IN THE MATTER OF ARBITRATION BETWEEN	DECISION
INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL NO. 117	OF
UNION	JOHN R. SWANSON
and	ARBITRATOR
STATE OF WASHINGTON DEPARTMENT OF CORRECTIONS	
EMPLOYER	**October 4, 2010**
Re: William Anderson Demotion	

APPEARANCES

TEAMSTERS LOCAL UNION #117 by General Counsel, Spencer Nathan Thal, Esquire for and on behalf of William L. Anderson.

Attorney General Rob McKenna by Assistant Attorney General, Elizabeth Delay Brown, Esquire, for and on behalf of McNeil Island Correction Center.

OTHERS PRESENT

William L. Anderson, Grievant
Michelle Woodron, Business Representative – Analtha Moroffko, Business Representative
Fran Halpain, Ben McDonald – Human Resources Office
Jackie Marks, Labor Relations Office
Ron Van Boening, Superintendent

ISSUE

Based on evidence in the record and the Collective Bargaining Agreement, did the Employer have just cause to demote Mr. Anderson?

If not, what is the appropriate remedy?

BACKGROUND

While acting as a relief Control Room Sergeant during the regular Control Room Sergeant's lunch break, Sergeant Anderson allowed an inmate to access the sally port while performing his other duties, i.e. taking in equipment, keys, restraints, radios and monitoring the opening and closing of the sally port doors. As a result, the inmate not only left the sally port but proceeded past the gatehouse where another correction officer failed to identify the inmate allowing the inmate to access the ferry boat that takes passengers to the mainland from the island. The inmate was subsequently detained and returned to the Correction Center.

A legitimate question has been raised by Counsel for the grievant regarding process and whether Grievant Anderson was provided due process and given his appropriate protection afforded by Loudermill. The parties were unable to agree on both the discipline and the extent of the discipline and the matter was submitted to arbitration.

RECORD BEFORE THE ARBITRATOR

1. Joint exhibit #1 Collective Bargaining Agreement by and between The State of Washington and Teamsters Local Union #117 effective July 1, 2007 through June 30, 2009.
2. Joint exhibits, Union and Employer exhibits accepted into evidence.
3. Transcript of July 20, 2010 arbitration hearing.
4. Briefs filed by counsel for the parties simultaneously mailed on September 13, 2010.

RELEVANT CONTRACT PROVISIONS

ARTICLE 2 – UNION RECOGNITION, UNION SECURITY AND DUES DEDUCTION

2.1 Recognition

This agreement covers the employees in the bargaining units described in Appendix A, entitled "Bargaining Units Represented by the Teamsters Local Union No. 117," but it does not cover any statutorily excluded positions or any positions excluded in Appendix A. Job classifications and/or positions that have been historically included in the bargaining unit, that are created as a result of the expansion of an existing facility which is included within the bargaining unit, will be included in the bargaining unit.

ARTICLE 3 – MANAGEMENT RIGHTS

3.1 Management Rights

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. (Emphasis added)

ARTICLE 5 – UNION/MANAGEMENT RELATIONS

5.1 Collective Bargaining Obligations

The Employer will satisfy its collective bargaining obligation under law before changing a matter that is a mandatory subject of bargaining. (Emphasis added)

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

The Employer has the authority to determine the method of conducting investigations, subject to the just cause Standard. Investigations will be completed in a timely manner. Except in cases involving alleged criminal activity, the employee may contact Human Resources and will receive a progress report and the expected date that the investigation will be completed every thirty (30) days. The Appointing Authority will grant written authorization to extend the time frame

beyond ninety (90) days, and a copy of such authorization will be provided to the Employee and the Union. (Emphasis added)

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.

8.6 Investigatory Interview

At the beginning of the initial interview, the Employer will inform the employee of the nature of the allegation(s). 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 this article must not interfere with the Employer's right to conduct the investigation.

8.7 Pre-Disciplinary Meeting

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 the meeting scheduled by the Employer or in writing if the employee prefers. (Emphasis added)

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 9.3 and are not subject to arbitration.

ARTICLE 9 – GRIEVANCE PROCEDURE

9.1 Terms and Requirements

A. Grievance Definition – A grievance is an alleged violation of this Collective Bargaining Agreement. Grievances will be processed in accordance with the provisions of the Collective Bargaining Agreement in which the grievance was originally filed.

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 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. The arbitrator will hear arguments 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 Employer and the grievant. (Emphasis added)

ARTICLE 13 – SAFETY

13.2 Employer Responsibilities

Recognizing the inherent risk(s) in a correctional setting, the Employer is obligated to provide a safe workplace and to educate employees n proper safety procedures and use of protective and safety equipment. The Employer is committed to responding to legitimate safety concerns raised by employees. The Employer will comply with federal and state safety standards, including requirements to first aid training, first aid equipment and the use of protective devices and equipment.

ARTICLE 44 – ENTIRE AGREEMENT

The Agreement expressed herein, in writing, constitutes the entire Agreement between the parties and any past practice or past agreement between the parties that existed prior to July 1, 2005 – whether written or oral – is null and void, unless specifically preserved in this Agreement. With regard to WAS 357, this Agreement preempts all subjects addressed, in whole or in part, by its provisions. This Agreement supersedes specific provisions of agency policies with which it conflicts. During the negotiations of the Agreement, each party had the unlimited right and opportunity to make demands and proposals with respect to any subject or matter appropriate for collective bargaining. Nothing herein will be construed as a waiver of the Union's collective bargaining rights with respect to changes in matters, which are mandatorily negotiated under the law. (Emphasis added)

Conclusions From the Record

1. The 2007-2009 Collective Bargaining Agreement (CBA) between the State of Washington and Teamsters Local No. 117 effective July 1, 2007 through June 30, 2009 was in full force and effect at the time of the incident on December 29, 2008.

2. While a question has been raised about the grievant's Loudermill rights, a complete review of the record and testimony does not require the Arbitrator to rule on whether Loudermill should be a factor in determining this case.

3. The grievant has been a corrections officer since being employed on September 10, 2001. In 2002 he was employed at McNeil Island Correction Center. After completing training and subsequent promotions, he became a Sergeant in 2005, a position he held until being demoted on June 16, 2009.

4. Prior to the incident of December 29, 2008, the grievant has a record without any discipline. His leadership potential was recognized when he was promoted as a temporary Lieutenant.

5. A confidential letter dated March 9, 2009 to the grievant regarding the December 29, 2008 incident outlined the potential discipline determined appropriate. ***"McNeil Island Corrections Center is considering taking formal disciplinary action against you, up to and including a reduction in pay."*** This contemplated action is consistent with Article 8 of the Collective Bargaining Agreement (CBA) between the State of Washington and the Teamsters Local Union 117. (Emphasis added)

6. When the Superintendent wrote and sent the letter of March 9 to the grievant, he was in receipt of: **(a) (R-1) the January 7, 2009 Incident Review Report** initiated by Earl X. Wright - a report from Team Leaders Associate Superintendent, James R. Key, Airway Heights Correction Center and Team Members Michael Green, Captain, Washington Corrections Center for Women and Tamara J. Rowden, Associate Superintendent, Clallam Bay Correction Center. This report outlined very

specifically grievant's admissions and specific circumstances as to what occurred on December 29, 2008.

(b) the February 24, 2009 Fact-Finding Report of Captain Ken Bratton who interviewed correction offices and grievant regarding the incident of December 29, 2008. This February 24, 2009 report also contained a statement of the grievant prepared by Captain Bratton and signed by the grievant. In Captain Bratton's report on Allegations Investigated, his reference in bullet point #4 is not supported by any evidence in the record.

7. (R-1) the January 7, 2009 Incident Review Report, under "Other Items", indicates the following:
   - **Some staff members – (old vs. new staff) claim it is not their responsibility to check ID.**
   - **Operational Memorandum not reviewed/updated at same time as DOC policy, i.e. DOC 410.360 updated 5/23/08 and MICCOM updated 3/30/07.**
   - **Control card photos and individual current appearances are not similar.**
   - **Post Orders are generic and do not include verbiage regarding verifying IDs.** (Emphasis added)

8. (R-1) the January 7, 2009 Incident Review Report recommends, among other things, the following changes relevant to this case:

   1. **Develop facility procedure for identifying and updating photos of offenders where appearance has dramatically changed.**

   2. **Revise Post Orders at Control points and all custody posts in the institution. Include the responsibility of checking and verification of staff and offender ID's. Reinforce established procedures that no staff (including island non-staff residents) be allowed to come into gatehouse to check mailboxes or have access to institution without proper identification.**

   3. **Inform all staff on the responsibility of checking, wearing and identification of ID's. We would recommend that management staff meet with staff in all areas of the institution (versus an email) to reinforce that it is the responsibility of all staff to complete this duty, not just custody staff.** (Emphasis added)

9. **As a result of the December 29, 2008 incident and the follow-up Incident Review Report, the MICC has amended the 1/26/09 and 1/1/10 *Post Orders for Control Room Sergeant* to specifically outline Major Control's responsibility regarding individual identification, a requirement not addressed in the 11/12/08 *Post Orders for Control Room Sergeant.*** (Emphasis added)

10. The record supports the following undisputed facts:

    1. Excluding the December 29, 2008 incident, the grievant has had an exemplary record and this has continued in spite of his contested demotion.

    2. At the time of the incident, the grievant had only very limited experience in sally port and was relieving the assigned Sergeant who was on his break.

    3. The grievant admitted he did not ask an unidentified individual dressed as a worker in the sally port for identification who later was identified as an inmate after he exited the gatehouse.

4. The grievant admits he opened the exterior sally port door and released the Individual to the MICC gate house and then contacted the gate house correction Officer when he was troubled about allowing the unidentified person egress.

5. The grievant does not deny that he only made a cursory review of the 11/12/08 *Post Orders For Control Room Sergeant* and did not sign the post order review sheet.

6. The grievant admits he did not directly contact the Lieutenant; however, he told the officer on the scene, who was aware of all the factors regarding the apprehension of the inmate, to immediately call the Lieutenant and report the specific actions and circumstances occurring.

7. The grievant also acknowledged he was not aware that he was to contact every person entering and/or leaving the sally port and verify their identification. The record contains unrefuted testimony of other corrections officers confirming that individual identification was not a requisite for entering or exiting the sally port prior to the 1/26/09 and 1/1/10 amended Post Orders.

8. (R-7) page 1 of 1 of the January 1, 2010 Amended Post Orders For Control Room Sergeant is somewhat different than the January 1, 2010 Union Exhibit #4 Post Orders given the Union during its investigation of the incident. Both R-7 and Union Exhibit #4 are dated 1/1/10 and signed by the same official. However, the agency provided the Union with the Post Orders for Major Control Officer (U#4), Post Orders which do not reflect the same detailed requirements for securing individual identification that is required by the Control Room Sergeant contained in the Amended Post Orders (R-7).

Discussion

It is unclear in the record as to the nature and atmosphere present during the discussion that took place between the grievant and the Superintendent- a discussion that apparently prompted the Superintendent to change his already-concluded maximum penalty outlined in the March 9, 2009 letter. At the time of his meeting with the grievant, the Superintendent had in his possession the detailed evidence of two very comprehensive investigations, the Incident Review Report (IRR) and Capt. Bratten's Fact-finding Report. In both those reports the grievant acknowledged very specifically what he did and did not do. In March, the Superintendent, with full knowledge of all the facts, concluded the most severe penalty might be up to a reduction in pay as provided in Article 8, 8.2 and 8.7. It appears obvious from the record that the Superintendent did not expect the IRR to identify numerous improvements necessary for security of MICC in the opinions of other correction officers. Neither did the Superintendent expect the explanations which the grievant suggested were partially mitigating regarding the December 29, 2008 incident. There is no evidence in the record that during the investigations for the IRR or Captain Bratten's report the grievant did not accept responsibility for his actions or conduct in the December 29, 2008 incident. The Superintendent,

based on extensive investigations both internally and externally, had a complete record of what occurred and what the grievant admitted were his own faults. The Superintendent had that information when he sent the notice of March 9, 2009 considering contemplated disciplinary action as required by Article 8-8.7. There is no reasonable explanation in the record or in the investigative reports as to the delay between March 9, 2009 and June 16, 2009 which supports or justifies a change in the level of discipline contemplated by the MICC and provided the grievant. During the period between December 29, 2008 and June 16, 2009 the grievant continued to perform his duties in an acceptable and exemplary manner which is not in dispute.

While this December 29, 2008 incident should not have happened and could have potentially been serious for MICC, it actually resulted in improved and amended Post Orders and other safety and security procedures which should assure another such incident could not recur.

The record suggests that the Superintendent is an extremely knowledgeable, conscientious corrections executive who exhibited an understanding and comprehensive knowledge of the CBA. In his letter of a pre-disciplinary meeting of March 9, 2009, he outlined the possible disciplinary action that MICC might impose as required by Section 8-8.2 and 8.7. Again it is without evidence to the contrary the Superintendent had complete and comprehensive data as to all the events of December 29, 2008. He notified the grievant of the potential disciplinary action which might occur and what he should be prepared to defend as a worst case scenario and that could include a reduction in pay.

There is no reasonable justification in the record for the failure to complete the discipline, if determined appropriate, in a timely manner after receipt of the complete investigative reports (R-1). The period involved was not the timely manner required in Article 8-8.3. There is also no legitimate, just cause reason or rational explanation that would support the change from a contemplated penalty of up to a reduction in pay to the much more severe penalty of a demotion from Sergeant to Correction Officer.

It is true that the 'just cause' standard is subject to many and varied interpretations; however, the standard must be interpreted and applied on a reasonable and just basis. Based on the grievant's past record of more than acceptable performance, his willingness to cooperate fully in all aspects of the investigation and his efforts in his defense to describe the circumstances regarding the December 29, 2008 incident, the grievant's explanation of the circumstances cannot then be used as just cause to change the already contemplated formal degree of discipline outlined in the Article 8.7 notice of March 9, 2009.

It is clear that all involved want to do what is fair, just, good and reasonable; however, knowing what that is in the corrective and non-punitive sense is often the tough part and why you have chosen an Arbitrator in this case to determine just cause.

Decision and Order

1. The grievant, William Anderson, will be restored to his previous classification of Sergeant for compensation and other purposes effective ninety (90) days from June 16, 2009.

2. The ninety (90) day period beginning June 16, 2009 and prior to his reinstatement on September 15, 2009 is the disciplinary "reduction of pay" penalty contemplated by the March 9, 2009 letter to the grievant as provided in Article 8-8.2 and 8.7.

3. The grievant, Sergeant William Anderson, is to be made whole following the ninety (90) day period in 1. above to the present. The make-whole remedy is to be determined on the basis that Sergeant William Anderson began working as a Sergeant September 15, 2009.

4. The Arbitrator will retain jurisdiction of this decision and order for sixty (60) days if needed to assist in its implementation.

Respectfully, John R. Swanson

John R. Swanson, Arbitrator

DATED: October 4, 2010