

BEFORE ARBITRATOR KATRINA I. BOEDECKER

In the matter of the arbitration)
of a dispute between:)
)
STATE OF WASHINGTON,)
DEPARTMENT OF CORRECTIONS,) ARBITRATION AWARD
Employer,)
)
and) Peggy Smet Demotion Grievance
)
TEAMSTERS LOCAL UNION 117,)
Union.)
_____)

Attorney General Robert W. Ferguson, by Assistant Attorneys General Ohad M. Lowy and Patricia A. Thompson, appeared on behalf of the employer.

Spencer Nathan Thal, General Counsel, appeared on behalf of the union.

JURISDICTION

The undersigned Arbitrator was notified on November 13, 2012, that she had been selected to hear a grievance regarding a disciplinary demotion. The arbitration hearing was held June 4 and 5, and July 11, 2013, in Spokane, Washington.

The arbitration was conducted pursuant to the parties' July 1, 2011 through June 30, 2013 collective bargaining agreement. The parties submitted their post-hearing briefs to the Arbitrator by September 6, 2013.

STATEMENT OF THE ISSUES

The parties stipulated to the statement of the issues as:

1. Did the employer have just cause to demote Peggy Smet?
2. If not, what is the appropriate remedy?

The parties also stipulated that there is no issue as to arbitrability, thus making the matter properly before the Arbitrator.

RELEVANT CONTRACT LANGUAGE

ARTICLE 8 - DISCIPLINE

Section 8.1 Just Cause

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

Section 8.2 Forms of Discipline

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

Section 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.

ARTICLE 9 - GRIEVANCE PROCEDURE

Section 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 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. ...

Section 9.6 Arbitration Costs

The expenses and fees of the arbitrator, and the cost (if any) of the hearing room will be shared equally by the parties. ...

BACKGROUND

The State of Washington, Department of Corrections (DOC) and the Teamsters Local Union 117 are parties to a collective bargaining agreement with a duration from July 1, 2011 through June 30, 2013. Among the positions in the bargaining unit are Classification Counselor 2 and Office Assistant 3.

DOC has an employee handbook. In it, the employer differentiates between "corrective action" and "disciplinary action." Corrective action is defined as "action taken by a supervisor in order to educate an employee, correct or prevent unacceptable behavior, and/or poor job performance. Corrective actions may include, but are not limited to:

Memo of counsel;
Memo of concern;
Memo of expectation; and/or
Corrective interview."

Under disciplinary action - just cause, the handbook directs that "In order to correct serious incidents, repetitive incidents, and/or continuing performance problems with an employee, the following disciplinary actions may be recommended by a supervisor:

Letter of reprimand;
Suspension without pay;

Reduction in salary;
Demotion; and/or
Discharge/Dismissal."

Peggy Smet began working for the employer in April, 1995, as a correctional officer at the Airway Heights Corrections Center (AHCC). She worked as a correctional officer for approximately 10 years. During these years, Smet did not receive any discipline of any kind.

On December 1, 2004, Smet promoted into the position of Classification Counselor 2 (CC2) at AHCC. CC2's duties involve the management of adult criminal offenders. They provide resident program planning, custody treatment services, and pre-release counseling. Their duties include determining the appropriate custody level for offenders assigned to their caseloads; evaluating offenders who might be at risk of being a victim, or of victimizing others, under the Prison Rape Elimination Act (PREA); assigning offenders to counseling, education and/or work referral programs; and developing and verifying Offender Release Plans (ORPs).

One of Smet's supervisors, Ginger Burk, testified that there is no document that prioritizes or triages all of the different tasks a CC2 has to perform. When first hired, a CC2 attends a three week training academy to learn about facility plans (the proper classification of the offender and proper placement in the appropriate custody level at the facility), policies, and risk assessment tools. The employer provides on-going in-service training on new, or updated, policies and procedures.

First Evaluations

Smet's trial service review as a CC2, in May, 2005, contains the following remarks:

Peggy carries herself as a professional in her interactions with staff and inmates alike. Peggy is well liked by her peers as well as the supervisors she has worked for. Peggy has a "can do" attitude that is highly appreciated by the entire M-Unit team. Peggy's knowledge of policy and procedure is expanding daily due to asking questions, and daily problem solving resolutions. She has good communication skills and makes every effort to make the Mary Unit environment safer for both staff and inmates. The quality of work generated has been graded with an above average outcome.

Although the review noted certain areas where Smet was still learning, it concluded with, "Peggy has shown continued improvement on meeting deadlines and understanding the need for prioritization." In the area for the employee's comments on the review, Smet wrote, "I would be willing to attend any training/classification offered or recommended which might benefit me in this position."

Smet's December 2005 annual review concludes with, "Her quality of work generated has been rated with above average outcomes." Although the evaluation includes that she "requires ongoing direction in completion of her duties", it immediately follows with "She accepts guidance well and learns from every opportunity." It repeats that: "Peggy has a "can do" attitude that is highly appreciated by the entire M-Unit team."

Medical Complications

In 2006, Smet was diagnosed with breast cancer. She underwent aggressive chemotherapy treatment. She returned to work in February, 2007. At the time, CC2s were working a 4-10 work week. Smet had trouble with her physical stamina when working a 10 hour day with a full caseload.

Because of the aggressiveness of the chemotherapy, Smet developed additional physical problems.

Further Evaluations

Smet's 2007 Performance and Development Plan evaluation (PDP) includes the following assessments from her supervisor: "Peggy works diligently during expected work hours and can always be counted on when scheduled for work" and "Peggy has been able to keep her caseload up to date and meeting required deadlines. She continues to learn new strategies to prioritize and multi-task." It concludes, "She does not hesitate to share information and concerns with the other staff members to ensure the safe operation of the unit."

In August, 2008, her supervisor evaluated that:

Peggy has had a lot of challenges this review period. There has (sic) only been two counselors in the unit for this entire year. There are normally three. This has placed a lot of added work load. And for the last month, there has only been one counselor in the unit. With this added work load, Peggy has focused on releases, transfers and Offender Release Plans. This has created a lag in the ability to keep up with new intakes and facility plan changes. Peggy has done a good job identifying the highest priorities and handling them appropriately.

Later in the assessment, the supervisor wrote: "Peggy is a very reliable team member"; and "Peggy has made improvements in her ability to track important classification actions." The supervisor pointed out: "Peggy has had to adjust to a lot of changes during this evaluation. There have been several staff changes and a new computer system that is going to require a significant learning curve. Peggy has made the necessary changes in order to learn and apply this new program to her work. ..."

Letters of Reprimand

On June 3, 2010, Superintendent Maggie Miller-Stout issued Smet a letter of reprimand for low productivity and poor performance as a

CC2. The two had met in a pre-disciplinary meeting on May 18, 2010, along with a Teamsters Business Representative and a Human Resource Consultant. During that meeting, Smet stated that she had a medical condition that may be affecting her work performance. The parties discussed accommodations that would be possible. They agreed on returning Smet to a 5/8 work week. Although the new work week helped Smet physically, it presented a problem with how she could meet with inmates before or after their work day or when they attended assigned programs.

On July 20, 2010, Miller-Stout issued Smet a one month, two step (5%) reduction in pay for "insubordination" in failing to follow her supervisor's direction not to work any unauthorized overtime. Smet had worked past her assigned work schedule on May 28, 2010 and on June 15, 2010. The first time, Smet was working on a spread sheet and lost track of time. The second time, Smet was leaving work as scheduled when she was stopped by some inmates she had been trying to meet with; she took the time to talk with them after her shift was technically over. The pay reduction was effective August, 2010.

Transfer

On November 17, 2010 Miller-Stout transferred Smet to Robert Unit, a medium security unit. Her supervisor became CC3 Ginger Burk. Burk testified that she allowed Smet to ease into the new unit. For December, January, February and March, Burk testified that "it appeared that she was doing well. I was happy with what I was seeing. ... It seemed as if everything was going well."

Burk's supervisor, Custody Unit Supervisor (CUS) Richard Hewson was also pleased with Smet's performance. He testified that "She was on caseload and was doing a really good job it seemed. And

pleasant and - and doing well." Hewson confirmed that Smet was responsive to his suggestions for performance improvements.

Skipped Evaluation and Letter of Reprimand

On January 7, 2011, Miller-Stout wrote Smet that she had learned that Smet's annual PDP evaluation for July 2009 through July 2010 was past due. [The content of the letter supports that it was written in 2011, although it actually is dated "January 7, 2010".] She wrote, "I have reviewed your personnel file and find that troublesome performance issues during this period have been addressed." Miller-Stout, therefore, informed Smet that she had decided to forgo Smet's evaluation for that period.

Also on January 7, 2011, Miller-Stout issued Smet a letter of reprimand for a workplace violence incident on July 15, 2010 and for failure to properly follow through on "A Day with Dad" event. The work place violence incident occurred during a meeting with Smet and two supervisors. After discussing a work related item, one supervisor presented Smet with two Performance Meeting Records. Smet claimed that they had not met on one of the dates on one of the records. After some discussion, the other supervisor stated that the conversation was over and they all needed to move on. Smet asked for a union representative. The supervisor declared the meeting over. Smet stood, walked into the first supervisor's personal space and shook the two Performance Meeting Records at him.

The improper follow through in the Day with Dad event referred to Smet making a critical remark about another DOC staff member to an inmate.

Counseling Sessions

On June 23, 2011, Burk first documented problems with Smet's performance. Burk acknowledged that the documentation was not corrective action; it was just documentation of a discussion she and Hewson had with Smet on that date. Burk's notes record that they discussed assisting Smet to accomplish goals and expectations in: Processing Board Reports; PREA assessments; spending too much time with offenders; and organization. Burk thought that Smet took the supervisor feedback and coaching well.

Hewson conducted a performance meeting follow-up one week later, after which he issued a Performance Meeting Record (PMR). Hewson noted a lack of improvement in Smet's performance in the past week. Burk had conducted an internal audit of Smet's PREA evaluations; she found 22 entries that she believed needed corrections. She gave the list to Smet. The PMR indicates that it was a "Counseling Session"; it was placed in Smet's supervisory file but not her personnel file.

On July 13, 2011 the three met again for a counseling session about an Offender Release Plan Smet was working on. Smet had received an email from the offender's community corrections officer that the offender would not be cleared to live in the Boylston Hotel upon his upcoming release. So when the offender did request to be placed in the Boylston Hotel, Smet rejected the requested placement. She did not obtain written justification of the denial from the community corrections officer. The inmate ultimately was not able to move into the Boylston Hotel because the community corrections officer denied the placement.

On August 2, 2011, the parties had what was to be their final meeting before Smet's demotion. This meeting was also categorized as a "counseling session". The meeting was about Smet's assignment

to correct the 22 errors in her PREA reports. Smet told the supervisors that she had lost the list, so she was rescreening everyone on her caseload.

Hewson testified that he thought that Smet was responsive and positive with respect to feedback and direction.

Hostile Confrontation

Hewson went on vacation in August, 2011 making Burk unit supervisor. Smet had completed the PREA reports. She printed them out to demonstrate that the work was done. When she went to get them from the office printer, they were not there. Smet went into Burk's office to tell her about the problem. Burk was not there; Smet looked through Burk's in box to see if the reports were there. Burk returned to her office. Smet asked her where the reports were. There is conflicting testimony about how the conversation escalated: Burk thought that there was an angry and hostile exchange by Smet; Smet did not think so.

Final Evaluation

Hewson wrote Smet's evaluation on August 31, 2011. He noted that at the beginning of her assignment to R-Unit, "Smet was diligent in meeting the time lines for regular classification actions." Although he noted that Smet had had difficulties in meeting some job competencies, she "worked hard and was able to get it done." He recorded, "She said she felt tasks such as board reports and funeral packets interrupted her rhythm. She stated that is what made her confused which ultimately led to her getting behind." He included that, "Communication with staff is respectful and she gets along well with all staff and offenders." He also noted that he counseled her not to spend so much time working with offenders. He included that Smet participated well in unit meetings. Hewson

concluded that "Smet's overall performance is below normal standards for a counselor with her tenure."

In the employee comments section, Smet wrote:

There is no documentation in my Personnel File to indicate my direct supervisor felt my performance was less than satisfactory, concerning PREA, Classification, or release planning until the very recent documentation entered into my file beginning June 23, 2011. Since that time, there have been a few entries entered in regards to the same issues. Until the end of June, I was told my work was above average and my supervisors were very pleased with my ability to work with the offenders and my work production. There have been numerous changes regarding the PREA screening, how it should be done or if it should be done. The PREA tool has changed several times and there was no PREA tool until when the most recent revised tool became available in May 2011. I have continued to interview the offenders on my caseload during their intake in regards to PREA and have assured their safety to the best of my ability. It was documented in OMNI and scanned into LIBERY, although most recently I was made aware that I have been entering the event incorrectly as are many of my peers. While auditing the offenders on my caseload, I found the PREA documentation was being entered several different ways, multiple errors were made by myself, my own supervisor and the other counselors in my facility, as well as those in other facilities. The policy states PREA is to be done within 48 hours of their arrival, a task that is difficult to achieve, even by my supervisor. My audit indicates many counselors are not meeting that goal. As with most audits, the areas needing improvement have become apparent. I am attaining that goal, as it was brought to my attention.

Employer Investigations

The employer conducted two investigations of Smet's work. The first was in September, 2011, triggered by a performance concern document submitted by Hewson. In the document, Hewson expressed concerns about Smet's lack of productivity, lack of compliance with

her caseload and her being deficient in various other duties. The investigation concluded that Hewson had grounds for his concerns.

The union did not challenge the sufficiency of the employer's investigation. It did, however, prove that there were inaccuracies in the PREA section of the investigation. The report claimed that Smet had miss-scored eight offenders, when actually there were only two incorrect PREA scores.

The second investigation was in November, 2011, to look into the allegation that on May 24, 2011, Smet used another offender to translate information, instead of using a certified interpreter, for a subject offender while she was doing a regular review. The investigation found that she had done what had been alleged. The union did not challenge the accuracy of this investigation either.

Demotion

Effective May 16, 2012, Miller-Stout demoted Smet to an Office Assistant 3 (OA3) position at AHCC.

In the letter of demotion, Miller-Stout lists three reasons for the demotion: 1) Demonstrated lack of productivity, out of compliance with her caseload, and deficient in the performance of Counselor duties; 2) On May 18, 2011 she did not use an interpreter for the intake review of an offender; and 3) Again on May 18, 2011, she gave the same offender a form to sign indicating he was waiving certain rights.

In deciding that a demotion was the appropriate sanction, Miller-Stout wrote:

In determining the appropriate level of discipline, I reviewed your previous work history, length of service, training provided and previous disciplinary actions. I

found that you were previously issued a Letter of Reprimand on June 3, 2010, for low productivity and poor performance as a Classification Counselor 2. On July 10, 2010, you were issued a Reduction in Salary of 5% for one month for your insubordination when you were incurring unauthorized overtime. On January 7, 2011, you were issued a Letter of Reprimand for a workplace violence incident and for failing to appropriately follow through on a "Day with Dad" event.

The demotion to OA3 caused a \$1,300 per month loss in salary for Smet. She eventually was not able to maintain her house payments. Smet lost her house back to her lending institution.

ANALYSIS

Burden of Proof

In disciplinary grievances, the employer has the burden of proof to establish by clear and convincing evidence that it had just cause to impose the discipline that is being grieved. In this case, Smet's demotion. While a "preponderance of the evidence" standard of proof - where a party must establish that it is more likely than not that the factual events are as it asserts -- can be used in certain arbitration cases, I require a "clear and convincing" standard in a permanent demotion or discharge case, since these penalties have severe career and compensation impacts.

Union Claim - Demotion Too Severe

The employer did an admirable job of addressing all seven elements of just cause in its brief. The union, however, is only challenging one of the elements: Is the punishment appropriate to the misconduct? The union is not arguing about whether or not Smet had job performance issues. It is contending that the demotion imposed is not appropriate for Smet's performance. Therefore, this

Arbitration Award will only analyze the standard of just cause that the union is challenging.

The union contends that Smet's demotion was not "reasonably related" to her performance. It offers several sources that describe the "reasonably related" standard.

Arbitrators have consistently held that an excessively harsh penalty for misconduct violates the requirement that discipline be imposed for just cause. "Inherent in the right to discipline for just cause is the requirement that the form and degree of discipline be reasonable both as regards the basis of discipline and the penalty assessed"

Brand, Discipline and Discharge in Arbitration, 86 (1998), [citing *Merchants Fast Motor Lines*, 103 LA 396, 399 (Shieber, 1994) and *Clow Water Sys, Co.*, 102 LA 377 (Dworkin, 1994).]

The concept of just cause includes not only the proof of the commission of an offense in violation of applicable rules, but the severity of the penalty as well, which must be proportional to the offense.

Cummins, Inc., 104 LA 1012, 1017 (1995); *Barnstead-Thermolyne Corp.*, 107 LA 645, 653 (Pelofsky, 1996); *Capital Airlines*, 25 LA 13 (1955); *Huntington Chair Corp.*, 24 LA 490 (1955).

The union also claims that the employer has failed to prove that Smet's performance warranted a permanent demotion due to her inability to perform the functions of a classification counselor because the employer did not give Smet adequate opportunity to address her performance issues. It argues that the employer failed to follow progressive discipline, since less severe steps, prior to demotion, were not used. It cites *State of Montana*, 121 LA at 1199, " ... [I]t must be clear that progressive discipline was used and that further corrective efforts toward rehabilitation could no longer reasonably be expected to prevent the employee from repeating such performance."

Length of Service

Smet was a CC2 from December, 2004 until May, 2012. No performance issues were brought to her attention in 2004, 2005, 2006, 2007, 2008, or 2009. The union advances *City of Portland*, 77 LA 820, 826 (Axon, 1981), for the holding that an employee's prior good service matters. In light of her work record, the union contends that even if there are some valid present performance issues a permanent demotion, without progressive discipline, is excessive. I agree. Now the analysis must turn to whether there was progressive discipline.

Employer Reasons for Demotion

In the letter notifying Smet of her demotion, Miller-Stout listed three reasons: 1) Demonstrated lack of productivity, out of compliance with her caseload, and deficient in the performance of Counselor duties; 2) Not using an interpreter for the intake review of an offender; and 3) Giving that same offender a form to sign indicating he was waiving certain rights. Miller-Stout also detailed what she had reviewed when determining what level of discipline to impose: Smet's work history; length of service; training provided; the Letter of Reprimand on June 3, 2010, for low productivity and poor performance; the August, 2010, Reduction in Salary of 5% for one month for insubordination when incurring unauthorized overtime; the January 7, 2011, Letter of Reprimand for a workplace violence incident and for failing to appropriately follow through on a "Day with Dad" event.

The DOC employee handbook defines corrective action as "action taken by a supervisor in order to educate an employee, correct or prevent unacceptable behavior and/or job performance." Corrective actions include memos of counseling, memos of concern, memos of expectation, and corrective interviews.

Smet received three PMR's to document counseling sessions after she transferred to Robert Unit: From July 1, 2011; July 13, 2011; and August 2, 2011. The PMRs stated concerns about untimely and/or incomplete intake and facility plans and PREA reviews; errors in classification, OMNI entries and offender screening; use of offenders as interpreters during a PREA interview; and not following her supervisor's direction.

The union argues that counseling is not part of progressive discipline. It submits support for this contention from Norman Brand's treatise, *Discipline and Discharge in Arbitration*, (1998). "[N]ot all employer comments on employee behavior are part of the progressive discipline system." At page 58. The union continues with quotes from Brand that "Counseling may put the employee on notice of employer expectations, but it 'does not constitute adverse action' and counseling is therefore 'a separate and distinct procedure from discipline.'" At page 58-59. Even the DOC employee handbook separates counseling, as corrective action, from disciplinary action. More importantly, the parties' collective bargaining agreement lists progressive discipline as: oral and written reprimands, reductions in pay, suspensions, demotions and discharges. The counseling sessions are not oral reprimands. Therefore, they are not to be considered part of progress discipline.

It is unclear whether the employer considered the three PMRs when determining that a demotion was the next level of discipline appropriate for Smet. Miller-Stout wrote that she considered Smet's work history. The PMRs were not put in Smet's personnel file, but were kept in her supervisor's file. However, none of the PMRs state that they are documenting a reprimand. The record supports a finding that the employer could have, improperly, treated the PMRs as disciplinary action.

Miller-Stout did consider the June 3, 2010 letter of reprimand for "gross mismanagement", specifically for low productivity and poor performance. This was proper since she was trying to determine the level of discipline for failure to perform the job duties of a CC2.

Next, Miller-Stout took into account Smet's a one month pay reduction. Although labeled as "insubordination", the actual cause was for working after the end of her shift without authorization. I agree with the union that this issue does not relate to Smet's competence in the performance of her job duties. Thus, it would be inappropriate to consider this discipline a part of a record about progressive discipline for work performance. Working unauthorized overtime is not of a like nature to competency in the performance of job duties.

Smet received a letter of reprimand on January 7, 2011 for workplace violence and poor job performance. The employer reviewed this letter. The job performance issue was making a comment about another employee to an inmate. Neither this nor workplace violence (here shaking papers at a supervisor) relate to Smet's ability to execute the duties of a CC2. I agree with the union that a careful review of the letter shows that it dealt with a stand-alone issue. It was inappropriate to consider this letter of reprimand.

Is Demotion Appropriate?

The union advances two other arbitration awards for the principal that demotion is an extremely harsh penalty, properly reserved for situations in which efforts to improve the employee's performance have proven futile, or in which the employee's ability to perform the work is permanently compromised.

In *Duquesne Light Co.*, 48 LA 1108, at 1111 - 1112, (McDermott, 1967), Arbitrator McDermott held:

Under generally accepted arbitration principles the distinction to be made is that demotion must be related to an employee's ability to perform the work on a continuing basis in terms of his competence and qualifications, while discipline is properly related to infractions of rules of conduct, i.e. particular actions of misconduct or a series of such actions. If an employee has full capability of performing a job, but for reasons of deliberate misconduct and improper attitude he does not properly carry out his duties, then subsequent to an effort to correct the employee's misconduct, disciplinary measures which bear a reasonable relationship to the gravity of the offense must be utilized.

In *Ohio Department of Highway Safety*, 103 LA 501, at 504, (Feldman, 1994), an officer had falsified an arrest record. Arbitrator Feldman upheld a five-day suspension, but overturned the demotion and reinstated the grievant to the rank of sergeant. He held:

The demotion is an extremely heavy burden when used as discipline because it is everlasting. Not only is the grievant disciplined immediately for the activity he was involved in but the discipline is ongoing in that it affects his wage for a continuing and lasting period of time. Further it affects his retirement payments. ... the grievant received discipline that was tantamount to a discharge in that he has been the recipient of embarrassment from every quarter.

The union advances that demotion is nearly as bad as termination because of the on-going nature of the penalty and the devastating career implications.

As the union stresses, Smet did not engage in dishonesty. Her supervisor CUS Hewson confirmed that he did not believe that Smet was motivated by ill intent. Smet did not engage in any willful

acts of misconduct. There is no evidence that she knowingly acted in a way that she should have known was wrong.

The performance deficiencies that the employer could properly consider are simply not enough to justify a permanent demotion. A permanent demotion is not reasonably related to the seriousness of Smet's work record. Smet had five years as a CC2 without any discipline. In her evaluations, her supervisors continually commented on her willingness and readiness to learn. For the first 14 years that Smet worked for DOC, she did not incur any discipline. Until her evaluation by Hewson, all of Smet's supervisors rated her performance above average. A reasonable employee in Smet's place would see no warning that she was on the verge of being demoted.

Besides Smet's longevity without any discipline, another troubling aspect of this record is the employer's treatment of the lack of a performance evaluation for Smet. Miller-Stout was aware that Smet had not been evaluated for the time period July 2009 - July 2010. She then proceeded to forgo the evaluation. Miller-Stout wrote to Smet assuring her that the problems had been addressed. The evaluation Smet received in preparation for her transfer to Robert Unit was positive. Smet had no warning that she was going to be demoted.

The employer claims that Smet was counseled in the summer of 2011 about certain performance issues. She was given two weeks between counseling sessions: From on or about June 30, 2011 to July 13, 2011 to August 2, 2011. Then she was subject to an investigation triggered by Hewson in September, 2011. She was again subject to an investigation in November, 2011 for an incident that had occurred in May, 2011, six months previously. This is simply not enough time to give Smet an opportunity to correct any claimed

deficiencies. The speed of all of this coming at one person would cause any employee's head to spin. This is especially so when one is dealing with the after-effects of aggressive chemotherapy. This record does not support that the employer was trying to help Smet perform to her ability. Instead, it appears that the employer was lying in wait in 2011 for Smet to stumble. In another example, Smet shook the PMR papers in her supervisor's personal space in July 15, 2010. Miller-Stout issued the letter of reprimand for this "workplace violence" incident on January 7, 2011. Given that the employer characterized this paper shaking as a workplace violence situation, a six month lag in issuing discipline is unexplainable unless the employer was building a case against Smet.

The employer contends that Smet had an "overall deficiency" in her performance as a CC2. The employer wants to use a broad brush to paint over all of Smet's work history, since she returned from her battle with cancer, and turn every incident into a performance issue. This is not in keeping with progressive discipline. The progression has to be for the same problem. For example, an employer might want to generalize that an employee, who received a letter of reprimand for tardiness, can then be given a suspension without pay for being rude to customers, because they are both "performance problems". By lumping them together, however, the employer has failed to give the employee a chance to change specific behaviors. That is much the same in Smet's case. The employer's action of labeling unauthorized overtime and workplace violence as in line with the discipline it was giving Smet for not performing the job duties correctly weakens the just cause mandate.

Progressive discipline is a two-way street. First, the employer issues the discipline to get the employee's attention. Then the employee must change; but the employee must be given time to change. Even though the three counseling sessions in the summer of

2011 were rapid-fire in timing, Hewson characterized Smet as being responsive and positive about the feedback and direction.

The union points to Arbitrator Sabghir's dealing with the spirit of progressive discipline. That Arbitrator held that a demotion was more appropriate than discharge for an employee who had received 18 warnings over 14 years for poor work performance. The Arbitrator wrote:

Progressive and corrective discipline is not simply an escalator to crucify an employee. Through it an employer must demonstrate an honest and serious effort to salvage rather than savage an employee. To hold otherwise distorts, demeans and defeats the goals underlying the concept of progressive and corrective discipline.

Victory Markets Inc., 84 LA 354, 357 (Sabghir, 1985).

Discipline that was found to lack "any corrective form to lessen the Grievant's chances of failure" was overturned. *Western Auto Supply Co.* 87 LA 678, 683 (O'Grady, 1986).

The employer argues that it transferred Smet to a new unit, re-trained her and gave her an opportunity to reacquaint herself to DOC policies. The record establishes that Smet had three counseling sessions in six weeks, then Hewson put in paperwork to start an investigation on her. The next month, another investigation was started for an incident that had occurred six months earlier. Smet was not really given a chance to improve her performance. The union did not challenge the sufficiency of either employer's investigation. It did, however, prove that there were inaccuracies in the PREA section of the first investigation. The report claimed that Smet had miss-scored eight offenders, when actually there were only two incorrect PREA scores. This supports

Smet's "employee comments" on her evaluation that there was confusion among staff about PREA scoring.

The employer argues that Smet's evaluations from 2005 - 2011 show a pattern of unsatisfactory conduct regarding work performance, organization and communication skills. A close examination of her evaluations proves differently. Her supervisors repeatedly told Smet that she was performing above average. Although some problems were mentioned, the overall evaluations were positive. There was nothing to put Smet on notice that she was in jeopardy of being demoted.

The employer claims that Smet's employment records reveal an on-going pattern of performance issues that had existed for nearly six years without improvement and were, in fact, getting worse. To the contrary, the record contains incidences that occurred only after she returned from her cancer treatments which had caused additional medical complications. It is central to this Arbitration Award that Smet performed without discipline for five years as a CC2.

Interest on Back Pay

The union asks that any back pay award should also be ordered to carry interest. There is a time value to money. However, the language of the parties' collective bargaining agreement states at Article 9.5 "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."

This contract language prohibits me from ordering interest to be paid on the back pay award.

CONCLUSION

In determining what level of discipline to issue Smet for her poor performance of the duties of a Classification Counselor 2, the employer improperly considered a one month pay reduction Smet had been given for a matter separate and apart from executing the job's duties. The employer also improperly considered the January 7, 2011 letter of reprimand for a matter separate and apart from Smet's ability to perform the duties of her job. Additionally, the employer did not allow Smet enough time to respond to the directions of her supervisors. With the elimination of these two disciplines, and the consideration of the lack of time the employer gave Smet to change her performance, demotion is simply not the next step in a progressive discipline environment.

The employer has not met its burden of proof to establish that it had just cause to demote Peggy Smet. The union developed reliable evidence for the record.

Since the employer did not have just cause to demote Smet, it must reinstate her as a Classification Counselor 2. It must make her whole for any loss in pay or benefits. It must expunge any reference to the demotion from her personnel file, supervisor file and any place else that there is a reference or record of the demotion.

Under the language of Section 9.6 the expenses and fees of the arbitrator will be shared equally by the parties.

AWARD

Any facts or arguments presented at the hearing or in briefs which are not cited within this Award, I found to be non-persuasive or immaterial. Based on the sworn testimony of the witnesses, the documents admitted into evidence, and the record as a whole, I award:

The grievance is SUSTAINED.

ISSUED in Chehalis, Washington, this 30th day of September, 2013.

Katrina Boedecker
KATRINA I. BOEDECKER, Arbitrator