

In the arbitration hearing the investigator viewed the video and made comments as it was playing. He noted that he found the incident reports consistent with the video.

The investigator also testified that he found from the video that the Grievant had stopped at three cells for a significant time, and had a conversation with inmates, and had passed something, all inconsistent with what the Grievant told him when he interviewed him. In addition while watching and commenting on the video he noted that the Grievant banged on the door of the "salle porte" area and spoke with inmate Ochoa, inconsistent with what the Grievant told him in his interview.

The investigator also noted that:

A. ...I found their incident reports to match up to the video. If someone going to do a conspiracy, it's very difficult to have a video that matches that conspiracy, in my opinion.

One of the critical questions was whether or not the inmates had adequate and timely access to the refrigerator in the break area, where the Grievant claimed he placed the hot sauce after he gave some of it to the other CO. One CO testified that the area where the refrigerator is located does not have a surveillance camera and it was possible for inmates to get access to the refrigerator without staff knowledge. Another CO testified that while the inmates "...have to be supervised the whole time that they're back there...", the inmates clean around the refrigerator, but not the refrigerator itself. Another CO testified that:

Q...do staff ever allow inmates to go back into there and clean?

A. Yes.

Q. And how does that happen?

A. The booth usually calls to make sure that they're clear to come back, and then they bring the janitors back, and the janitors clean up the area...

Q. Do you know if on October 26th of 2011 there was a cleaning crew of inmates that came back?

A. No, there wasn't.

While that CO's testimony as to that point appeared credible, a related second question is whether the length of time before the cell search was conducted provided a reasonable opportunity for an inmate to take any hot sauce placed in the refrigerator. The answer to that question posed at hearing to the Acting Superintendent is instructive:

Q. ...We know that Officer Meza brought the hot sauce in, and we know that the hot sauce wound up in an inmate's cell. But with 24 hours in between those two, almost 24 hours in between those two events, in an area where inmates had access to the refrigerator where the hot sauce was, isn't it at least possible that that the hot sauce got there by some other way than Officer Meza passing it?

A. Based on what you are saying, I'd say it's possible, but slim.

Another critical question is the basic credibility of the Grievant on the issue of whether he passed the hot sauce. Here we have the testimony of the CO who observed the Grievant stop at three cells, with that portion of the observation collaborated by the video. His testimony, largely un-impeached, was that the Grievant both passed something and had a conversation. However, whether the Grievant took something out of his pocket, and passed that to an inmate, was not clear from viewing the video, a key 5-6 seconds being missing. That witnessing COs testified:

Q...And then you saw him do what at 16?

A. Pass through the wicket, again, something out of his pocket.

Q. And then when else did you see him stop?

A. At 23 house.

Q. And what did you see there?

A. Actually, I was able to hear the conversation...between him and the inmate.

The investigator's recollection of what the Grievant said about passing something to inmates and the Grievant's testimony to that point is also useful.

The investigator testified that:

Q. Did you ask him about passing anything at all into any of the cells?

A. Yes.

Q. And what did he say?

A. That he denied.

Q. Did he deny passing paper or-

A. Denied passing anything.

Q. And was he very clear with you about whether or not he had passed anything?

A. Yes. And I believe I asked the question several times, several different ways, so that we were very clear that he was adamantly denying passing anything.

In contrast, at the hearing the Grievant testified:

Q. And is there ever any time that you open the wicket for--
--...

A. I don't remember actually opening the wicket, but it looks like I might have opened it...

Q. Did you pass anything to the inmate?

A. No. Not to my recollection, no I did not.

Q. Well, is it possible that you passed something to the inmate?

A. It's possible, yeah.

By way of exhibits and testimony it appears inconclusive whether the crack in the wicket of the cell door was insufficiently wide to pass the hot sauce in the plastic container. However, if the Grievant had opened the wicket itself, there was obviously sufficient width.

While he was watching the video, the CO who was watching and listening as the Grievant stopped at the cell doors, testified:

A. I can see him passing something through that wicket right there.

Q. And when you say "wicket," what does that mean?

A. A wicket is an opening in the door that we have that has--that has a door to itself to where we can open it to cuff them up or, you know, do something, pass things to them as far as their supplies or whatever.

Based on a review of the testimony and exhibits, it is clear that the admitted possession of 34 excess uniforms was a violation of the general ethics provisions, and that the Grievant was aware of those provisions, even though there was no specific written prohibition on having excess uniforms. The possession of the inmate address book was at worst a minor violation of similar informal policies.

The major potential violation was the passing of the hot sauce, which was viewed by the WSP as a serious offense, and known by the Grievant to be serious as well. The testimony of several COs established at least to a preponderance of the evidence--which was partly collaborated by, and not sufficiently impeached, by the testimony of the Grievant--that the Grievant most likely passed the hot sauce to an inmate, whether or not he also placed the hot sauce in the refrigerator.

However, in light of the lack of a clear signed statement regarding the evidence of deception in the investigation, and the proof of the underlying issue of passing the sauce to only the lesser standard of preponderance of the evidence, the WSP did not establish by the higher standard of clear and convincing evidence that the Grievant lied about the passing of the sauce.

6) Has the employer applied its rules, orders, and penalties evenhandedly and without discrimination to all employees?

The parties stipulated to the "...following disciplinary actions, related to providing items to inmates, occurred at the Washington State Penitentiary:"

A CO in November of 2008 brought in and provided tobacco to inmates. He denied doing so. He was dismissed.

A CO in October of 2009 provided instant coffee to an offender. "He admitted the offense and stated he thought it was OK to provide it to offenders. He received a letter of reprimand."

A CO in August of 2009 "Was throwing away the remainder of his meal and gave a 'tater tot' to an offender. [He]

admitted to the behavior and received a letter of reprimand."

Two COs "...gave tastes of homemade pepper sauce to inmates openly, and admitted gave the pepper sauce to inmates. [They] received letter[s] of reprimand, but did not go up to Superintendent."

No other evidence of discrimination or unequal treatment in other situations was established by any testimony or exhibits presented. Infighting among the COs was alleged but not established. Allegations of favoritism toward one gang were made against the Grievant, and allegations concerning discrimination based on his speaking Spanish to inmates were inferred by the Grievant, but none were established.

In order to challenge the penalty on the basis of disparate treatment, in our situation the Grievant would have to establish the affirmative defense of unequal treatment. It must be shown that the Grievant was treated differently than others and that the circumstances surrounding the Grievant's offenses were substantially like those of individuals who received more moderate penalties. (Cenie Co. 97 LA 542 (Dworkin, 1991)) That was not shown.

7. Was the degree of discipline administered by the employer reasonably related to (a) the seriousness of the employee's proven offense and (b) the record of the employee's service?

In considering this test, the two remaining "legitimate interests" of management, rehabilitation of a potentially satisfactory employee and deterrence of similar conduct, will be taken into account.

As noted in the termination letter of December 6, 2011:

In determining that this level of discipline was appropriate, I considered the information available to me, including your actions, your response, and your five year employment history with DOC. A review of your personnel file shows that on April 10, 2009 you received disciplinary action of a three (3) day suspension for insubordination... and on August 24, 2011 you received a letter of reprimand for tardiness....

The Acting Superintendent was asked at the hearing about rehabilitating employees and why he didn't do that here. He noted:

A. We have done that in the past, where, you know, whether it's a last chance, whether it's a last-chance agreement, whether it's sending him to some additional training, whatever the case is.

Q. Why wasn't that appropriate here?

A. I think what happened here is the security of the facility had been compromised due to the fact that we had some contraband end up in an offender's cell. Because there was no accepting of the responsibility, I'm concerned about the safety and security on a daily basis of what's being jeopardized if we're not willing to accept the responsibility of a habanero sauce, compared to what it could have been. So that's was my concern.

With those comments focused on the hot sauce, plus the Acting Superintendent's other comments that he might not have proposed discharge if the Grievant had confessed to passing the hot sauce, and his comments about the 34 extra uniforms as a violation, the sense is of a focus on ethics and truthfulness as the true reason for the level of the discipline.

Furthermore, there is merit to the Grievant's argument that:

It is absurd to require someone to admit to something they didn't do and then fire them for refusing to confess.

Thus having established that the Grievant likely passed the hot sauce to an inmate, and definitely had more than the number of uniforms he should have had in his car, the question is looking at the severity of the offenses and the work history of the Grievant, what is the appropriate penalty?

The WSP cites two arbitration decisions on dishonesty and the Grievant cites several decisions where there was some form of unauthorized possession but no proof of dishonesty.

In the decision of Cummings Inc., 104 LA 1012, (Hart, 1995) where an employee may have stolen an item of minimal value from an employer, the arbitrator noted:

Given the uncertainties of its actions committed by the Grievant, and the doubts that exist as a result, it would appear that termination is too great a penalty to impose on him. The concept of just cause includes not only the proof of the commission of an offense...but the severity of the penalty, which must be proportional to that offense. (at p. 1017)

In light of the Acting Superintendent's comments in testimony that if there had been a confession, discharge was unlikely, the key remaining issues are an examination of the Grievant's work record and the seriousness of the offense.

As noted in the police-related decision of City of Portland, 77 LA 820 (Axon, 1981) where two police officers intentionally killed opossums:

It is a cardinal rule of labor-management relations that the degree of discipline must be reasonably related to the seriousness of the offense and the employee's work record. (at p. 826)

While the arbitrator in the Portland case found that the conduct demanded some punishment, discharge was not warranted. The Grievants were noted to be fully able to be rehabilitated, and had good work records.

It has often been noted that the penalty must flow from an analysis of "both the misconduct and the individual employee..." Clow Water Systems Co., 102 LA 377 (Dworkin 1994); cited in Merchants Fast Motor Lines, 103 LA 396 (Shieber 1994).

The pattern of conduct is important to assess whether the penalty is appropriate and whether the grievant is able to perform his duties.

"Although some form of discipline is appropriate, the penalty...is not. There does not exist a pattern which includes the Grievant's employment record, course of conduct or profile that demonstrates that he is unable to perform the duties..." City of Key West, 106 LA 652, 654 (Wolfson, 1996)

"It is well established that corrective discipline implies the application of successively severe penalties..." State of Montana, Department of Environmental Quality, 121 LA 1194, 1199-1200 (Calhoun, 2005)

In our situation, on the one hand for aggravating factors, our Grievant has two prior disciplinary actions within his five year career with WSP, and the WSP has a duty to be both consistent and firm on the issue of contraband of whatever sort not getting into inmates' hands. The possession of the excess uniforms and the somewhat evasive comments and later testimony of the Grievant properly adds to the concern of the WSP, and thus acts as an additional aggravating factor to the key issue of the passing of the hot sauce.

On the other hand for mitigating factors, the proof of the key offense of passing the hot sauce is only minimally sufficient, prior passing of hot sauce has been penalized to a lesser degree, dishonesty has not been fully proven, and hot sauce itself is certainly not serious contraband.

On balance, in this context both the passing of the hot sauce and the possession of excess uniforms are viewed by this arbitrator as serious offenses; yet neither individually nor collectively rise to the level where dismissal was appropriate, especially in light of the absence of testimony that the Grievant with his work record would not be able to function as a CO, provided appropriate retraining was provided.

Thus while just cause has not been shown for termination, it has been established for a significant suspension and appropriate training safeguards for the WSP to address their legitimate concerns over rehabilitation and deterrence.

Award and Remedy

The grievance is sustained in part and denied in part.

The Department of Corrections will immediately reinstate the Grievant to the position he held on December 6, 2011, or other substantially equivalent position at the Washington State Penitentiary, under the following conditions:

- 1) He will serve a disciplinary suspension without pay, but with full seniority and all other benefits, of 120 days beginning on December 6, 2011; and
- 2) He will attend, without any further loss of income, additional training on ethics, pertinent WSP policies,

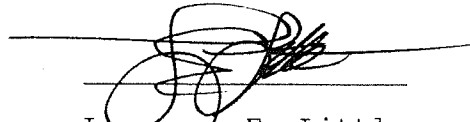
and interaction with inmates and staff, as determined appropriate by the WSP and at their expense; and

- 3) He will receive his back pay, without any interest, for the period since his termination to today, excluding the period of his suspension.

The Arbitrator remands this remedy to the parties to determine any further specifics of its implementation. The Arbitrator will maintain remedial jurisdiction for a period of sixty days to resolve any disputes that may arise regarding the remedy.

As specified in Article 9.6 of the parties' negotiated agreement, the expenses and compensation of this arbitrator shall be borne by both parties equally.

Dated this 31st day of December, 2012.



Lawrence E. Little
Arbitrator