

In the Matter of Arbitration Between)	
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)	
WASHINGTON FEDERATION OF)	
STATE EMPLOYEES,)	
(Union),)	
)	
and)	OPINION AND AWARD
)	
)	AAA Case No. 75 390 448 08
WASHINGTON DEPARTMENT OF)	
TRANSPORTATION,)	John Tate Grievance
(Department or Employer).)	
)	
_____)	

BEFORE: David W. Stiteler, Arbitrator

HEARING LOCATION: Seattle, Washington

HEARING DATE: July 14, 2009

APPEARANCES: *For the Union:*
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RECORD CLOSED: August 21, 2009

OPINION & AWARD ISSUED: September 17, 2009

OPINION

I. INTRODUCTION

The Department demoted Grievant John Tate from maintenance supervisor to maintenance lead technician effective February 16, 2008. The Union grieved, contending that there was not just cause for the demotion. The parties could not resolve the dispute, and the Union demanded arbitration. Through the procedures of the American Arbitration Association, the parties selected David W. Stiteler to serve as Arbitrator.

A hearing was held before the Arbitrator on July 14, 2009. The parties were afforded the full opportunity to examine and cross-examine witnesses, present documentary evidence, and argue their positions. The hearing was transcribed by Vicky Pinson, RPR-CSR. Witnesses testified under oath. The parties agreed that the dispute was properly before the Arbitrator for resolution. They also agreed that the Arbitrator could retain jurisdiction after the decision was issued to resolve disputes about the remedy, if one was awarded.

After the evidence was presented, the parties agreed to submit written closing arguments. Those arguments were received by the Arbitrator on August 21, 2009, and the hearing record was closed.

II. ISSUE

The parties stipulated that the issue is:

Did the Department have just cause to demote Grievant, and if not, what is the appropriate remedy?

III. RELEVANT CONTRACT LANGUAGE

Article 27

Discipline

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

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

IV. FACT SUMMARY

Grievant has worked for the Department since 1986. For much of his career, he was a sign technician or a lead sign technician. He was promoted to maintenance supervisor in September 2005. He had not been disciplined before the incident that led to his demotion.

As a maintenance supervisor, Grievant was responsible for overseeing the maintenance of roads within a particular geographic area. There were about 22 employees under his general supervision, including: four lead maintenance technicians, 12 maintenance technicians, two sign technicians, and one equipment operator. Among the maintenance duties performed by these employees were snow and ice removal and sanding.

One of the roads within Grievant's area of responsibility was SR 534. He was familiar with that road not just because it was within his geographic area, but also because he drove on it every day on his way to and from work. It is a short, curvy, and shaded road that runs between I-5 and Highway 9 south of Mt. Vernon.

In the fall of 2007, Grievant became concerned about a beaver dam he noticed near the road at about milepost 2.8. The dam was partially inside the Department's right-of-way, and was holding back a considerable amount of water. He was not sure how long the dam had been there, but by early November, the water level at the dam was over four feet.

Grievant had three main concerns. The first was that the dam increased the risk of flooding over the road, particularly during storms, making travel hazardous. A related concern was that he had seen accidents in that area, including one in which a car had rolled over and he had pulled the driver out. The dam was near a curve in the road, and there was no guardrail. His third concern was that water behind the dam could saturate the fill slope adjacent to the road and cause a sink hole or otherwise damage the roadway.

Grievant talked to members of his crew about the dam. He learned that they were aware of it and had tried to discourage the beavers by hanging bear hides in the area. Those efforts had not been successful. Grievant did not know if his crew had actually removed any of the dam material.

As the weather worsened and the water level at the dam increased later in November, Grievant's concerns increased. He thought the dam should be removed and he wanted to make sure it was done correctly. He talked to Mark Cornwall, the Department's regional environmental program manager, about removing the dam. Cornwall is responsible for obtaining or coordinating environmental permits for the Department's construction and maintenance projects in the region.

Any construction or maintenance work that will be done within the normal high water line of a waterway requires a hydraulic project approval (HPA) permit from the Washington Department of Fish and Wildlife (DFW). Other permits may be needed as well. The Department has a blanket HPA permit that covers beaver dams that are less than a year old. Dams that are older or that meet other criteria require an individual permit.

In mid-November, Grievant and Cornwall went out to the spot to view the dam, which apparently had been in existence for more than a year, but which had been impounding a significant amount of water for shorter time. Cornwall could see that there would be permit issues, because the dam was holding water in a wetland. Grievant did not tell Cornwall specifically what he wanted to do about the dam, but did mention putting in a water leveler and trapping the beaver.

Cornwall agreed that the dam could pose safety issues. He told Grievant he would contact the appropriate agencies about permits. It typically takes from two to six weeks for permit approval.

On November 14, Cornwall tried to meet with Chris Kowitz from Skagit County to discuss the dam. He tried contacting Kowitz because he thought that the dam was partially on County land. (It was discovered later that County land was not

involved; the dam was partially on private land.) Kowitz was not there, so Cornwall sent an email the next day explaining that the Department was interested in removing the dam. He included contact information for Grievant because Cornwall was leaving for vacation. Kowitz never responded to Cornwall. Over the next two weeks, no action was taken regarding the dam.

The weather forecast for the period of Friday, November 30 through Sunday, December 2, was for heavy rain and snow. Maintenance supervisors are expected to monitor weather forecasts to anticipate and prepare for maintenance issues on the roads for which they are responsible. This road was considered a high priority road for maintenance based on the history of hazardous conditions. Grievant was aware that the section of road near the dam was prone to icing up, increasing the chance of an accident with a car ending up in the water. From his experience driving it, Grievant did not think that sand and de-icer would be enough to prevent an accident.

Maintenance supervisors are given a card with emergency contact numbers for DFW. Cornwall teaches maintenance supervisors to call those numbers if some urgent action needs to be taken that will affect a waterway. In such circumstances, the supervisor cannot be prosecuted for a willful violation of the permit laws if they call before taking action. Also, in emergency circumstances, DFW has to grant the Department the right to act.

On Thursday, Grievant instructed one of his maintenance crews to remove the dam. Grievant did not have a permit to have this work done. He did not tell his crew he had a permit, but did tell them that Cornwall was working on the permit.

That day, then-Assistant Maintenance Superintendent Kim Glass saw members of Grievant's crew building a water leveler in the shop and asked Grievant about it. Grievant told him that he was working with Cornwall to get a permit.

The crew Grievant sent gradually removed material from the dam until the water was flowing freely. The next day, the crew placed a pipe in the remaining dam structure so water would continue to move.

A member of the public called DFW about the dam removal. Jeff Kamps of DFW called and talked to Grievant, who told Kamps he was responsible. Kamps also left messages for Cornwall and Glass about the incident.

Glass tried to call Cornwall and found Cornwall was still on vacation. Glass contacted Kamps, who said that a Department maintenance crew had been observed removing the dam. Glass said he would investigate.

Grievant went to talk to Glass about the issue. He told Glass that he had sent a crew out to take down the dam and install the leveler. Glass told Grievant that the Department was in trouble with DFW because there was no permit for the work. Grievant explained that Cornwall had been on vacation and that he felt the work could not wait.

Glass eventually got in touch with Cornwall, who said he would work with DFW. Grievant also went to talk to then-Maintenance Superintendent Ted Dempsey. He explained what had occurred and took responsibility for having the dam removed before a permit had been obtained.

Cornwall talked to Kamps, who directed the Department to remove the pipe immediately; Grievant sent a crew to do that. Kamps suggested that the Department address the safety concerns by installing a guardrail, planting a thick blanket of willow or dogwood on the roadside bank, or possibly widening the shoulder.

The Department has an environmental compliance assurance process (ECAP). Part of the ECAP process involves self-reporting within the agency about what occurred. Grievant submitted an ECAP report.

Assistant Regional Administrator David McCormick heard about the incident from Dempsey. He considered it a serious violation because of the damage to the Department's reputation with DFW and because of the potential fines and criminal charges that could result. McCormick asked Cornwall to try to repair the Department's working relationship with DFW. He asked HR to investigate the incident and the policy violations.

McCormick held a pre-disciplinary meeting with Grievant in January 2008. At that meeting, Grievant took responsibility for ordering the dam removed without a permit, acknowledged that he knew a permit was required, said that he knew understood what he did was wrong, explained that he acted on emotion in ordering the removal, and apologized for his actions.

In February, McCormick decided to demote Grievant from maintenance supervisor to maintenance lead technician. In reaching that decision, McCormick considered several factors. Compliance with environmental regulations is a Department policy priority. To help effectuate that policy, the Department established regional environmental coordinator positions, such as Cornwall's. The Department also provides training on best practices to field staff. The Department provides a checklist and manuals for supervisors. The Department adopted policies on environmental rules. There were other actions that Grievant could have taken to reduce the safety hazard, particularly since the dam had been there for some time.

McCormick also considered that Grievant did not tell his supervisor about the dam removal until after DFW called the Department. He considered that other agencies were involved, and that Grievant's failure to tell anyone might have caused issues for other parties who might have been impacted by the removal. He considered that Grievant was in a supervisory role and his action modeled bad behavior for his maintenance crews. McCormick was unaware of any similar incident; no other environmental violations had been the result of intentional action. Grievant was a long time employee with a good work record, but he had not been in the maintenance supervisor position for long. McCormick received several letters supporting Grievant, including some from Grievant's co-workers and subordinates, which he also weighed.

In the end, McCormick concluded that demotion was appropriate because: the violation was serious; the violation was intentional; there were no comparable cases; discharge was too harsh a penalty given Grievant's long satisfactory service; a pay reduction was not appropriate because there needed to be a visible sign to other

employees; Grievant had been a good employee in lower level jobs; and demotion would give Grievant another opportunity.

At the third step grievance meeting, the Union submitted a letter from Anne Cohen, a licensed mental health counselor. Grievant was surprised by the letter; he had not seen it before the meeting. He also was dismissive of the letter.

Grievant had met with Cohen at the Union's suggestion. Cohen diagnosed Grievant with a mild case of post-traumatic stress disorder (PTSD) caused by things he had seen as a first responder. She recommended against demotion, advised certain treatment, and said that while his disorder did not excuse his actions, it did explain them.

Labor Relations Manager Jeff Pelton conducted the third step meeting and answered the grievance for the Department at that step. He considered Cohen's letter, but gave it little weight because Grievant was dismissive of it and because Cohen acknowledged that Grievant's disorder did not excuse his action. He also considered all the information that had been provided to McCormick, and some other letters of support that had come after McCormick's decision. Ultimately, he concluded that just cause existed for the discipline imposed and denied the grievance.

As of the hearing date, the Department had not been fined by DFW for the incident. Neither Grievant nor any other Department employee was charged with any criminal violation for removing the dam. There were no complaints from property owners. According to the Department, the incident led to some difficulties in obtaining permits from DFW for other work. The beaver dam has been rebuilt, and the water level is essentially the same as it was before the incident. The suggested safety precautions have not been taken: no guardrail has been installed; no trees or bushes have been planted on the bank; the shoulder has not been widened.

V. SUMMARY OF THE PARTIES' POSITIONS

Department. The Department had just cause to demote Grievant. Department employees must respect the law. A knowing and willful violation of the

law warrants strong discipline to protect the Department's integrity. The discipline imposed struck a reasonable balance between principle and business necessity and respect for a long-tenured employee with a good record. The grievance should be denied and dismissed.

The Arbitrator has stated in another case that the elements for determining just cause are whether the employer proved the charged misconduct, whether the grievant knew or should have known that such misconduct would result in discipline, and whether the discipline imposed was reasonable.

The Department satisfied the first element. There is no dispute that Grievant committed the charged misconduct. He admitted that he violated law and policy by ordering the dam removed without a permit.

The Department also satisfied the second element. Grievant knew that he broke the law. A reasonable person would expect to be disciplined for using his employer's equipment and personnel in doing so. Also, Grievant, his supervisor, and other employees apparently thought he would be fired for his actions.

The issue here is whether the discipline imposed was reasonable. The Department established that it was, for several reasons.

First, Grievant knowingly and willfully violated Department policy and state law. Complying with environmental policies is a Department priority that had been particularly emphasized in Grievant's region by the regional administrator. Grievant was aware of that policy. He knew he needed a permit to remove the dam. The fact that this was a willful and knowing violation is an aggravating factor.

Second, Grievant's misconduct had the potential for serious consequences for the Department, Grievant, and the employees involved in removing the dam. It resulted in a public complaint. It caused problems for the Department with DFW. It could have harmed property.

Third, Grievant had legal alternatives. He could have started the permit process sooner, and the evidence is that getting a permit would only have taken about

two weeks. He could have put extra crews and equipment on that section of road for the weekend in question to head off potential safety issues. He could have called the DFW emergency number. He did none of these things, and as a result, violated the Department's trust.

Fourth, Grievant failed to timely inform his supervisor. He did not talk to Glass about the dam removal until after DFW called to investigate. When he had the opportunity to tell Glass what was going on when Glass questioned why the crew was building a leveler, Grievant instead only said that Cornwall was working on a permit; at that point, he had already ordered a crew to remove the dam.

Fifth, returning Grievant to a level where he had performed well in the past was reasonable. It gave Grievant the chance to regain the Department's trust. The Department weighed alternatives such as termination, which was rejected because of Grievant's long successful service, and discipline less than demotion, which was rejected because the Department felt the need to make the discipline visible to other agencies and employees.

Sixth, Grievant's PTSD is not a mitigating factor. The Department was not told of the diagnosis before discipline was imposed and so it is not relevant. Even if relevant, it was diagnosed as a mild case, the counselor stated that it did not excuse his actions, the letter was written for the Union, Grievant did not use the diagnosis as an excuse, and he has not sought treatment.

Seventh, Grievant's tenure and prior good service were considered in deciding on the discipline imposed. Those factors were the main reasons the Department did not decide to discharge Grievant. In addition, he had only been in the supervisor position for about two years.

Eighth, Grievant has no reasonable explanation for his actions. He said that he allowed his personal feelings to rule his actions. He admitted he had done so once before. The Department cannot be certain that he would not do so again. Demoting Grievant reduces that risk.

Union. The Department did not have just cause to demote Grievant. He is a good employee who made a mistake in the name of safety. His actions did not result in any civil or criminal penalties to the department or its employees. The grievance should be sustained, and the Arbitrator should order the Department to reinstate Grievant to the maintenance supervisor position, and make him whole less a six month reduction in pay.

The Department has the burden of proving it had just cause for the discipline imposed. The Arbitrator has listed the key factors in that determination as whether the employer proved the misconduct, whether there was due process, and whether the discipline was proportionate to the misconduct.

There is no dispute that Grievant ordered the dam removed without the necessary permit. There is also no dispute that the dam was a safety hazard.

There is a dispute about whether Grievant's actions were willful. He believed safety was his main responsibility. When he noticed that the water level behind the dam had reached an unsafe level, he took the necessary first step to get a permit. Unfortunately that process was not completed and he had to decide how to address the safety issue in light of a weather forecast for snow and ice. As he admitted, he acted on emotion rather than logic.

Under the circumstances, it cannot be said that Grievant acted deliberately to flout the rules and the law. Since the Department did not establish that Grievant acted intentionally, and since that was the reason given for the demotion, there is no support for the discipline.

In addition, the Department did not produce any rule or policy that would have put Grievant on notice that his actions could lead to discipline. The regulations do not state the potential penalties for violation. There also was no prior similar situation that would have served as a warning to Grievant that noncompliance could result in serious discipline.

Further, the Department did not apply progressive discipline. Grievant was demoted for his first mistake as a maintenance supervisor.

Other mitigating factors are that Grievant accepted responsibility for his actions. He did not lose the respect of co-workers or subordinates. He is a long term employee and this was the first discipline in his career. He now knows about his PTSD, and understands the need to get counseling after stressful events. He cooperated fully with the Department's investigation, which meant the Department did not have to turn to an outside agency.

VI. DISCUSSION

The issue is whether the Department had just cause to demote Grievant from his maintenance supervisor position. For the reasons explained below, I conclude that the Department did not have just cause for the discipline imposed.

In Article 27, the parties agreed that the Employer would not discipline permanent employees without just cause. The contract lists oral reprimands, written reprimands, pay reductions, suspensions, demotions, and discharge as disciplinary actions.

Just cause requires that, all things considered, the discipline imposed be reasonable. Among the factors in that analysis are whether the employee was provided the necessary due process, whether the employer proved the employee's misconduct, and whether the discipline was proportionate in light of mitigating and aggravating factors. Unless the contract provides otherwise, the employer has the burden of proof.

To varying degrees, all three of the above factors are at play here. The deciding factor, however, is whether demotion was a proportionate and appropriate discipline for Grievant's conduct.

Due Process. In industrial relations, the concept of due process encompasses several things, such as notice of consequences, fair investigation, the right to respond to charges, and the right to union representation. The Union argues that none of the

policies or regulations the Department relies on put Grievant on notice of the disciplinary consequences for violation.

Notice of potential consequences is important. But an employer need not issue a laundry list of every potential misdeed and the accompanying penalty. Some conduct is such that any reasonable person would know that it would result in discipline. For example, all employees know (or should know) that if they get caught stealing from their employer they will face serious discipline. No rule prohibiting theft is required for the employer to discipline the guilty employee.

This case, while not quite that cut and dried, is nonetheless clear enough. Grievant had received training about permit requirements. He knew it was not just a matter of Department rule, but also required by state law. He took Cornwall out to view the dam, and Cornwall confirmed that a permit would be needed. Under the circumstances, the fact that no disciplinary consequences were spelled out in the Department's policies is immaterial. Grievant knew, or reasonably should have known, that if he acted contrary to state law and Department policy, he would be disciplined. Whether he should have or could have anticipated the severity of such discipline is another matter.

Proof of Guilt. It is not in dispute that Grievant ordered a crew to remove the beaver dam at milepost 2.8 on SR 534 in November 2007, and that he did not have a valid permit for the work. Grievant and the Union concede these facts, and indeed, concede that discipline is warranted. What occurred is well-established; not well-established is why.

That matters because the Department charged Grievant with a *willful* violation of Department rules and regulations. The Department stressed that the willful and knowing nature of Grievant's violation should be seen as an aggravating factor. The Union contends that the Department failed to prove that Grievant's conduct was willful, which in its view means there was no just cause for the demotion.

The word “willful” has several meanings. One meaning is that it describes an action undertaken voluntarily. A willful action is one that is conscious and knowing. In that sense, willful is an apt description of what Grievant did. This was not an accidental or negligent action. He consciously and knowingly ordered his crew to remove the dam, although he knew a permit was needed and he did not yet have one.

On the other hand, willful often is used to describe actions undertaken maliciously or with a bad motive or purpose. In that sense, willful is not a suitable word to describe Grievant’s action. Although he ordered the dam removed without the required permit, there is no indication that he acted maliciously or with bad intent.

In its characterizations of Grievant’s conduct as willful, the Department seems to intend this second meaning. For example, the Department cites the statement Grievant made at the *Loudermill* hearing that he “blatantly violated the law.”

I do not find that the evidence establishes that Grievant acted with disdain for the law. He did not set out to deliberately undermine the Department’s rules, or damage its working relationship with DFW, or sully its reputation with the public. He was, instead, motivated by concerns about road safety, the Department’s number one priority. In acting on that motivation, he made a bad decision. But on this record, he did not act with contempt for the law and regulations.

Thus, while there is no dispute that Grievant knowingly ordered removal of the dam before he had a permit, I do not find that his actions were willful in the sense that Grievant had bad intentions. However, he violated Department rules and policies, as well as state law, and his conduct deserves significant discipline. My conclusion about Grievant’s intentions plays a role in my decision about the appropriateness of the demotion.

Appropriate Discipline. The main question in this case is whether, all things considered, demotion was appropriate for the offense. The Department contends that

it was for several reasons. The Union asserts that it was not because, among other reasons, the discipline was not progressive.

According to the Union, the evidence shows that Grievant had a clean disciplinary history; this was the first time he had been disciplined. Despite that record, the Department imposed the second most serious discipline available for Grievant's first mistake as a maintenance supervisor.

The Union's contention has merit. The parties have bargained a disciplinary matrix that lists demotion as the most serious discipline short of discharge.¹ Article 27 does not expressly mention progressive discipline. But the list of disciplinary actions in Section 27.2 mirrors the commonly accepted progression from minor—oral reprimand—to the most serious—discharge. It is a fair reading of the contract that the parties intended that progressive discipline be used.

For all but the most serious misconduct, the type for which summary discharge is appropriate, the purpose of discipline should be corrective rather than punitive.² To that end, progressive discipline generally requires the employer to impose less serious discipline, such as reprimands, before imposing economic discipline, such as suspensions or discharge. However, each case must be considered on its own facts, and some offenses are so serious that the employer need not use the lesser discipline steps.

Progressive discipline serves as notice to the employee that future misconduct will be dealt with more severely. It gives the employee the chance to live up to the employer's expectations. It potentially benefits the employer by improving the employee's behavior, thus making the expense and disruption of replacing the employee unnecessary.

¹ Arbitrators generally do not favor demotion as a disciplinary tool. Many, if not a majority of arbitrators, will not uphold a disciplinary demotion unless the contract specifically provides that demotion is an allowable discipline. See *Elkouri & Elkouri: How Arbitration Works*, 6th Ed., Ruben, ed., 800-802 (BNA 2003), *Discipline and Discharge in Arbitration*, Brand, ed., 71-72 (BNA 1998), and *Grievance Arbitration*, Zack, 17-18 (Lexington Books 1989).

² *The Common Law of the Workplace*, St. Antoine, ed., 173 (BNA 1998);

WFSE and Washington DOT

Tate Grievance

I do not minimize the seriousness of Grievant's conduct. He was in a position of responsibility and his actions understandably damaged the Department's trust in his judgment. He acted intentionally with knowledge that he did not have the necessary permit.

However, just cause requires that discipline be proportionate to the offense. As one treatise explains:

The concept of "just cause" implies not only that the employer have a "cause" for disciplining the employee, but also that the discipline be "just" in relation to the asserted cause.³

Grievant's offense, though serious, was not on par with the level of discipline imposed. This was not conduct worthy of discipline only one step removed from summary discharge. Progressive discipline in the form of a suspension would have been more proportionate to Grievant's actions. By demoting Grievant for his first, albeit serious, offense, the Department acted contrary to this important element of just cause.

Grievant acted with good intentions—to correct a condition recognized as unsafe by others in the Department and even by DFW. There is no evidence of significant harm that resulted from his actions. He was not a repeat offender. Though he should have known his conduct would result in discipline, it is not likely that he knew or could reasonably have anticipated the severity. He took responsibility for his actions, and did not make excuses. There is no evidence that his actions damaged his ability to manage and direct maintenance crews and other employees. He was candid and contrite.

The Department nonetheless argues vigorously that demotion was a reasonable penalty for Grievant's conduct. The Department first asserts that the level of discipline was appropriate given the knowing and willful nature of Grievant's actions.

³ *The Common Law of the Workplace* at 172. See also *Discipline and Discharge in Arbitration* at 85-89.
WFSE and Washington DOT

As discussed more fully above, even though Grievant acted intentionally, I do not find that his intentions were bad. The evidence is that Grievant was motivated by safety concerns. While compliance with environmental policies is an important Department goal, safety is the Department's top priority.

The Department next argues that Grievant's conduct could have resulted in serious repercussions, such as property damage, fines, and criminal charges. Where an employee's conduct actually causes serious harm, it can be an aggravating factor.

None of the Department's concerns came to pass here. No serious harm occurred. There is no evidence that there was either property or environmental damage from the dam removal. Neither the Department nor any of its employees were fined. No Department employee faced any criminal charges. The Department claimed that its relationship with DFW was harmed, but offered no objective evidence to support that claim.

The Department also claims that Grievant's failure to take advantage of legal alternatives damaged its trust in him and warranted the demotion.

Grievant exercised poor judgment. There would have been no need for hasty action had he started the permit process earlier in the fall. And he failed to call the DFW emergency number. This is a factor in deciding whether the demotion was reasonable.

The Department points to Grievant's failure to inform his supervisor until after DFW called to ask about the dam removal.

Grievant should have been proactive. The fact that he did not inform Department officials about the dam until prompted also is a factor in determining the appropriate level of discipline.

The Department argues that demoting Grievant to a level where he had prior success was best because it gives him a chance to regain the Department's trust.

The problem with a disciplinary demotion is that it is a penalty of indeterminate, perhaps permanent, duration. The demoted employee may manage to

rebuild the employer's trust within a short time, but unless a position opens up, the employee may never again get the opportunity to advance. Grievant's conduct was not so egregious that such a harsh penalty was warranted.

According to the Department, Grievant's PTSD should not be a mitigating factor because the Department was unaware of it and the counselor said it did not excuse his actions, among other reasons.

I agree that the PTSD does not mitigate Grievant's conduct. Grievant did not try to use it as an excuse. It did not factor in my conclusion.

The Department also says that it already took Grievant's length and quality of service into account in deciding to demote rather than fire him, but also considered that he had only been in the maintenance supervisor position for two years.

Grievant's prior service is a mitigating factor. As the Department notes, however, his relatively short tenure as a maintenance supervisor undercuts the significance of this factor. It did not play a role in my decision.

The Department contends that Grievant's failure to offer a reasonable explanation for his actions supports its decision to demote him.

As the Department says, there is no certainty that Grievant would not exercise bad judgment at some point in the future; nothing is certain. But, this contention is too speculative to provide weight in favor of the disciplinary decision.

The Department also contends that the level of discipline must have been appropriate because Grievant and others apparently expected the Department to fire him. What Grievant anticipated after the fact, however, does not mean that he was on notice beforehand of the potential disciplinary consequences of this kind of an error in judgment.

In sum, I conclude that the Department had just cause to discipline Grievant, but did not have just cause to demote him. I reach the latter conclusion mainly because demotion is disproportionate to Grievant's conduct and was thus an unreasonable discipline. I also took into account the absence of progressive discipline.

As explained, I did not find some of the supporting rationale put forth by the Department to be persuasive. Other reasons the Department offered, as noted, support discipline more serious than merely a reprimand. In reaching my conclusions, I considered all of the evidence and argument submitted by the parties even if I did not discuss it above.

VII. Remedy

I have concluded that the Department did not have just cause, as required by Article 27, to demote Grievant. The Union requests that Grievant be reinstated to his maintenance supervisor position, and made whole for lost pay and benefits, less a six month reduction in pay. The Union's proposed remedy does not specify the amount of the pay reduction.

Though I believe that a suspension would have been reasonable discipline for Grievant's actions, under the circumstances here, the Union's proposed penalty of a pay reduction is appropriate, with an adjustment for the length of time. Grievant effectively will have served a temporary demotion. If the consequences of his conduct were not clear before, they should be clear now.

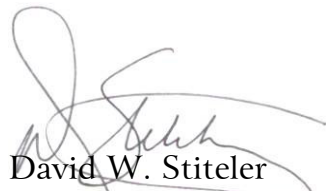
I will issue an award directing the Department to reinstate Grievant to the maintenance supervisor position he held before the demotion (or to an equivalent position mutually agreed by the parties). I will further direct the Department to make Grievant whole for the pay and benefits lost because of the demotion, less a pay reduction of 12 months. The pay reduction should be calculated on the difference between the salary of a maintenance supervisor and the salary of a maintenance lead technician.

AWARD

Having considered the whole record in this matter, and for the reasons explained in the Opinion, I make the following Award:

1. The Department did not have just cause to demote Grievant John Tate from the position of maintenance supervisor. The grievance is sustained.
2. The Department is directed to reinstate Grievant to the position of maintenance supervisor, as explained in the Opinion.
3. The Department is further directed to make Grievant whole for pay and benefits lost as a result of the demotion, less the equivalent of a 12 month salary reduction, as explained in the Opinion.
4. Pursuant to Article 29, the Arbitrator's fees and expenses will be shared equally by the parties.

Respectfully issued this 17th day of September, 2009.



David W. Stiteler
Arbitrator