

AMERICAN ARBITRATION ASSOCIATION

Proceedings before

James M. Paulson, Arbitrator

In the matter of:

**WASHINGTON FEDERATION OF
STATE EMPLOYEES**

and

THE STATE OF WASHINGTON on
behalf of its **Department of Corrections.**

AAA Case No. 75 390 00347 10
Bromps Suspension

DECISION

PRELIMINARY STATEMENT

Sherri-Ann Burke, Labor Advocate, appeared on behalf of the Washington Federation of State Employees.

Michael W. Rothman, Assistant Attorney General for the State of Washington appeared on behalf of the State's Department of Corrections.

The Washington Department of Corrections, hereinafter the "DOC" or the "State", and the Washington Federation of State Employees, hereinafter the "Union", are parties to a collective bargaining agreement¹, hereinafter the "Agreement", which provide for the arbitration of unresolved grievances. The grievance in the instant matter was processed as specified in the Agreement to arbitration through the American Arbitration Association. The parties agreed at the hearing that James M. Paulson was selected to arbitrate the matter and his decision would be final and binding as specified in the Agreement.

On January 12, 2011, a hearing was held at office of the Attorney General, 1116 West

¹ Joint Exhibit No. 1.

Riverside, Spokane, Washington. At the hearing, the parties were permitted to present testimony and documentary evidence. The State called as its witnesses: Jeremy Daniel, Police Officer, Spokane Police Department; Shandra Carter, Correctional Mental Health Unit Supervisor; and Debra Conner, Field Administrator. The Union presented as its witnesses: Dale Roberts, Counsel Representative, Washington Federation of State Employees; and Robert Bromps, Community Corrections Officer 3 and grievant.

By agreement of the parties, their Briefs were due March, 16, 2011. The Arbitrator closed the hearing on March 17, 2011 following the receipt of the Briefs. The Arbitrator will issue his Decision and Award on or before April 18, 2011.

STATEMENT OF THE ISSUES

At the hearing, the parties stipulated² to the following statement of the issues:

“Did the State of Washington, Department of Corrections, violate Article 27.1 and 28.3 of the collective bargaining agreement by and between the State of Washington and the Washington Federation of State Employees, 2009 through 2011, by imposing a two-day suspension on Community Corrections Officer (CCO3) Bromps on December 28, 2009? If so, what shall the remedy be?”

RELEVANT CONTRACT PROVISIONS

ARTICLE 27 DISCIPLINE

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

ARTICLE 38 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 hours or prior to their next scheduled work shift, whichever occurs first. Employees, . . . , will report any arrests that affect their ability to perform assigned duties to their Appointing Authority within forty-

² Tr. 5-6.

eight (48) hours or prior to returning to work, whichever occurs first. * * *

STATEMENT OF FACTS³

Background Facts

The Department of Corrections of the State of Washington, as part of its function, monitors and supervises convicted felons after their release from incarceration. The personnel of the DOC performing this function are titled Community Corrections Officers. Their function is commonly known as a parole or probation officer.

Robert Bromps is employed by the DOC as a Community Corrections Officer 3. His duties range from direct communications with and checking on convicts to presenting evidence regarding convicts who have violated their parole to a hearing officer. He regularly works with police and other community officials. Mr. Bromps is authorized to carry a weapon in the performance of these duties. He has been employed by the State since 1994 and by the DOC since 1999. He has no discipline on his record and has received awards for outstanding performance.⁴

Facts Giving Rise to the Discipline and the Grievance

Underlying Facts

By August, 2009 Mr. Bromps and his wife were separated with one living at an apartment and the other at their house. Two of their daughters live at the house with the parents changing locations every so often. Over a year earlier, Mrs. Bromps developed an interest in another man and this caused a severe strain in the marriage and resulted in Mr. Bromps filing for divorce. Subsequently, the parties sought marriage counseling. Mr. Bromps had discussed this situation with his supervisor at work. Whenever Mr. Bromps learned of continued communications between Mrs. Bromps and her male friend, he got quite upset. On one occasion in 2008 he had learned of intimate communications between his wife and her male friend by examining her cell phone.⁵

On the evening of August 28, 2009 Mr. Bromps, his wife and two of their daughters (ages 13 and 11) were at their apartment eating pizza. The children had been swimming and the parents had consumed some wine. Mrs. Bromps' cell phone began ringing. Mr. Bromps picked up the phone to see who was calling. While he was examining the phone, Mrs. Bromps came into the room and asked for her phone. He refused to give it to her. He was attempting to

³ The following recitation is intended to describe in summary primarily undisputed facts involved in this matter. Additional and/or disputed facts will be discussed, as may be necessary, later in this Decision.

⁴ Tr. 70-71.

⁵ Tr. 145-149.

determine if she was still communicating with her male friend. She tried to physically take the phone from him. In the course of the altercation Mr. Bromps pushed his wife sufficiently hard that she fell to the floor injuring her tailbone. He claimed that she scratched his face in attempting to retrieve her phone. After pushing his wife, Mr. Bromps “ran out of the apartment.” The children were present during the incident.⁶

Both Mr. and Mrs. Bromps called 911 and the Spokane Police arrived. Officer Jeremy Daniel was the Senior Patrol Officer and primary officer investigating the incident. He and two of his fellow officers interviewed all witnesses. As a result of these interviews, Officer Daniel determined that there was probable cause to arrest Mr. Bromps and charge him with domestic violence assault. He made this determination because he believed that Mr. Bromps was the primary aggressor. He, in turn, concluded that Mr. Bromps was the primary aggressor because he had taken his wife’s phone, he had pushed her and the children said that they were frightened of him. Officer Daniel was aware that Mr. Bromps was a Community Corrections Officer.⁷

DOC Investigation

Upon being arrested, Mr. Bromps immediately called his supervisor to report the arrest. Shortly thereafter Field Supervisor Debra Conner was informed. She required that Mr. Bromps surrender his state-issued weapon and initiated an investigation by assigning Shandra Carter, Correctional Mental Health Unit Supervisor to develop a fact finding report. She completed her report on September 21, 2009.⁸

On October 8, 2009 Ms. Conner issued a pre-disciplinary letter to Mr. Bromps inviting him to respond to the allegations against him. She attached Ms. Carter’s report to the letter.⁹ Because of the criminal charges pending against him, Mr. Bromps was initially unable to respond in detail to the allegations.

On December 8, 2009 the Municipal Court of Spokane County entered a Motion & Order of Dismissal With Prejudice. The stated basis for the motion was a “Plea Negotiation”, the “Interests of Justice” and “Completed required treatment.” “After reviewing the record and the basis for the motion”, the Court found “good cause to grant the motion.”¹⁰

On December 10, 2009 Ms. Conner, Mr. Bromps, HR Manager Young and Union Representative Roberts met to discuss the matter. Mr. Bromps presented the Motion and Order of Dismissal as well as a certificate of completion of a 24 hour Domestic Violence Information School. Mr. Bromps further indicated that he had reconciled with his wife and was sorry for the

⁶ Tr. 149-152 and Employer Exhibit No. 1, Attachment No. 1.

⁷ Tr. 24-30, 32.

⁸ Employer Exhibit No. 1, p. 1.

⁹ Employer Exhibit No. 1, Attachment No. 2.

¹⁰ Employer Exhibit No. 3.

incident.¹¹

Discipline

By a four page letter dated December 28, 2009 Ms. Conner issued a “corrected” disciplinary action against Mr. Bromps. She meted out a two day suspension as a result of his conduct and arrest on August 28, 2009. The letter contained a detailed description of her understanding of events and applicable policies. It also included 13 attachments relating to documents relevant to matters discussed in the letter.¹²

Grievance

On February 3, 2010 the Union filed a grievance on behalf of Mr. Bromps protesting his discipline and requesting that it be removed from his file and that he be made whole for any financial loss.¹³

CONTENTIONS OF THE PARTIES¹⁴

Position of the Department of Corrections

Overview

The State begins its argument with the overview position that just cause has an underlying standard based on being reasonable under the circumstances. The assertion is then made that the DOC was reasonable in this instance.

The Grievant’s Misconduct

The State first argues that the grievant’s conduct in pushing his wife, even though it was off-duty conduct, was detrimental to his work performance under Article 28.3 of the Agreement. It asserts that his behavior, for which he was arrested, harmed his ability to work with other law enforcement agencies. The State then alleges that his conduct jeopardized his ability to be effective with the offenders he supervises. The State further argues that as a COO3 Mr. Bromps is a lead officer and, therefore, supposed to be a role model to other COO’s. It is noted that Ms. Conner stated that she has lost confidence in him. Finally, the State asserts that, notwithstanding his many hours of training, he failed to control himself in an emotional situation and engaged in violence for which he was arrested.

¹¹ Employer Exhibit No. 1, p. 2.

¹² Employer Exhibit No. 1.

¹³ Union Exhibit No. 2.

¹⁴ This brief description of the positions of the parties is drawn primarily from their Briefs.

Second, the State argues that Mr. Bromps' behavior was detrimental to the program of the DOC as referenced Article 28 of the Agreement concerning off-duty conduct. It is noted that his conduct is not consistent with the mission of the DOC, which is to improve public safety. Law enforcement had to spend time with Mr. Bromps when it could have been doing other things regarding public safety. Finally, it is asserted that the image of the DOC was damaged and, therefore, its effectiveness in working with other agencies was diminished.

Appropriateness of the Penalty

The State argues that the two day suspension effectively corrects the grievant's behavior and deters other employees from committing similar misconduct. It also asserts that Mr. Bromps' long and commendable tenure with the DOC was appropriately reflected in the discipline meted out as much more serious discipline was considered. The State then cites other arbitration decisions indicating that the mere fact that the criminal charges were dropped is not a factor to be considered in determining the appropriateness of the discipline. Finally, the State cites other arbitration decisions standing for the proposition that once the employer proves misconduct warranting discipline, the Union has the burden of proving that the discipline was too severe. Here, the argument goes, the Union has failed to do so.

Position of the Union

An Arrest Is Not a Conviction

The Union begins its argument by pointing out that an arrest is not a conviction. It is also noted that there was no conviction of the grievant in this matter. The case was simply dismissed with prejudice. On the other hand, the Union contends, the State concluded that Mr. Bromps had been actually convicted and treated him accordingly in handing out the two day suspension. Reference is made to the letter of discipline in which concludes that the plea agreement he entered into means that Mr. Bromps was guilty as charged. Again, the Union observes that the court entered no guilty plea or conviction with respect to the grievant.

The Handbook is Subordinate to the Agreement

The Union next argues that the DOC treated the reference in its Handbook that employees are required to obey all laws as a binding promise on all employees to so conduct themselves in off-duty situations. The Handbook is then described as a non-negotiated document which is clearly subordinate to the negotiated Agreement which has specific provisions which limit when the State can discipline employees for off-duty conduct. The only potentially applicable provisions of the Agreement refer to off-duty conduct which is detrimental to the employee's work performance or the program of the agency.

No Detrimental Impact on the Grievant's Work Performance

In support of its argument that the off-duty conduct did not impact the grievant's work performance, the Union first points out that DOC Field Administrator Conner erroneously

inferred that Mr. Bromps' transfer was precipitated by his arrest. In fact, Mr. Bromps requested the transfer to be closer to his children. The Union also argues that the State presented no credible evidence that the grievant's off-duty conduct impacted his contact with offenders, powers of arrest, nor is contact with community partners and other law enforcement officials.

No Detrimental Impact on the Program of the Agency

The Union argues that Ms. Conner was unable to articulate any adverse impact to DOC programs by the grievant's off-duty conduct. She did not know of any publicity in the community of the grievant's arrest or any refusal or reluctance by co-workers or community partners to work with Mr. Bromps as a consequence of his arrest.

The Discipline Was Inappropriate

The Union observes that when its representative, Mr. Roberts, requested copies of discipline for similar off-duty conduct, the State was unable to produce any such documentation. The Union also argues that since the State chose not to discharge Mr. Bromps, the conduct must be of the type requiring progressive discipline. Progressive discipline begins with a warning, then a suspension and finally discharge. Here the State was unable to articulate any logical reason why it chose a two day suspension as opposed to some other form of progressive discipline. The Union concludes that no discipline was appropriate.

Just Cause Requires a Nexus between Off-duty Conduct and the Job

The Union cites to treatises and law review articles which state that the concept of just cause requires that an employer show that off-duty conduct must have a nexus to the employee's ability to perform his job in order to justify discipline. The Union argues that the DOC proved no such nexus and only had a "suspicion" that Mr. Bromps' arrest diminished his credibility with other law enforcement officials.

DECISION

Off-Duty Conduct, Just Cause and Agreement Provisions

General Arbitral Principles

The general area of an employer's right to discipline employees for off-duty conduct has been reviewed in many treatises on labor arbitration. A basic concept in this regard has been expressed in the following fashion:

"An employer's right to question an employee's conduct is generally limited to behavior that occurs while the employee is on duty. Once an employee is off duty and away from the workplace, there is a presumption that the employee's private life is beyond

the employer's control.”¹⁵

Just Cause

In Article 27, ¶27.1 the Agreement provides that no permanent employee will be disciplined “without just cause.”¹⁶ In this regard, it has been stated that:

“Arbitrators continue to require *a nexus—a material, adversely affecting relationship—between an employee’s off duty misconduct* in determining whether the employer has met its burden of establishing just cause for discipline. . . .”¹⁷

Some arbitrators have recognized a slightly different standard for public sector employees:

“Although arbitrators apply the ‘workplace nexus’ test in both public and private sector cases, it often appears easier for a *public* employer to dismiss an employee for off-duty misconduct. Arbitrators have tended to protect the government employer’s reputation and mission, citing the public trust. Even where public employees are involved, however, a nexus between the workplace and the off-duty conduct must be established.”¹⁸

Agreement Provisions Regarding Off-duty Conduct

As is relevant to this matter, Article 28, ¶28.3 states the off-duty activities of an employee will not be grounds for disciplinary action unless said activities are “*detrimental to the employee’s work performance or the program of the agency.*”¹⁹ Using basic principles of contract interpretation and contract law, the wording in this provision must govern the inquiry in this case.

First, the general principle exists that where language more specifically covers a

¹⁵ Brand & Biren, *Discipline and Discharge in Arbitration* (BNA 2nd Ed. 2008), p. 391. (Emphasis added and citation omitted).

¹⁶ Joint Exhibit No. 1.

¹⁷ Elkouri & Elkouri, *How Arbitration Works* (BNA 6th Ed. 2010 Cumulative Supplement), p. 341. (Emphasis added and citation omitted). “An employer can discipline an employee for off-duty misconduct where the arbitrator finds what is often called a ‘workplace nexus.’ There must be some connection between the off-duty misconduct and the employer’s interests that legitimizes the employers’ decision to take disciplinary action.” Brand & Biren, *supra*, p. 392. (Citation omitted).

¹⁸ Brand & Biren, *supra*, p. 404. (Citation omitted).

¹⁹ Joint Exhibit No. 1. (Emphasis added).

situation, it is to be applied rather than a general provision which may also cover the matter.²⁰ Here the parties have refined the definition of just cause by selecting the specific words to be applied to a situation where an employee is disciplined for off-duty conduct. Second, the State has argued, in effect, that “just cause” has been further defined by the DOC Handbook which requires that employees obey all laws. In this instance the language in the negotiated agreement, however, takes precedence over the unilaterally established Handbook rule.²¹

Burden and Quantum of Proof

It is well established that an employer has the burden of proof in a discipline case.²² In essence there are two proof issues. The first is to prove the existence of the misconduct providing just cause for discipline. The second, assuming that the first is established, is to prove that the penalty imposed was warranted.

Where the misconduct alleged is, in part, criminal behavior, as here, the burden of proof may be raised beyond the normal “preponderance of evidence” standard where the employer must only establish that it is more likely than not that the factual events are as it asserts.²³ “When the employee’s alleged offense would constitute a serious breach of law or would be viewed a moral turpitude sufficient to damage an employee’s reputation, most arbitrators require a higher quantum of proof, typically expressed as ‘clear and convincing evidence.’”²⁴

Applying these concepts to the instant situation, to the extent the State argues that the grievant violated criminal law, it has to establish the requisite facts by clear and convincing evidence. To the extent the State has to prove that the conduct of Mr. Bromps was “detrimental” to his work performance and/or to the program of the agency, it has to prove its case by a preponderance of the evidence. Where the employer has the burden of proof, any gap in or lack of evidence on a necessary factual issue means the employer has not met its burden of proof as to that matter.

Conduct and Discipline of Mr. Bromps

DOC’s Conclusion of Commission of a Crime and the DOC Handbook

In her disciplinary letter to Mr. Bromps, Ms. Connor concludes that “assaultive behavior

²⁰ Elkouri & Elkouri, *How Arbitration Works* (BNA 6th Ed. 2003) pp. 469-470.

²¹ “Company-issued booklets, manuals, and handbooks that have not been the subject of negotiations or agreed to by the union have been found by arbitrators to constitute ‘merely a unilateral statement by the Company and [are] not sufficient to be binding on the Union.’” Elkouri & Elkouri, *supra*, pp. 464-465 (citations omitted).

²² “The employer bears the burden of proving just cause for discipline. That includes proof that the level of discipline was appropriate.” St. Antoine, *Common Law of the Workplace* (BNA 2nd Ed. 2005), p. 190.

²³ See generally, Elkouri & Elkouri, *supra*, pp. 948-949.

²⁴ St. Antoine, *supra*, p. 192.

did occur and that you did violate the law.” In its post hearing Brief, the State quotes the testimony of Ms. Conner to the effect that the grievant’s conduct amounted to not “abiding by the same laws that we are holding people accountable for.”²⁵ Clearly, this is taking the position that Mr. Bromps was guilty of the crime for which he was arrested and charged. The State does not allow for the possibility that at a trial he might have been found innocent.²⁶ The recitation of the facts by Mr. Bromps allows for a possible claim of self defense. If the case of the prosecution could have been easily won, why did the prosecutor agree to a dismissal with prejudice merely upon completion of a course on domestic violence by Mr. Bromps? Ms. Conner only talked to the prosecutor²⁷ and not the defense attorney to conclude that Mr. Bromps was guilty. She became the judge and the jury in drawing her conclusion without hearing defense counsel.²⁸

As referenced earlier, the Union argues that an arrest is not a conviction nor did the court make any finding. In this respect, the Union is correct. Mr. Bromps did not plead guilty nor was he found guilty. While the Order dismissing the charge against the grievant did say that it was a “plea” bargain, there was no plea. The requirement that Mr. Bromps take an education course was a requirement of the prosecutor and not an Order of the court as it was completed *before* the dismissal. There is a serious question as to whether or not Ms. Conner’s conclusion of guilt was supported by clear and convincing evidence.

In her disciplinary letter after Ms. Conner concludes that Mr. Bromps violated the law, she references the DOC Handbook and points out that violating the law is prohibited for DOC employees.²⁹ In her concluding sentence she references Article 27 of the Agreement with respect the use of the grievance procedure to challenge the suspension without pay. Nowhere in her letter does Ms. Conner reference the just cause provision of Article 27. No analysis is made of the general requirements for discipline for off-duty conduct under the principle of just cause nor is any analysis made of the facts under the specific provisions in the Agreement under Article 28.³⁰ Regardless of whether Mr. Bromps was guilty of a crime, to the extent the discipline of Mr. Bromps under the DOC Handbook was inconsistent with the narrow provisions of Article 28 of the Agreement regulating discipline for off-duty conduct, it was in violation of that Agreement.

Provisions of the Agreement Regarding Discipline for Off-duty Conduct

²⁵ State’s Post Hearing Brief, p. 5 referencing the transcript at 105.

²⁶ “The mere fact that a man has been arrested has very little, if any, probative value in showing that he has engaged in any misconduct.” *Schwartz v. Board of Bar Examiners*, 353 U.S. 232, 241 (1957).

²⁷ Tr. 83-84.

²⁸ Tr. 88-89.

²⁹ “Employers are not society’s chosen enforcers. They have no general authority to punish employees for illegal or offensive off-duty conduct that has no significant impact on the employer’s business.” *St. Antoine, supra*, p. 181.

³⁰ Employer’s Exhibit No. 1.

As this Decision has referenced earlier, the specific provisions of Article 28 referencing discipline for off-duty conduct govern the inquiry in this matter. The evidence presented and arguments made by the State will be examined under those provisions.

Detrimental to the Grievant's Work Performance

Under the Agreement, the off-duty "activities" of an employee must be "detrimental to an employee's work performance" before those activities can "be grounds for disciplinary action."³¹ Even though the grievant did not arrest himself, the pushing of his wife did cause him to be arrested and, therefore, the arrest and subsequent charge may be examined as part of his off-duty "activities" to determine whether they were detrimental to his work performance.

Logically one would look for specific examples of problems that Mr. Bromps had on the job subsequent to his arrest and being charged to determine if his work performance was affected. However, when directly asked whether there was "any specific situation you can point to where you could say his ability to do his job was compromised because of this situation," Ms. Conner was unable to mention even one. She could only note that the arresting officers knew of the situation and that she had lost confidence in the grievant.³² This answer falls far short of showing an impact on his job performance that was material or even noticeable.³³ This answer was also in the context of the three month period after his arrest but before his discipline. Indeed, in the approximately sixteen month period of time between his arrest that the hearing in January, 2011, the State pointed to no specific example where the grievant's work performance was affected.³⁴ The State has not proven by a preponderance of the evidence that it was entitled to discipline Mr. Bromps because of any detriment to his work performance by his off-duty activity.

Detrimental to the Program of the Agency

Field Administrator Conner described the mission of the DOC as to "Improve Public Safety". In this respect it must be clarified that improving public safety as applied to the role of Community Correction Officers refers to protecting the public from convicted felons by competently and effectively controlling their post incarceration conduct. State, county and city police officers have responsibility for protecting the public from criminal activity. The grievant was not a police officer.

³¹ Joint Exhibit No. 1.

³² Tr. 103-104.

³³ The impact of the off-duty activities of an employee must be more than negligible or *de minimus* to allow an employer to issue discipline.

³⁴ The State makes the generalized statement that "[a]s his arrest becomes common knowledge in the community," it will cause offenders he supervises to lose respect for him. *Supra*, p. 5. No evidence was presented that this anticipated consequence has, in fact, happened.

In its post hearing Brief³⁵ the State argues that the mere fact that the Spokane Police had to respond to the incident and arrest Mr. Bromps shows that his off-duty activities were detrimental to the program of the DOC. As the Union argues, this interpretation of the concept of off-duty activity as being “detrimental” to the program of the agency would allow for *any* violation of a criminal law in which a person is arrested to permit discipline. There must be something more to have a material effect on the program of the agency.

In any event, logic would require that the DOC provide some specific evidence of where a third party made some indication that the arrest and charge of the grievant diminished the image of the agency. None was presented even though approximately sixteen months had passed from the time of the arrest until the hearing in this matter.

The DOC’s case for meting out discipline to Mr. Bromps would have been enhanced if the incident had received some notoriety. Ms. Conner was aware of no newspaper or other media coverage of the situation.³⁶ The State’s arguments are based on speculation as to how some people might have viewed the situation. No evidence was presented that anyone (parolees, law enforcement partners or the public) considered the incident as diminishing the image of the DOC. This may be because many people know, as the previous quotation from the United State Supreme Court indicated, that an arrest has very little probative value in determining someone’s guilt.

Based on the foregoing, the State has not proven by a preponderance of the evidence that the grievant’s off-duty activities were detrimental to the program of the agency.

³⁵ *Supra*, p. 7.

³⁶ Tr. 92-93.

CONCLUSION

For the reasons set forth above, the Arbitrator finds that:

The suspension of Robert Bromps on December 28, 2009 was in violation of Article 27 and 28 of the Agreement. He shall be made whole financially as well as otherwise put in the place he would have been in but for the suspension. The Arbitrator will retain jurisdiction for sixty days from the date of this Decision to resolve any disputes the parties may have implementing the foregoing remedy.

James M. Paulson, Arbitrator

April 1, 2011