

Federal Mediation & Conciliation Service

In the Matter of an Arbitration

Between

WASHINGTON STATE DEPARTMENT OF
CORRECTIONS,

And

TEAMSTERS LOCAL UNION 117 (on behalf of Lewis
Royal).

**ARBITRATOR'S
OPINION AND AWARD
FMCS NO. 060406-02951**

INTRODUCTION

This arbitration arises pursuant to a Collective Bargaining Agreement between the TEAMSTERS LOCAL UNION 117 (on behalf of Lewis Royal). (hereinafter "Union"), and the WASHINGTON STATE DEPARTMENT OF, CORRECTIONS (hereinafter "Employer"), under which DAVID GABA was selected to serve as Arbitrator and under which his award shall be final and binding among the parties.

A hearing was held on July 6, 2006, 2006, in Port Angeles, Washington. The parties had the opportunity to examine and cross-examine witnesses, introduce exhibits, and fully argue all of the issues in dispute. Briefs were received on August 18, 2006, and the hearing was closed on August 20, 2006, when the arbitrator received the transcript.

APPEARANCES:

On behalf of the Union:

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On behalf of the Employer:

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ISSUE

The parties agreed to the following statement of the issue:

Did the employer lack just cause to demote Lewis Royal, and if so what is the proper remedy.¹

¹The transcript of hearing indicates that the issue is "Did the employer lack just cause to demote Lewis Royal, and if so what is the premise." The parties have agreed that the transcript contains a misprint.

RELEVANT PORTIONS OF THE CONTRACT

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**

All agency policies regarding investigatory procedures related to alleged staff misconduct are superseded. The employee conduct report (ECR) process will no longer be utilized. The Employer has the authority to determine the method of conduction investigations, subject to the just cause standard. Investigations will be completed in a timely manner.

8.4 **Work Assignment**

An employee accused of misconduct will not be removed from his/her existing work assignment unless there is a safety/security concern, including security issues due to any allegation that involves a conflict between staff.

8.5 **Home Assignment**

Any employee assigned to home as a result of a disciplinary investigation, and who would otherwise be available to work, will be placed and maintained on paid leave for the duration of the home assignment.

8.6 **Notification of Charges**

Prior to imposing discipline, except oral or written reprimands, the Employer will inform the employee of the reasons for the contemplated discipline and an explanation of the evidence. Upon request, an employee may also have a union representative at a pre-disciplinary meeting, if held. The employee will be provided an opportunity to respond either at a meeting scheduled by the Employer, or in writing if the employee prefers.

8.7 **Interview**

Upon request, an employee has the right to a union representative at an investigatory interview called by the Employer, if the employee reasonably believes discipline could result. If the requested representative is not reasonably available, the employee will select another representative who is available. Employees seeking representation are responsible for contacting their representative. The role of representative is to provide assistance and counsel to the employee. The exercise of

rights in the Article must not interfere with the Employer's right to conduct the investigation

8.8 Grievance Processing

Disciplinary action is subject to the grievance procedure set forth in Section 9.2. Grievances relating to oral and written reprimands may be processed only through the Grievance Resolution Panel of the grievance procedure set forth in Section 93 and are not subject to arbitration.

9.5 Authority of the Arbitrator

The arbitrator will have the authority to interpret the provisions of this Agreement to the extent necessary to render a decision on the case being heard. The arbitrator will have no authority to add to, subtract from, or modify any of the provisions of this agreement, nor will the Arbitrator make any decisions that would result in a violation of this Agreement. The arbitrator will be limited in his or her decision to the grievance issues(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. The arbitrator will hear argument on and decide issues of arbitrability before the first day of arbitration at a time convenient for the parties, immediately prior to hearing the case on its merits or as part of the entire hearing and decision-making process. If the issue of arbitrability is argued prior to the first day of arbitration it may be argued in writing or by telephone, at the discretion of the arbitrator. Although the decision may be made orally, it will be put in writing and provided to the parties. The decision of the Arbitrator will be final and binding upon the Union, The Employee and the grievant.

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. If the arbitration hearing is postponed or cancelled because of one party, that party will bear the cost of the postponement or cancellation. The costs of any mutually agreed upon postponements or cancellations will be shared equally by the parties. If either party desires a record of the arbitration, a court reporter may be used. If that party purchases a transcript, a copy will be provided to the arbitrator free of charge. If the other party desires a copy of the transcript, it will pay for half of the costs of the court reporting fee, the original transcript and the arbitrator's copy. Each party is responsible for the costs of its representatives and witnesses. Grievants and their witnesses will not be paid for preparation for, travel to or from, or participation in arbitration hearings, but may use leave for such activities.

DOC Rules

As an employee of the Department, you will have many things to learn, not the least which will be the expectations of your supervisor, your co-workers and the agency as a whole. To assist you with this responsibility, the following is a list of some

departmental expectations for your study. Familiarize yourself with the list so that you may better understand and fulfill the duties of your position.

As an employee of the Department of Correction, you will be expected to:

- Treat fellow staff with dignity and respect;
- Remain constantly alert in all situations;
- Conduct yourself and perform your duties safely;

It is also important as a new employee that you understand some of the specific prohibitions that the Department must enforce. You are not allowed to:

- Use profanity or inflammatory remarks with offenders or individuals with which you work;

DOC 280.100, *Acceptable Use of Technology*, states in its pertinent part:

I. General Guidelines

- F. Offender access to electronic data shall be limited to local information Technology systems dedicated as offender systems per DOC 280.925 Offender Access to Electronic Data .

DOC 280.925, *Offender Acceptable Use of Technology*, states in its pertinent part:

II. System Security

- B. IT systems located in area where offenders have physical access must have an electronic security protocol (i.e. password protection) in place in addition to the necessary physical barriers that are necessary to ensure that offenders cannot access the system(s).

FACTS

Teamsters Local Union No. 117 ("Local 117" or "Union") and the State of Washington, Department of Corrections ("State," "Employer" or "DOC") are parties to a collective bargaining agreement dated July 1, 2005 through June 30, 2007.² The parties have a dispute regarding the interpretation and application of that agreement as it relates to the Employer's decision to demote Lewis Royal, a bargaining unit employee. The matter was timely grieved pursuant to Article 9 of the collective bargaining agreement.

² Joint Exhibit 1.

Lewis Royal has been employed with the Department of Corrections at the Clallam Bay Corrections Center for 14 years. From approximately 2001 until his demotion in January 2006, Mr. Royal worked as a Sergeant. Mr. Royal is retired from the military, where he was a Sergeant for his entire 20 year career.

The Paper-Cutter

In May 2005, Sergeant Royal was in a bid post as a sergeant of G/H Unit. Sergeant Royal volunteered to do special projects for other units, which included making picture boards of inmates in those units. He obtained permission from management to hire Inmate Xavier, who had been working as a janitor, to assist on these projects. It was known by management that Inmate Xavier was working on these projects in his cell. In early June 2005, other officers confiscated a large quantity of project supplies from Xavier's cell. One of the projects to which Inmate Xavier was assigned was to build picture boards for a unit at the Clallam Bay Correctional Center (CBCC). A picture board is a board that can hold pictures of all of the unit's inmate residents and is color-coded to allow the unit officers to assess whether an inmate has any restrictions such as loss of recreation or loss of day-room privileges. In order to accomplish this project, Sergeant Royal gave a paper cutter to Xavier to cut the colored film.

The paper cutter provided to Xavier had a blade approximately 16 inches long attached at a fulcrum point to a base-board. The base-board measured approximately 16 inches square and weighed approximately eight pounds.

Sergeant Royal gave the paper cutter to Xavier to use in his cell on two occasions. In each instance, he gave Xavier the paper cutter only when the inmates were beginning to return from "mainline," the CBCC meal period. He chose this time period because that

was when there were the least number of inmates in the unit or common area. As more and more inmates finished their meal, the number of inmates present would increase. Xavier lived in the H-unit at CBCC which housed approximately 95 inmates. In considering where the inmate should be allowed to use the paper cutter, Sergeant Royal specifically gave thought to whether or not the inmate should be allowed to use it in the common area, but he finally determined that the safety risk was too great; he believed that the inmate's cell posed less of a safety risk.

There is one officer assigned to the H-unit during third shift. Third shift runs from approximately 2:00 p.m. until 10:00 p.m. Connected to the H-unit is another unit called G-unit which also houses approximately 95 inmates. A second Officer is stationed in G-unit. Connecting G-unit and H-unit is a corridor where a third officer is stationed. Overseeing all three as well as other officers is a sergeant; in this case Sergeant Royal.

In the latter part of June, Correctional Officer (CO) Mark Welch (Welch) was the regular swing shift officer in H-unit. Officers are required to conduct tier checks every hour. During a tier check the officer is required to physically walk the lower and upper tier of their assigned unit looking for irregularities and safety issues. On one of these tier checks, CO Welch saw the paper cutter in Xavier's cell. Prior to his observing the paper cutter in the cell, CO Welch had no knowledge that Sergeant Royal had given the inmate the paper cutter. CO Welch's concern was that Xavier had an item that could be used as a weapon. When CO Welch saw the paper cutter he immediately went back, to the officer's podium which is centrally located in the common area and called Sergeant Royal to report his observation.

Disrespectful Comments

After noticing the paper-cutter, CO Welch asked Sergeant Royal whether he was aware that there was a paper cutter in the unit, to which Sergeant. Royal responded yes; that he was aware of it. Sergeant Royal went on to question whether CO Welch had a problem with it to which CO Welch expressed that it could be made into a very dangerous weapon. CO Welch later alleged that Sergeant Royal's response was inappropriate; asking whether CO Welch was afraid and then asking whether CO Welch was a "pansy or sissy." Approximately ten minutes later, Sergeant Royal came to Xavier's cell and spoke to the inmate. Approximately five minutes later Xavier exited the cell carrying the paper cutter, crossed the day room, and exited.

Part of an officer's responsibility is to identify issues to protect the safety for employees and inmates alike. Officers are trained to identify and share safety concerns when they identify them. CO Welch testified that did not feel that his concern about the paper cutter had been taken seriously. CO Welch did not raise any issues at the time of the paper cutter incident and never reported it through his chain of command. At some point, two weeks or more after CO Welch told Sergeant Royal that he was uncomfortable with the paper cutter being in Inmate Xavier's cell, CO Welch decided to speak to Sergeant Reno who worked as a relief sergeant and with whom he had discussed issues in the past.

Upon being told about the paper cutter, Sergeant Reno told CO Welch that because of the serious nature of the issue, he was required to report it; that it was his responsibility. Sergeant Reno's assessment of the paper cutter was that "an inmate armed with a weapon this size could take over the facility, could kill an officer. He could do

whatever he wanted.” Sergeant Reno drafted a memo to Lt. Adams reporting the information.

Correctional Program Manager (CPM) Sandy Diimmel (Diimmel) was assigned to conduct a preliminary review to determine whether a full investigation was warranted. Correctional Unit Supervisor (CUS) Kevin Bowen assisted in conducting the preliminary review. CPM Diimmel's preliminary review found substantiation of the allegations as well as uncovered additional issues of concern. Associate Superintendent Ron Fraker then completed a formal investigation. Associate Superintendent Fraker investigated allegations that Sergeant Royal allowed Inmate Xavier to use a paper cutter in his cell, allowed Xavier to use a computer, was disrespectful to Officer Welch, brought three cans of paint into the facility without permission, and left barber tools unsecured in the barbershop.³ Based on his interviews and research of Department policies, Mr. Fraker issued his report along with his findings.⁴ In his report Associate Superintendent Fraker did not identify any policy violated by Sergeant Royal.

The Computer

There is little dispute about the events concerning the use of the computer. The DOC maintains two separate computer systems. The first is the DOC system for staff use and the second is the Inmate LAN specifically for inmate use. The two systems are separate standalone systems that are not cross-connected in any way. The DOC maintains highly sensitive information on the DOC system. In order to safeguard the information on this system, the DOC has specific policies prohibiting inmate access to the DOC system. This restriction is communicated to DOC staff in two separate policies; DOC

³ Joint Exhibit 2, page 11.

280.100, *Acceptable Use of Technology* and more specifically in DOC 280.925, *Offender Access to Electronic Data*.⁵

Associate Superintendent Fraker addressed the allegations of Sergeant Royal working at the computer with Xavier. When asked about his working at the computer with Xavier, Sergeant Royal told both CPM Diimmel and Associate Superintendent Fraker that he had worked at the computer with Xavier. Xavier was giving Sergeant Royal instruction on how to use a program on the computer. Sergeant Royal explained that he and Xavier sat at the desk for approximately two hours with Xavier providing verbal information on how to use the computer while Sergeant Royal used a word processing program. The inmate did not touch the computer, and Sergeant Royal never left the inmate alone with the computer.

The Paint

The preliminary review by CPM Diimmel also uncovered evidence that Sergeant Royal smuggled paint into the institution. Sergeant Royal has accepted responsibility for this from the first time the issue came up. "Ms. Diimmel asked me . . . She asked me where did that paint come from. I stated right then and there I brought it in." The picture boards required paint. In order to complete the projects with the least amount of cost to the institution, Sergeant Royal purchased the paint himself and brought it into the institution in his lunch bag. Sergeant Royal did not obtain prior authorization to bring the paint into the institution, but the paint was used solely for the picture boards and was secured "in a locker with a lock in the storage room."

⁴ Joint Exhibit 2, pp. 11-13.

⁵ Exhibit R-2, page. 30-43.

Sergeant Royal needed the paint to give to Xavier for the picture boards he had worked on. The supplies that Sergeant Royal needed were not a regular inventory item for the CBCC. The CBCC has a process for requesting unusual items: when staff needs an unusual item the proper process is to request it through the chain of command. Sergeant Royal was aware that it was inappropriate for him to bring paint into the CBCC.

The Investigation

After the investigation by Associate Superintendent Fraker, and without herself interviewing any witnesses, Superintendent Carter rejected some of Mr. Fraker's conclusions and substituted her own. On January 3, 2006, Sergeant Royal was demoted from a Sergeant to a Correctional Officer.⁶

DECISION

The Applicable Standard is Just Cause.

Where there is no contractual definition, it is reasonably implied that the parties intended application of the generally accepted meaning that has evolved in labor-management jurisprudence: that the “just cause” standard is a broad and elastic concept, involving a balance of interests and notions of fundamental fairness.⁷

Described in very general terms, the applicable standard is one of reasonableness:

...whether a reasonable (person) taking into account all relevant circumstances would find sufficient justification in the conduct of the employee to warrant discharge (or discipline)⁸

⁶ Joint Exhibit 2, pages 1-5.

⁷ *Rabanco Recycling*, 118 LA 1411 (2003).

⁸ *Rabanco Recycling*, 118 LA 1411 (2003), citing, *RCA Communications, Inc.* 29 LA 567, 571 (Harris, 1961). See also *Riley Stoker Corp.*, 7 LA 764, 767 (Platt, 1947).

As traditionally applied in labor arbitrations, the just cause standard of review requires consideration of whether an accused employee is in fact guilty of misconduct. An employer's good faith but mistaken belief that misconduct occurred will not suffice to sustain disciplinary action.⁹ If misconduct is proven, another consideration, unless contractually precluded, is whether the severity of disciplinary action is reasonably related to the seriousness of the proven offense and the employee's prior record. It is by now axiomatic that the burden of proof on both issues resides with the employer.¹⁰

The State asserts that because there was substantial evidence and the Department of Corrections believed in good faith that the Grievant was guilty of the acts alleged, the just cause standard of review is satisfied. It relies for the proposition on a test originally articulated by the Washington State Supreme Court in *Baldwin v. Sisters of Providence*.¹¹ In a case involving an employer commitment made in a unilaterally implemented employee manual, the Court in *Baldwin* described just cause as existing when the facts on which an employer relies are supported by substantial evidence and are reasonably believed by the employer to be true, so long as the reason for the discharge is not arbitrary, capricious or illegal.¹²

The *Baldwin* decision was premised upon the conclusion that when an employer **unilaterally** adopts **self-imposed** limitations, then the employer should be left to make the requisite factual determinations. In this regard, our state Supreme Court quoted with approval the following reasoning by the Oregon Supreme Court:

⁹ *Fluor Hanford*, 122 LA 65 (2006).

¹⁰ *State of Alaska*, 114 LA 1305 (2000).

¹¹ *Baldwin v. Sisters of Providence*, 112 Wn.2d 127, 769 P.2d 298 (1989).

¹² *Baldwin* at 139.

[T]here is a just cause provision, but no express provision transferring authority to make factual determinations from the employer to infer that such a meaning was intended by the terms of the Employee Handbook[The handbook] is a unilateral statement by the employer of self-imposed limitations upon its prerogatives....[T]he meaning intended by the drafter, the employer, is controlling and there is no reason to infer that the employer intended to surrender its power to determine whether facts constituting cause for termination exist....In the absence of any evidence of express or implied agreement whereby the employer contracted away its fact-finding prerogative to some other arbiter, we shall not infer it.¹³

The Employer cites to no other cases supporting its position. This is because no cases exist other than those involving unilaterally implemented employer policies. The “just cause” requirement which I am called upon to apply was not gratuitously offered by the State to its employees; it was the result of a bargained agreement.¹⁴

Some collective bargaining agreements contain an express definition of “just cause.” When the parties have thereby indicated their mutual intent an arbitrator should apply a standard of review that is consistent with the expressed contractual intent. In this case, what constitutes “just cause” has not been defined in the contract between the State Department of Corrections and Teamsters Local #117, and the State offered no evidence that the contractual “just cause” provision has been applied in any other way other than in accordance with its customary application in labor arbitrations.

The just cause standard has been seminally defined by Arbitrator Carroll Daugherty, and incorporates the following seven tests:

1. Did the company give the employee forewarning or foreknowledge of the possible or probable disciplinary consequences of the employee's conduct?

¹³ *Simpson v. Western Graphics Corp.*, 298 Or. 96, 100-101, 643 P.2d 1276 (1982)(emphasis added).

¹⁴ Even if this analysis of the contract were to fail, I would still find the use of the phrase “just cause” to constitute a trade term with specific meaning for the contract in question.

2. Was the company's rule or managerial order reasonably related to (a) the orderly, efficient, and safe operation of the company's business and (b) the performance that the company might properly expect of the employee?
3. Did the company, before administering discipline to an employee, make an effort to discover whether the employee did in fact violate or disobey a rule or order of management?
4. Was the company'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 company applied its rules, orders, and penalties evenhandedly and without discrimination to all employees?
- 7: Was the degree of discipline administered by the company in a particular case reasonably related to (a) the seriousness of the proven offense and (b) the record of the employee in his service with the company?¹⁵

If one or more of these questions is answered in the negative, then normally the just cause requirement has not been satisfied.¹⁶

The Applicable Burden of Proof is a Preponderance of the Evidence.

In a case involving the demotion of an employee, the burden is on the employer to sustain its allegations, and to establish that there was just cause for the demotion. In order to prevail in a discipline case, it is incumbent on the Employer to show by at least a preponderance of the evidence that the employees committed the act in question. Preponderance of the evidence can be defined as:

the standard of proof in most civil cases in which the party bearing the burden of proof must present evidence which is more credible and convincing than that presented by the other party or which shows that the fact to be proven is more probable than not.¹⁷

In the instant case the Employer has presented substantial evidence to support the discipline that was imposed, the question to address is whether this evidence rises to the level of preponderance.

¹⁵ *Enterprise Wire Co.*, 46 LA 359, 363-4 (1966).

¹⁶ *Enterprise Wire Co.*, 46 LA 359, 362 (1966).

Has the Just Cause Standard Been Met?

There is no question that just cause exists to discipline the Grievant if he engaged in the acts he is accused of. If an employee willfully disregards his employer's reasonable rules, he or she should be subject to discipline. The question in this case turns entirely on the events in question, what really happened, and if a reasonable employee would have knowledge of the Department's alleged rules.

If I accept the Employer's version of the facts, Mr. Royal engaged in action that clearly warranted his discharge including multiple acts of dishonesty and misleading the arbitrator at the hearing. While this is clearly a close case, I believe that the totality of the facts supports a conclusion that Mr. Royal did not violate Departmental Policy in three of the four acts he is accused of and was completely honest at the hearing.

The Computer

The DOC's policies on inmate access to computers are clear and not in question. They state:

Offenders may only be granted **access** to local information technology systems dedicated as offender systems used to perform assigned work duties or educational functions. **Access** must have local management approval. . . . Offenders shall work only on designated workstations and are not allowed to use staff workstations, fields or Local Access Networks.¹⁸

The question is simple; by allowing an inmate to sit next to him while working on a Microsoft Word document; did Sergeant Royal grant an inmate access to the DOC's computer system?

¹⁷ *Merriam-Webster's Dictionary of Law*, 1996.

¹⁸ DOC 280.925, *Offender Access to Electronic Data*. Ex. R-2, pg. 42.

For an employer to discipline an employee it is incumbent on the employer to communicate the rules to the employees unless it is one that a reasonable employee could infer using common sense. As stated by Arbitrator William M. Hepburn and quoted by Elkouri:

Just cause requires that employees be informed of a rule, infraction of which may result in suspension or discharge, unless conduct is so clearly wrong that specific reference is not necessary.¹⁹

Further, when an employer's application of rules is predicated on the unfounded assumption of willful dishonesty, it does not meet the standard of just cause.²⁰ Again, as stated by Elkouri:

It has been reported, on a basis of examining over 1000 discharge cases, that one of the two most commonly recognized principles in arbitration of such cases is that there must be reasonable rules of standards, consistently applied and enforced and widely disseminated.²¹

In the instant case I believe that the facts clearly show that Sergeant Royal did not believe that he was violating a rule; what he did was in plain sight and he made no attempt to hide his activities. The question of course is not what Sergeant Royal thought, but what a "reasonable" employee would think after reading the DOC's computer access policy.

Words are to be given their ordinary and popularly accepted meaning, unless other evidence indicates that the parties intended some specialized meaning. As stated by Elkouri:

¹⁹ *Lockheed Aircraft Corp.*, 28 LA 829, 831 (1957). See also, *Federal Aviation Admin., Denver Air Route Traffic Control Ctr.*, 99 LA 929 (Corbett, 1922); *Bayshore Concrete Prods. Co.*, 92 LA 311, 316 (Hart, 1989); *Fairmont Gen. Hosp.*, 91 LA 930, 932 (Hunter, 1988).

²⁰ *Hanford Environmental Health*, 115 LA 97 (Gaba, 2000)

Arbitrators have often ruled that in the absence of a showing of mutual understanding of the parties to the contrary the usual and ordinary definition of terms as defined by a reliable dictionary should govern. Use of dictionary definitions in arbitral opinions provides a neutral interpretation of a word or phrase that carries the air of authority.²²

The word access means:

access

n.

1. A means of approaching, entering, exiting, communicating with, or making use of: *a store with easy access.*
2. The act of approaching.
3. The ability or right to approach, enter, exit, communicate with, or make use of: *has access to the restricted area; has access to classified material.*
4. Public access.
5. An increase by addition.
6. An outburst or onset: *an access of rage.*²³

Synonyms for access include: admission, admittance, approach, avenue, connection, contact, course, door, entrance, entree, entry, in, and ingress.²⁴ When sergeant Royal allowed an inmate to sit next to him at a computer, he did not allow the inmate admission or admittance to the computer nor did he allow him entree, entry, or ingress. In short, a reasonable person reading DOC Policy, DOC 280.925, *Offender Access to Electronic Data*, would not know that they were doing something inappropriate. This is no doubt why Associate Superintendent Raker found: “Moreover I can find no evidence he

²¹ Elkouri & Elkouri, *How Arbitration Works* (6th Ed., 2003), see also, *Arbitration Awards in Discharge Cases*, 28 LA 930, 931032 (1957).

²² Elkouri and Elkouri, *How Arbitration Works*, Pages 490-91 (5th ed. 1997). See also, *Gerberding v. Munro*, 134 Wn.2d 188, 199, 949 P.2d 1366 (1998); *Washington State Coalition for the Homeless v. Department of Soc. & Health Servs.*, 133 Wn.2d 894, 905, 949 P.2d 1291 (1997).

²³ *The American Heritage® Dictionary of the English Language*. Fourth Edition. Houghton Mifflin Company, 2004.

²⁴ *Roget's New Millennium™ Thesaurus, First Edition (v 1.3.1)* Lexico Publishing Group, LLC. 2006.

violated policy by having offender Xavier observe the computer screen while they worked on lettering for the picture boards.” In making my finding I am not seeking to substitute my judgment for that of the employer, rather I simply find that Associate Superintendent Fraker is a reasonable employee and adopt his finding.

The Disrespectful Language

An unavoidable issue in this case is Mr. Royal's credibility versus that of Officer Welsh. Long experience leads arbitrators to recognize that a grievant's testimony may in some circumstances be presumed not to be credible, particularly when contradicted by a witness who has nothing at stake in the arbitration:

[A]n accused employee is presumed to have an incentive for not telling the truth and that when his testimony is contradicted by one who has nothing to gain or lose, the latter is to be believed.²⁵

However, this case is distinguishable given Mr. Royal's forthright admission of wrongdoing regarding the paint he brought into the CBCC and the fact that CO Welsh is far from a disinterested witness. This is also coupled with the odd nature in which the alleged comment surfaced; allegedly Sergeant Royal made the comments more than two weeks prior to them being reported. The alleged comments only came to light due to the diligent reporting of Sergeant Reno. Officer Welsh could not remember the exact comments that Sergeant Royal allegedly made. Most importantly, I observed the demeanor of each individual who testified and find Mr. Royal's testimony to be more credible. Specifically, I agree with Associate Superintendent Fraker (who also witnessed the demeanor of each individual) who found during his investigation the alleged

²⁵ *United Parcel Service*, 66-2 ARB ¶ 8703 (Dolson, 1966) quoting Stessin, *Employee Discipline* 44 (1960).

comments “cannot be substantiated.” A preponderance of the evidence does not support a finding that Sergeant Royal was disrespectful. Again, I do not seek to substitute my opinion for that of the employer, but find that the individual who actually conducted the investigation and witnessed the parties demeanor is the most credible to determine what actually happened.

The Paper-cutter

The most important job of the employees at the CBCC is to provide for the safety of the staff and inmates at the facility. As I stated in a previous decision in which I upheld the termination of an employee for safety violations:

Due to blasé attitude towards the health and safety of her fellow employees it would be irresponsible to place her back on a shop floor where employees must rely on each other to maintain an adequate level of safety.²⁶

The Employer argues that Sergeant Royal violated DOC Rules, but cannot establish what rules were broken. Before allowing Inmate Xavier to use the paper cutter in his cell, Sergeant Royal researched the tool control policies. He determined that there were no policies that controlled inmates' use of a paper cutter. CUS Bowen's own knowledge of the tool control polices would seem to confirm this.

Q. So if an item isn't on that list, do you know whether policy intended or contemplated that item being issued to an offender?

A. I don't know.²⁷

CUS Bowen also indicates that it was possible that inmates were using the paper-cutter in the Conference Room.²⁸ This would seem to be probable given Inmate Xavier's

²⁶ *Mission Foods*, 118 LA 1608 (Gaba, 2003):

²⁷ Tr. 70, IL 8-11.

²⁸ Tr. 65, 11. 22-25.

statement that he used the paper-cutter six to twelve times. It seems probable that a number of CBCC Staff saw an inmate using the paper-cutter and did not believe that any policy was being violated. Indeed, the CBCC Superintendent admits that Sergeant Royal did not violate any policy directive by allowing the inmate to use the paper cutter in his cell.

Q. With respect to the paper cutter in the cell, did you find that Sergeant Royal violated a particular policy directive?

A. Not a particular directive, no.²⁹

Further, the evidence establishes that Sergeant Royal carefully considered the safety of his officers and other inmates when he made the decision to have the inmate use the paper-cutter in his cell, as opposed to a public area where other inmates could access the paper-cutter. Clearly Sergeant Royal believed that he was not violating his employer's rules when he issued the paper-cutter to Inmate Xavier. The DOC has not shown by a preponderance of the evidence that a reasonable employee would have known they were engaging in misconduct by acting in the manner Sergeant Royal acted.

The Paint

For an employer to discipline an employee it is incumbent on the employer to communicate the rules to the employees unless it is one that a reasonable employee could infer using common sense. Common sense tells one that NOTHING should be brought into a medium security correctional facility without permission. Sergeant Royal knows this and admitted as much at the hearing. There is no question that just cause exists to discipline the grievant.

The Penalty

In the instant case the Employer has chosen to demote Sergeant. Royal for four separate violations of the Employer's Rules. As stated by Elkouri:

Where the Agreement fails to deal with the matter, the right of the arbitrator to change or modify penalties found to be improper or too severe may be deemed to be inherent in the arbitrator's power to decide the sufficiency of cause, as elaborated by Arbitrator Harry H. Platt:

In many disciplinary cases, the reasonableness of the penalty imposed on an employee rather than the existence of proper cause for disciplining him is the question an arbitrator must decide. . . . In disciplinary cases generally, therefore, most arbitrators exercise the right to change or modify a penalty if it is found to be improper or too severe, under all the circumstances of the situation. This right is deemed to be inherent in the arbitrator's power to discipline and in his authority to finally settle and adjust the dispute before him.³⁰

The Supreme Court has long agreed with statement of Elkouri above. As stated in

Paperworkers v. Misco:

Normally, an arbitrator is authorized to disagree with the sanction imposed for employee misconduct. In *Enterprise Wheel*, for example, the arbitrator reduced the discipline from discharge to a 10-day suspension. The Court of Appeals refused to enforce the award, but we reversed, explaining that though the arbitrator's decision must draw its essence from the agreement, he "is to bring his informed judgment to bear in order to reach a fair solution of a problem. *This is especially true when it comes to*

²⁹ Tr. 132,11. 7-10.

³⁰ Elkouri & Elkouri, *How Arbitration Works* (6th Ed., 2003), See also, Arbitrator Kossoff in 76 LA 300, 308; Volz in 50 LA 600, 603; Gilbert in 45 LA 580, 584; Dworkin in 36 LA 124, 128. Also see *Amoco Oil. V. Oil, Chem. & Atomic Workers Local 7-1*, 548 F.2d 1288, 94 LRRM 2518, 2521, 2524-25 (7th Cir., 1977). For discussion of other court cases on this aspect, see Fogel, "Court Review of Discharge Arbitration Awards," 37 Arb. J. No. 2, pp. 22, 32 (1982).

formulating remedies.” 363 U.S., at 597 (emphasis added by the court).³¹

Where an employer seeks to impose a penalty against an employee, the penalty must be consistent with other penalties imposed for similar offenses, under similar circumstances. Where an employer imposes different disciplinary treatment for similar offenses, the arbitrator must examine whether the employer had a valid reason for treating the employees differently. Where disciplinary distinctions cannot be accounted for, just cause is lacking.³² In this case there is no question that the penalty imposed by the State would be upheld if the evidence supported a finding that Sergeant Royal committed all four of the acts in question. However, in this case there is no evidence of what penalty the Employer would have imposed for just the one infraction and no evidence of how other employees have been disciplined in the past.

The principle of progressive discipline is one of the most important aspects of Just Cause. It requires the employer to provide discipline to employees in increasing degrees of severity, based “on the premise that both employers and employees benefit when an employee can be rehabilitated and retained as a productive member of the workforce.”³³ Moreover, arbitrators “are likely to set aside or reduce penalties when the employee had not previously been reprimanded and warned that his or her conduct would trigger the discipline.”³⁴

This case is difficult because employees who shirk their employer's rules are usually motivated by laziness or sloth, while the employee in this case would appear to

³¹ *Paper-workers v. Misco Inc.*, 484 U.S. 29 (1987)

³² *Alan Wood Steel Co.*, 21 LA 843, 849 (Short, 1954) (discharge for fighting not appropriate where other employees guilty of fighting received only suspensions). See also *B-Line Sys.*, 94 LA 1047 (Fowler, 1990).

³³ *Discipline and Discharge in Arbitration*, N. Brand, Ed., p. 57 (BNA, 1998).

have been motivated by a desire to better his institution and save his Employer money. If Sergeant Royal had been lazy this episode would never have occurred. Given the nature of the offense that the Grievant did commit I believe that a written warning would be the most appropriate penalty in this case. I also note that I am unfamiliar with the past practices of the parties regarding discipline and explicitly find that this award should not be presidential in any future arbitration. Specifically, my decision only deals with an employee who brings materials into the institution to help the institution, and not himself or others. I can imagine many scenarios where discharge would be appropriate for bringing contraband into the CBCC.

This is truly a close case: both parties provided well-written briefs with a number of cases on point cited to support their positions. In the instant case, despite the excellent lawyering of the State's Counsel, I have found that a preponderance of the evidence does not support a finding that Sergeant Royal engaged in three or the four acts he was accused of.

Interest

The Union makes a well thought out request for interest on this award. I deny this request because I have always done so. As stated by Emerson: a foolish consistency is the hobgoblin of small minds.³⁵ While more arbitrators are adopting the position espoused by the Union I will not do so until it becomes the majority position.

CONCLUSION

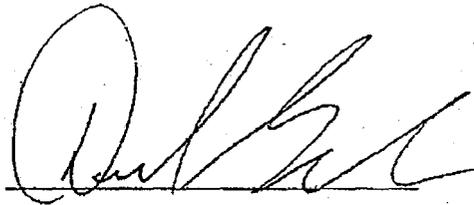
The burden is on the Employer to show by at least a preponderance of evidence that just cause existed to demote Sergeant Royal. While the Employer provided

³⁵ Elkouri & Elkouri, *How Arbitration Works* (6th Ed., 2003).

substantial evidence to support the demotion, I find that the Employer has not met its burden of proof, and the grievance is upheld. While a remedy of back-pay in this situation is harsh given the closeness of this case, it is required by arbitral precedent

AWARD

The grievance is sustained. The Employer will reduce Grievant's discharge to a written warning and reimburse him for all lost pay and benefits. The Union's request for interest is denied. All fees and expenses charged by the Arbitrator shall be divided equally between the parties, as provided in Article 9 of the parties Collective Bargaining Agreement.

A handwritten signature in black ink, appearing to read 'David Gaba', written over a horizontal line.

David Gaba, Arbitrator

September 9, 2006
Seattle, Washington

³⁵ From the essay "Self-Reliance" by Ralph Waldo Emerson.