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LABOR & PERSONNEL DIVISION

IN THE MATTER OF ARBITRATION)
)
 BETWEEN)
)
 WASHINGTON FEDERATION OF)
 STATE EMPLOYEES,)
)
 Union,)
)
 and)
)
 WASHINGTON STATE, DEPARTMENT)
 OF SOCIAL & HEALTH SERVICES,)
 WESTERN STATE HOSPITAL)
)
 Employer.)

AAA NO. 75-390-00016-07

ARBITRATOR'S OPINION

AND AWARD

GRIEVANCE OF

DONNA CLARK

HEARING SITE:

Western State Hospital
Tacoma, Washington

HEARING DATE:

July 27, 2007

POST-HEARING BRIEFS DUE:

Postmarked August 31, 2007

RECORD CLOSED ON RECEIPT OF BRIEFS:

September 7, 2007

REPRESENTING THE UNION:

Gregory M. Rhodes
Younglove Lyman & Coker, PLLC
P.O. Box 7846
Olympia, WA 98507-7846

REPRESENTING THE EMPLOYER:

Janetta E. Sheehan
Attorney General's Office
Labor & Personnel Division
7141 Cleanwater Drive SW
P.O. Box 40145
Olympia, WA 98504-0145

ARBITRATOR:

Gary L. Axon
P.O. Box 190
Ashland, OR 97520
(541) 488-1573

I. INTRODUCTION

Washington State, Department of Social & Health Services/Western State Hospital (WSH or Employer) terminated Mental Health Technician 1 Donna Clark (Grievant or Clark) on June 6, 2006 for off-duty conduct. Grievant's discharge was precipitated by her guilty plea and conviction of poisoning animals, a gross misdemeanor under Washington law. The Washington Federation of State Employees (WFSE or Union) filed a grievance challenging the termination under the parties' 2005-2007 Collective Bargaining Agreement.

II. STATEMENT OF THE ISSUES

The parties agreed to the following state of the issues:

Was there a just cause for the termination of Donna Clark on June 6th of 2006, and was it in compliance with Article 27 of the Collective Bargaining Agreement between the State of Washington and Washington Federation of State Employees, and Article 28.3 of that same Agreement? And if not, what should the remedy be?

Tr., pp. 4, 5.

The parties agreed if the grievance is sustained and a remedy ordered, the Arbitrator would retain jurisdiction to resolve issues, if any, regarding the remedy awarded.

III. RELEVANT CONTRACT LANGUAGE

**ARTICLE 27
DISCIPLINE**

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

...

**ARTICLE 28
PRIVACY AND OFF-DUTY CONDUCT**

...

28.3 The off-duty activities of an employee will not be grounds for disciplinary action unless said activities are a conflict of interest as set forth in RCW 42.52 or are detrimental to the employee's work performance or the program of the agency. Employees will report any court-imposed sanctions or conditions that affect their ability to perform assigned duties to their appointing authority within twenty-four (24) hours or prior to their next scheduled work shift, whichever occurs first. Employees, excluding those in the Washington State Patrol (WSP), will report any arrests that affect their ability to perform assigned duties to their appointing authority within forty-eight (48) hours or prior to returning to work, whichever occurs first. Employees in the WSP will continue to abide by WSP regulations relating to off-duty conduct.

...

Er. Ex. 10.

IV. STATEMENT OF FACTS

WSH is a State psychiatric hospital providing services to the most seriously mental ill individuals in western Washington. Donna Clark held the position of Mental Health Technician 1 at WSH. A Mental Health Technician 1 provides nursing care under the direction of a registered nurse to patients with psychiatric and physical illness. Grievant described her daily work with patients as showering and dressing them, helping patients with their hygiene and meals, and monitoring and supervising them throughout their day.

At the time of her discharge, Grievant had worked for WSH for about 11 years. She had received no prior discipline. Prior to WSH, Grievant performed similar

work at other hospital and nursing homes. Clark, now 44, began doing this type of work when she was 16 years old.

Clark was arrested and charged with three felony counts of cruelty to animals in May of 2005 while on vacation. In April of 2006, she entered a guilty plea to the charge of poisoning animals, a gross misdemeanor. Although Grievant was sentenced to 365 days in jail, 305 days were suspended with conditions that she serve 30 days in jail and perform 30 days of community service. Er. Ex. 7.

Court documents indicate Grievant admitted to putting antifreeze in a bowl of chicken in her back yard. She also admitted to knowing her neighbor's cats had come, and would come, into her yard. That neighbor had three cats. They ate the food and became extremely ill. The cats had to be euthanized. Court documents indicate the State entered into a plea agreement because there were difficulties in proving a felony charge; namely, there were problems proving that Grievant intended to kill the specific cats and that she intended for them to unduly suffer before they died. Er., Exs. 7, 9; Un. Ex. 1. These events received considerable negative attention in the local news media (print and television). In a number of news accounts, Grievant was identified as a nurse and as an employee of WSH. Er. Exs. 1, 8.

Andrew Phillips is the Chief Executive Officer (CEO) of WSH. As CEO, Phillips is the appointing authority for hiring and disciplinary actions for all employees. He does not delegate this authority for final hiring and final disciplinary action. Phillips learned from staff that Clark was the individual in the news who had been arrested and charged with a felony. Initially, it was decided to move Grievant from patient care and

assign her to a non-patient area: dietary services (i.e. the kitchen) where her duties were to clean pots and pans. Er. Ex. 3.

In July of 2005 Grievant suffered an on-the-job (L&I) injury to her back while working in the kitchen. Clark returned off and on to light duty work until February 11, 2006, when light duty funding ceased. She remained on L&I injury leave thereafter. After Grievant pled guilty and was convicted of poisoning animals, WSH notified Clark of its intent to dismiss her from employment. Phillips conducted a pre-disciplinary meeting with Grievant in May 2006. Er. Exs. 2, 4. WSH terminated Grievant on June 6, 2006. The Employer's notice of discharge set forth the reasons for her dismissal as follows:

In accordance with Article 27 of the Master Agreement (MA) between the State of Washington and the Washington Federation of State Employees (WFSE), this action is the result of your pleading guilty to poisoning animals, a gross misdemeanor, your failure to comply with Article 28.3 of the WFSE Collective Bargaining Agreement (CBA), your failure to notify your supervisor that you would not be available for work and your neglect to build public trust.

Er. Ex. 1: emphasis added.

Phillips testified at the arbitration hearing that Clark's acknowledgement of guilt of poisoning animals really carried his decision to terminate her. Phillips reported that neither media attention nor Grievant's failure to notify WSH of her arrest and jail time were significant factors to his decision. Rather, the decision was based on the seriousness of the crime and its relationship to the type of patients at WSH. Phillips explained he favored dismissal over a possible demotion because anyone who pled guilty to poisoning animals was not a person one wants working with vulnerable individuals in a State psychiatric hospital. Tr., pp. 57, 58.

The Union filed a grievance on behalf of Clark. The Employer denied the grievance. The parties were unable to resolve this dispute at the lower levels of the grievance procedure. The Union advanced the case to arbitration. A hearing was held at which time both parties were accorded the full and complete opportunity to present evidence and argument in support of their respective positions. Post-hearing briefs were timely filed. The case is now properly before the Arbitrator for a final and binding decision.

V. POSITIONS OF THE PARTIES

A. The Employer

The Employer argues management has established Clark was guilty of the alleged misconduct--she pled guilty to poisoning animals, a gross misdemeanor. Also, Clark admitted she did not contact WSH or her supervisor when she was arrested and charged, or convicted. Finally, WSH has proved that her actions, and the extensive media attention linking her to WSH, negatively diminished public trust in the hospital.

WSH argues Clark's conduct justified discharge under Article 28.3 of the CBA because her actions were detrimental to her work performance and the program of WSH. The Employer points out that news reports identified Clark as an employee of WSH, thereby specifically linking her to WSH. Furthermore, the Employer believes an act of poisoning an animal relates closely to the treatment of vulnerable persons. As stated by Phillips, anybody pleading guilty to poisoning cats is not a person you want working with vulnerable individuals at a State psychiatric hospital.

The Employer contends the publicity surrounding Clark reflected poorly not only on Clark but on WSH and public employees. To keep Clark as an employee sends a negative message to the public and would lead to public distrust of WSH judgment. Her conduct was highly offensive to WSH management. WSH relies on testimony from Clark's supervisor, Kimmi Munson-Walsh, as well as Phillips and HR Manager Lynn Glad to support this argument.

WSH asserts that the discipline here was appropriate and measured. The Employer distinguishes this case from other cases where discipline was found too severe. Here, Clark entered a guilty plea and was criminally convicted of killing animals. Media attention contributed to the diminished reputation of the hospital, but Phillips based his decision on how the crime affected her ability to do her job and its impact on hospital patients and staff. WSH emphasizes Phillips did not want Clark to have hands-on access to patients upon learning of her alleged criminal conduct and removed her from patient care. Regardless of her past employment record, Phillips could not retain an employee with a criminal conviction of killing animals to care for severely physically and mentally challenged elderly people. Phillips had just cause to terminate Clark and her discharge should not be overturned, reduced, or modified.

B. The Union

The Union argues that Phillips' testimony relayed that the decision to terminate Clark was based upon her conviction and no other consideration. WFSE contends this testimony contradicts other Employer pronouncements, which highlight media attention and Clark's failure to report her arrest and incarceration as substantial justifications for her termination.

WFSE emphasizes the record is replete with evidence demonstrating Clark was the focus of intense, vilifying media attention. The Employer relied heavily on media reports in assessing their response and reaction to the situation. The Union argues this Arbitrator has already held that the extent of publicity generated is not an accurate measure of harm inflicted upon an employer.

According to WFSE, the Employer did not independently prove its operations were actually damaged; media reports themselves do not prove damage and are "hearsay in its most extreme form." The Employer also did not independently prove that the negative media attention would make it difficult for Clark to return and work effectively with staff.

With respect to the Article 28.3 reporting requirement, the Union claims that Clark's ability to perform assigned duties was not compromised because she was off work with an injury. There was no obligation to report under the contractual language due to the fact she was off work on L&I leave. In addition, the Employer was fully aware of her whereabouts through media reports. Furthermore, Grievant did not expect to serve jail time as shown by her testimony. The Union argues even if a violation of Article 28.3 were found, it does not justify termination based upon the factual record here.

The Union contends that although WSH asserts the criminal conviction was detrimental to the Employer, management offered no evidence to support this assertion. Arbitral authority establishes that to justify discharge there must be a connection between the off-duty conduct and the effect on the employer/employee's job

that is reasonable and discernible, not speculative. The language of Article 28.3 recognizes this principle.

WFSE avers there is not a nexus between elements of the crime for which Clark was convicted and her ability to do her job surrounding the facts of the case. The Employer did no independent investigation of the circumstances. Moreover, the evidence shows Clark was not a threat to patients: she had been taking care of vulnerable patients since she was 16 (11 years at WSH); coworkers laud her manner with patients and dedication to the job; and the prosecuting attorney in the criminal case swore under penalty of perjury that he did not believe Clark was a danger to self or others. The Union cites a recent arbitration decision concerning the same Employer in support of its argument that a guilty plea in a matter unrelated to work does not reach the standard proof needed to sustain termination.

The Union requests the Arbitrator find Clark's termination violated the CBA and reinstate her with full back pay, interest, seniority, benefits and any other remedy, which would make Clark whole.

VI. DISCUSSION

The Arbitrator finds WSH failed to establish just cause to terminate Donna Clark. The termination was not in compliance with Article 27 and Article 28 of the Collective Bargaining Agreement. Accordingly, the grievance will be sustained. The reasoning of the Arbitrator is set forth in the discussion that follows.

The parties agree the issue presented is whether the Employer had just cause to terminate Grievant Clark under the terms of Article 27 and in accord with

Article 28.3 of the parties' Collective Bargaining Agreement. Just cause and similar terms such as "reasonable cause" and "proper cause" all imply the same basic standard, that the discipline must be reasonable in light of all the circumstances. Elkouri & Elkouri, *How Arbitration Works*, 932, (6th Edition, 2003).

The material facts in this case are not in dispute. Grievant pled guilty and was convicted of poisoning animals, a gross misdemeanor under Washington law. Following Clark's conviction, CEO Phillips terminated her for that reason. The conduct at issue occurred when Grievant was off work. It did not take place on WSH property and did not concern other WSH employees or patients. The parties have agreed to specific contract language concerning off-duty conduct and disciplinary action. Article 28.3 of the CBA provides in part:

The off-duty activities of an employee will not be grounds for the disciplinary action unless said activities are a conflict of interest as set forth in RCW 42.52 or are detrimental to the employee's work performance or the program of the agency.

...

The above language is consistent with arbitral authority. Arbitral case law establishes that generally an employer does not have the authority under just cause to discipline its employees for off-duty conduct that is less than exemplary. *Orange County*, 90 LA 117 (1987). The employer must establish a nexus between the off-duty conduct and the business of the employer before just cause for discipline exists. Elkouri & Elkouri at 938-939. That is, the pivotal element is to link the conduct with the employer's business operations and the employment relationship. See "Discharge for Off-Duty Misconduct in the Private & Public Sectors," 40 *Arbitration Journal*, pp. 24-37 (June 1985). Basically, the employer must demonstrate an injurious effect on business.

The effect must be reasonable and discernible, not merely speculative. Elkouri & Elkouri at 939.

Here, there is no doubt that Grievant engaged in wrongdoing while off duty. The crux of this case turns on that pivotal element of nexus between her off-duty misconduct and WSH operations and the employment relationship.

CEO Phillips was responsible for WSH's decision to terminate Clark. He was clear about the reason. It was Clark's acknowledgement of guilt of poisoning animals that carried his decision. Phillips explained that it was the seriousness of the crime and its relationship to the type of patients at WSH. Phillips' testimony showed that neither media attention, nor Grievant's failure to notify WSH of her arrest/jail time were important factors to his decision.

Phillips' reaction to Clarks' acknowledged crime is understandable. However, no reasonable and discernible evidence supports Phillips' statement that there is a relationship between Clark's conduct and the type of patients at WSH. The Arbitrator agrees with the Union that there is nothing in the nature of the crime that inherently or automatically gives rise to a connection to Clark's employment at WSH caring for patients. That is, the crime itself is not enough in and of itself to establish a link to the performance of her duties at WSH.

WSH contends that upon learning of Clark's alleged conduct of poisoning animals Phillips did not want her to have hands-on access to patients and he removed her from patient care. This argument is undermined by management's assignment of Grievant to dietary services, i.e. the kitchen following her arrest. If management was so concerned and considered Grievant a threat to the health and safety of patients it does

not seem likely she would be assigned to the kitchen where she had access to patient food preparation.

Furthermore, there is no evidence that established Grievant is a safety threat. To the contrary, there is specific evidence that Grievant is not. Documents submitted in the court proceedings show that mental health evaluation was performed and indicated that Clark has no tendency for animal cruelty and is not a danger to self or others. Un. Exs. 1, 2.

Similarly, there is no evidence that Clark's off-duty misconduct has affected her ability to perform her work duties; or led staff and/or patients to refuse, or be reluctant, to work with her or receive care from her. See Elkouri & Elkouri at 939. In fact, registered nurse and former coworker Sheila Stockman testified she considered Clark a good employee and Stockman's assessment of Clark and Clark's ability to work at WSH was not changed by Grievant's conviction. Tr., pp. 11, 12.

WSH argues Clarks' conduct justified discharge because the extensive media attention linking her to WSH negatively diminished public trust in the hospital. WSH also cites testimony of Munson-Walsh that people in the community approached her and asked why WSH would employ a person who poisons cats.

Despite the Employer's media arguments, Phillips testified media attention was not an important factor in his decision to terminate Grievant. Furthermore, negative publicity, including publicity that identified Clark as an employee of WSH, is neither reliable nor sufficient evidence to establish a nexus between Grievant's misconduct and her work. It would be a shaky and slippery slope if news accounts and resulting public opinion formed the sole evidentiary basis for establishing an injurious effect and

justifying employee terminations for off-duty conduct. Here, there is no showing that negative publicity had a demonstrable adverse effect on Grievant's work performance or the program of WSH. This conclusion holds true for the argument that Grievant's off-duty misconduct is highly offensive to management as well. While it is understandable management found Grievant's conduct offensive, such offensiveness does not inherently establish an injurious effect on Clark's performance or WSH operations.

As explained above, the Arbitrator finds the evidence fails to show Grievant's off-duty misconduct was detrimental to Clark's work performance or the program of the WSH.

WSH also contends Clark admitted she did not contact WSH or her supervisor when she was arrested and charged, or convicted. The Employer argues Grievant failed to meet the notification requirements of Article 28.3, thereby justifying WSH's decision to terminate her.

Article 28.3 provides in relevant part:

Employees will report any court-imposed sanctions or conditions that affect their ability to perform assigned duties to their appointing authority within twenty-four (24) hours or prior to their next scheduled work shift, whichever occurs first. Employees, excluding those in the Washington State Patrol (WSP), will report any arrests that affect their ability to perform assigned duties to their appointing authority within forty-eight (48) hours or prior to returning to work, whichever occurs first.

Emphases added.

Phillips testified that Grievant's failure to report her arrest and conviction was not a significant factor to his termination decision. In addition, the Union correctly points out that the reporting requirement of Article 28.3 speaks to situations in which court-imposed sanctions and conditions affect an employee's ability to perform assigned duties. It is undisputed that Grievant's ability to perform her assigned duties was not

affected by court proceedings and she was off work due to the L&I injury at the time she served her jail term. I find the record inadequate to justify discharge on the grounds of Grievant's failure to meet reporting requirements of Article 28.3.

For the foregoing reasons, the Arbitrator concludes there was not just cause for termination of Donna Clark on June 6, 2006, and her termination was not in compliance with Article 27 and Article 28.3 of the CBA. In arriving at this decision I have carefully considered all of the evidence, arguments, and authority submitted by the parties even if not specifically discussed in this opinion. While I considered the specific arbitration awards cited, this case was decided based upon the particular contract language and evidentiary record presented here.

The Union requests the Arbitrator reinstate Clark with full back pay, interest, seniority, benefits and any other remedy, which would make Clark whole. In light of the above findings and conclusions, I find it appropriate to order Grievant reinstated with full seniority and benefits. The remedy to be applied in this case is complicated by the fact that as of the date of the arbitration hearing Grievant Clark was unable to return to work due to an injury suffered on the job. Until Grievant Clark is medically cleared to return to work your Arbitrator will delay actual implantation of the return to work order.

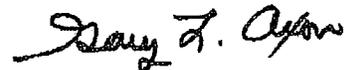
The issue of the back pay award is similarly compromised due to Grievant's injury and ongoing receipt of L&I benefits. Tr., pp. 67, 68; 73, 74. Accordingly, I will not enter an Award on the back pay issue at this point. The parties agreed that it would be appropriate to attempt to resolve reinstatement and back pay issues through negotiations in the event the grievance was sustained. Based on the

parties' stipulation, the Arbitrator will retain jurisdiction to resolve any issues regarding the remedy awarded. Pursuant to Article 29.3 E of the CBA, the parties will share equally in the payment of the Arbitrator's fees and expenses.

AWARD

Having reviewed all of the evidence, authority and argument, and having the opportunity to observe the demeanor of the witnesses during their testimony, I hold there was not just cause for termination of Donna Clark on June 6, 2006. Further, I find Grievant's termination was not in compliance with Article 27 and Article 28 of the Collective Bargaining Agreement between the State of Washington and the Washington Federation of State Employees. The Employer is ordered to reinstate Grievant to her former position with seniority and benefits subject to being medically cleared to return to work. The Arbitrator retains jurisdiction for a period of 60 days from the date of this Award to resolve any issues regarding the remedy awarded. The implementation of any back pay order is similarly delayed until the parties are able to resolve the L&I benefit issues. Pursuant to Article 29.3 E of the Collective Bargaining Agreement, the fees and expenses of the Arbitrator shall be borne equally by the parties.

Respectfully submitted,



Gary L. Axon
Arbitrator

Dated: October 11, 2007