

BEFORE ARBITER BARBARA J. DIAMOND

Fish and Wildlife Officers' Guild)	
)	
(Guild))	DECISION AND AWARD
and)	
)	WA PERC No. 138967-R-24
Washington Dept. of Fish and Wildlife)	
)	
(Employer))	
)	
(Kirsch Grievance))	
_____)	

I. BACKGROUND

This arbitration arises pursuant to a collective bargaining agreement between the Fish and Wildlife Officers Guild (the Guild) and the Washington State Department of Fish and Wildlife (the Department or the Employer) in effect from July 1, 2021, through June 30, 2023. The undersigned neutral arbitrator was appointed by the Washington PERC to hear this matter. The parties stipulated that the grievance was properly before the arbitrator to render a final and binding decision.

A hearing was held via Zoom videoconference on January 28-29, 2025, before certified court reporter Steva Brown. All parties had a full opportunity to examine and cross-examine witnesses, to make arguments and to enter documents into the record. A transcribed record of the proceeding was received on or about February 12, 2025. The parties submitted post hearing briefs on or about April 4, 2025, and the record was closed.

For the Guild:

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For the Department:

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II. THE ISSUE

The parties did not stipulate to the issue and presented their versions of the issues, stipulating that the Arbitrator would determine the issues after the hearing and consideration of any post-hearing argument.

The Guild

1. Did the retirement of Grievant's K-9 Jax constitute a form of discipline to the Grievant? If so, did the Employer have just cause to impose the discipline on the Grievant?
2. Did the retirement of Grievant's K-9 constitute discrimination or retaliation for Guild activities?
3. Did Captain Anderson's conduct during the disciplinary meeting constitute harassment prohibited by the CBA?¹
4. If so, what is the remedy?

The Employer

1. Was the retirement of the K-9 Jax in compliance with Articles 33.1 and 38.20 of the CBA?
2. Is just cause in Article 28.1 applicable to the retirement of K-9 Jax?
3. If not, what is the appropriate remedy?

¹ The Union did not address this question in its post-hearing brief as a separate claim. Therefore, it will not be addressed in this opinion.

The Arbitrator

1. Did the retirement of Grievant's K-9 constitute discipline under the parties' agreement? If so, did the Employer have just cause for discipline? If not, what is the appropriate remedy?
2. Did the retirement of Grievant's K-9 constitute discrimination or retaliation for Guild activities? If so, what is the appropriate remedy?

III. RELEVANT PROVISIONS OF THE AGREEMENT

ARTICLE 28: DISCIPLINE

28.1 Just Cause

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

* * *

28.3 Forms of Discipline

Discipline includes oral and written reprimands, reduction in pay, suspension, demotion, and discharge.

28.4 Investigative Process

A. The Employer has the authority to determine the method of conducting investigations and develop and follow appropriate guidelines for conducting investigations, including the DFW Law Enforcement Program Administrative Investigation Regulation. The Employer will notify the Guild of those guidelines and of any amendments, consistent with Article 43.5. The provisions of Articles 28.4 and 28.5 shall apply only to investigations that may lead to discipline.

28.5 Investigatory Interviews

A. Unless exigent circumstances exist, the Employer will notify the employee at least forty-eight (48) hours in advance of an investigative interview, including the time and location of the interview. The forty-eight (48) hours notification period may be waived upon mutual agreement of the parties. The notification will include the nature of the interview, the date of the incident (if known), and a summary of the allegations against the employee sufficient to reasonably apprise the employee of the nature of the investigation.

* * *

28.7 Pre-Disciplinary Meetings

Prior to imposing discipline, except oral or written reprimands, the Employer will offer the opportunity to schedule a pre-disciplinary meeting with the employee. Five (5) days prior to the pre-disciplinary meeting, the Employer will inform the employee and the Guild of the

reasons for the contemplated discipline and an explanation of the evidence and copies of written documents relied upon to take the action, including the Office of Professional Standards (OPS) investigative file. Employees may request a shorter timeframe for the pre-disciplinary meeting. The employee will be provided an opportunity to respond in writing or in person.

28.8 Notice Prior to Reduction in Pay or Demotion

The Employer will provide an employee with fifteen (15) calendar days' written notice prior to the effective date of the reduction in pay or demotion.

28.9 Ability to Grieve Specific Discipline

The Employer has the authority to impose discipline, which is then subject to the grievance procedure set forth in Article 29, Grievance Procedure. Oral Reprimands, however, may only be processed through the Agency Head step of the grievance procedure.

* * *

IV. RELEVANT POLICIES

Regulation 4.75 Canine Program insert

I. DEFINITIONS

A. Fish and Wildlife Police Canine (FWPK9)

1. A FWPK9 is a canine specifically trained and certified to detect specific evidentiary items, conduct article searches, and or track humans. The FWPK9 will not be trained to physically apprehend humans.

B. Fish and Wildlife Police Service Canine (FWPSC)

1. A FWPSC is a canine trained or utilized to conduct specialized Natural Resource Law Enforcement duties within the WDFW Enforcement Program. FWPSC's are primarily used as a non-lethal option for handling conflicts between humans and dangerous wildlife or for detection of Aquatic Invasive Species. FWPSC's are typically used for, but not limited to; tracking, capturing, and aversive conditioning of wildlife or for locating live/dead wildlife.

III. POLICY

- A. The WDFW Canine Program exists and operates at the sole discretion of the Chief.
- B. All canines within the program are the property of WDFW.
- C. Canines may be obtained from other agencies, shelters, vendors, breeders, private

owners, officer owners, or donated by the public. Acquisition and selection of the canines shall follow guidelines set forth within the Canine Program Standard Operating Procedures Manual (CPSOPM).

- D. WDFW Enforcement Program shall pay for canine handler expenses in accordance with Collective Bargaining Agreements (CBA). All canine expenses and expense approval levels shall follow guidelines set forth within the CPSOPM.
- E. Handler approved uniforms, compensation, work hours, vacation leave, responsibility for canine health and welfare, residence and kenneling requirements, and veterinarian services shall follow guidelines set forth within the CPSOPM.

IV. PROCEDURES

A. Handler Selection

- 1. All appointments within the Canine Program and location of canine teams will be determined by the Chief based on Program needs and shall follow the guidelines set forth within the CPSOPM.
- 2. The Chief will make the final decision on selection of canine handlers. The handler selection process and minimum requirements shall follow guidelines set forth within the CPSOPM.

B. Training Requirements

- 1. Before a canine can be utilized in the field, the handler and canine must be properly trained and certified in accordance with the CPSOPM.
- 2. All handler and canine training, minimum certification, initial and ongoing requirements, use of training aids, and training aid specifications shall follow guidelines set forth within the CPSOPM.

C. Handler Compensation and Leave

- 1. Compensation
 - a. All handlers will be compensated per CBA and any other Agreement/contract/MOU with the Chief/WDFW Enforcement Program that pertains to handler compensation for (but not limited to);
 - (1) Routine Duty days
 - (2) Scheduled days off, or annual leave days

(3) Overtime.

WDFW Enforcement

Canine Program: Standard Operating Procedures

Chief's Discretion

The WDFW Canine Program exists and operates at the discretion of the chief. All appointments within the canine program as; canine program manager, canine unit coordinator, and all canine handler(s) is at the discretion of the chief. The assignment location of canine teams will be determined by the chief based on WDFW Enforcement Program needs.

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Canine Meeting Service Obligation or Honorably Retired/Removed from Active

When a canine is removed from active service, the preferred placement is with the handler as the canine has likely bonded with that handler and/or their family. Canines may be honorably removed from active service for a variety of reasons to include but not limited to:

1. Age
2. Injury
3. Overall health
4. Service obligation met

Additionally, at the chief's discretion, canines that can no longer safely and reliably perform all aspects of their duties but are still healthy and active, may be "retired from active service" and be "goodwill ambassadors" used strictly for educational and public outreach activities. Final placement for canine honorably retired/removed from service is with the handler. WDFW agrees to sell the canine to the handler for one dollar (\$1.00).

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V. FACTS

Background

Grievant Keith Kirsch (Grievant) is a sworn police officer employed by the state Department of Fish & Wildlife. He is represented by the Fish and Wildlife Officers' Guild. For the past 7 years or more, he has worked as a K-9 handler. In this capacity, he was a sworn officer able to enforce all laws. However, he was deployed by the state to enforce

fish and wildlife laws. He functioned as a “game warden.” He was also responsible for training, exercising, and caring for the canine, a Karelian Bear Dog (KBD) named Jax, which was the property of the Department.

Under the collective bargaining agreement, Grievant received compensation for caring for Jax on his days off. Jax was a family dog when not on the job. Grievant was entitled to take an hour of each workday for Jax’s ongoing training and care. When management decided to retire Jax, Grievant lost dog handler pay provided by the CBA, which he calculated as totaling \$7000-\$8000. He filed a grievance alleging that the Employer’s actions were disciplinary and constituted a reduction in pay for just cause purposes. The state demurred to this interpretation and this arbitration ensued.

The Department has deployed K-9s to assist in a range of challenging endeavors. Wildlife service dogs are used to deal with dangerous wildlife, such as bears. This is the gist of the breed’s name, Karelian Bear Dog. Under Department policy, K-9s are expected to have a useful life of at least five years, after which they can be fully retired. In such cases, the handler, who has trained the dog from a pup, are offered the right to buy the canine from the Employer for a nominal fee. Some dogs have worked until age 14 (Colter) or 11 (Spencer.) Freya retired at about five years old, but this was likely due to medical issues of the handler. At the time of hearing, there was only one working K-9 left in the Department, named Exo. After the Department retired Jax, Grievant was permitted to keep the dog, but had to assume full financial responsibility for his care, including vet bills. Previously, he could submit vet bills to the Department.

Department Efforts to Increase K-9 Deployments

Captain Eric Anderson is the manager of the state-wide K-9 program. He stepped into that role in December 2021. The Chief asked Anderson to do a cost benefit analysis to determine if the program was worthwhile. To that end, he oversaw the development of an app which could be used by all six K-9 handlers to track K-9 deployments in their regions. Anderson knew that there were rumors circulating that the program was going to be abolished. He hoped to be able to show numbers to avoid that outcome.

Anderson met with each handler in May 2022 to discuss the Chief's expectations, which included "a lot of use" of the dogs in the areas of dangerous wildlife and attending outreach/education events. In his discussion with Grievant, Grievant expressed that he would not take his dog to bear calls if he thought that the bear would be lethally removed. Anderson told Grievant that this was not a reasonable expectation with problem bears. According to Anderson, Grievant was adamant that he did not want to do so. Grievant explained that he also did not like attending outreach events. Anderson testified that he told Grievant that these activities were "key components" of the program.

Anderson also convened a group meeting with the handlers on July 1, 2022. At that time, he went over the K-9 program mission, objectives, and expectations. He brought in IT to assist the handlers with downloading and using the new tracker app. According to a slide from Anderson's presentation, he discussed the rumor that the Chief did not see any value in the K-9 program. He said that his response was that the group should accept this as a challenge to demonstrate how the program expanded the capabilities of the Department to meet strategic objectives.

In this meeting, Anderson also went over the expectation that KBDs such as Jax be used for both non-lethal and lethal applications. Anderson directed the handlers to use the tracker app, because good statistics would be a way to show that the program was effective. On September 9, 2022, Anderson sent a memo to the handlers attaching documentation of each team's stats, including the number and duration of deployments. The memo noted that Grievant had not entered any deployment stats as of that date.

Based on this data, Anderson determined that Grievant went to one outreach event in 2022 and declined three others, while the other handlers attended three or four of such events during 2022. Jax was utilized on three occasions for dangerous wildlife events in 2022, but none were in his region. Anderson calculated that Jax was the least utilized K-9 in the program, in that he was used less than 3.9 hours per month. Grievant's direct supervisor Sgt. Tyler Bahrenburg corroborated that he did not see the K-9 deployed very often on service calls.

The Bear Incident

On November 7, 2022, Sgt. Tony Leonetti emailed Grievant asking him to bring Jax to deal with a bear frequenting a residential area. Leonetti explained that they had tried using traps and been unsuccessful. Leonetti asked Grievant to come the next day to take Jax through the area. The email was sent at 7:26 pm. At 8:00 pm, Grievant responded that "tomorrow might be tough. I'll have to keep you posted if I can assist." Leonetti answered that Grievant should contact him by text or phone call so they could meet. The following day, Grievant traveled to the area. He texted Leonetti that he should be free between 3:00 and 3:30 pm if that might work. Leonetti declined, explaining that he had to be home by 4:00

pm. He suggested that they meet at 9:00 am the following Friday, after Grievant's days off. He requested that Grievant bring his dart gun and drugs. If Grievant did not have drugs, Leonetti would get some. He would also let Grievant know if they caught the bear in the trap in the meantime.

Leonetti had copied Bahrenburg on the last email. In turn, Bahrenburg emailed Grievant and Leonetti that he supported making the attempt on the following Friday, which was a directive that Grievant show up. Bahrenburg explained that the activity of the bear, attempting to enter a residence, was a learned behavior which would limit their ability to successfully relocate the animal. Grievant responded that he did not have drugs, netting, or a dart rifle so "hopefully you've got those bases covered." Leonetti responded by emailing Anderson, asking why Grievant would not have these items available. In the end, Grievant did not deploy Jax in response to this call.

Anderson was informed of what occurred and discussed this incident with Chief Bear. He shared Grievant's low statistics, indicating that there were not a lot of calls or public appearances for Jax. The Chief decided that the most appropriate action would be to retire the dog, as it had more than five years of service. To that end, Anderson scheduled a meeting with Grievant, his direct supervisor Sgt. Bahrenburg, and manager Captain Sprecher, who supervised both Bahrenburg and Grievant. Prior to the meeting, Anderson obtained a letter signed by the Chief retiring Jax from service, as discussed more fully below.

The November 23, Meeting

On November 11, 2022, Anderson emailed Grievant, Bahrenburg, and Sprecher notifying them of a meeting at the Region 1 office. The email stated that the "purpose of the

meeting is to discuss the K-9 Program policy, SOP, and expectations of Enforcement Program K-9 handlers/team members.” Neither Bahrenburg nor Grievant were told that a decision had already been made by the Chief to retire Jax. Bahrenburg asked Sprecher beforehand what the meeting was about; Sprecher said it was to go over the expectations for the K-9 going forward. Sprecher denied a decision had already been made to retire Jax. Bahrenburg shared this information with Grievant.

Eventually, the meeting was rescheduled to November 23. Anderson had more than one purpose for the meeting. The first was to go over the information he had to support retiring Jax, to see if there was something he was missing in the data. He thought that there could be hurdles or barriers to deploying the K-9 he did not previously understand. However, he testified that he told Sprecher beforehand that he was coming to retire the dog and wanted to find out why the dog was not being utilized. The meeting became contentious. At first, Anderson asked questions about the lack of use of the dog and Grievant became defensive, especially when Anderson presented the statistics. According to Anderson, Grievant repeatedly stood up and interrupted him. At one point, Anderson told Grievant that he needed to sit down, stop interrupting him, and be quiet, because he (Anderson) was trying to lead the meeting.

There was also a heated exchange regarding Grievant’s failure to deploy Jax in response to Leonetti’s request. Anderson had previously discussed the situation with Bahrenburg and believed Grievant disliked Leonetti, which may have contributed to his failure to respond immediately. When Anderson asked Grievant if the reason he did not respond was because he did not get along with Leonetti, Grievant denied it. At this point,

Anderson said he had evidence to the contrary. Grievant then asked if Anderson was calling him a liar. Anderson said that it appeared Grievant was not telling him the truth. By this point, voices were raised, and the interactions had become heated. Anderson realized he had “gone too far” with what he said, apologized, and told Grievant he should not have said that. Anderson gave Grievant the letter retiring Jax. Anderson candidly testified that, in retrospect, he should have handled the situation differently. Specifically, he should have told Grievant right out that they were retiring the dog.

The Department management team did not consider the decision to retire the dog to be a disciplinary matter. Prior to the meeting, Anderson called Sgt. David Jones, who had recently promoted out of the bargaining unit but formerly served as the Guild president. Jones testified that he spoke with Anderson prior to the meeting. Anderson shared that Grievant was not utilizing the dog enough or was using the dog and not documenting it. Jones advised Anderson to explain the problem to Grievant and to use the evaluation process to be progressive with the issue.

After the meeting, Anderson called Jones back and explained what happened. Jones testified that he “swore” at Anderson, because Anderson had done the opposite of what he had advised. Jones, who had been a dog handler in the past, was unaware of any dog getting retired at such an early age. Anderson testified that he called Jones to confirm his understanding that if the chief decides to retire a dog, it would not be an issue for the Guild. Anderson did not recall Jones discussing progressive discipline with him.

Chief Steve Bear is the appointing authority for the Department’s enforcement program. He does not consider handler pay as salary but considers it compensation for

having to care for K-9s on the handler's days off. He did not consider retiring Jax to be discipline. The discipline process occurs after an administrative investigation which is documented, as well as a sit-down process with the employee to give them a chance to answer questions. This process was not followed here because they were not considering disciplining Grievant. Rather, they were dealing with a program which was not self-funded and was underutilized. In making the decision to retire Jax, he did not consider Grievant's performance as an officer, but only the facts related to utilization. Bear testified that he that he takes actions such as this routinely, such as taking someone off an FTO assignment. He felt the decision fell well within management rights.

Testimony of Grievant

Grievant testified that the decision to retire his dog was a decision made by management with malice because of his actions six months prior. Specifically, Grievant was the target of a lengthy internal investigation. That investigation involved allegations that Grievant was biased against men who use dogs to hunt wildlife, such as bears and cougars. During the investigation, he called out what he felt were egregious omissions and flaws. As a result of his advocacy, he only received a reprimand. This was only possible because the Guild grieved the discipline originally imposed. Grievant was able to argue against six sustained policy violations, resulting in only one sustained violation.

Captain Sprecher and Chief Golden were both involved in the investigation. Grievant believed the investigation was an embarrassment to the Department and that, as a result, he had a target on his back. He concluded that his actions criticizing the Department's investigation was the real reason why he was targeted with adverse action, because Jax had

years of productive service in him. The decision to retire Jax, which came out of the blue, was not part of any normal decision-making process. He had expected Jax to work for at least ten years. As his handler, there was no reason to retire the dog.

Grievant also compared Jax's retirement to the way honorable retirements of K-9s had been handled in the past, with ceremonies and parties. Grievant also was blindsided at the meeting when he was told Jax was being retired. He was told that the meeting was to talk about program policy, SOPs, and expectations for the K-9 program. He was not told there was any plan or intent to retire Jax. He was told that his deployment numbers were no good and that there was no need for a dog in Region 1. They discussed the issue of his not helping on the bear situation. and the Captain accused him of lying. He asked for a Guild representative and for the meeting to stop, but it went forward. He was furious to get the retirement letter. Captain Anderson said, "How dare you not help Sgt. Leonetti?" Anderson was stern and mean during the meeting, which felt disciplinary.

With respect to the statistics, Grievant felt his numbers may have been less because the term "deployment" was not defined in the app. He had been taught by previous handlers to document his deployments in an Excel spreadsheet, which he continued to do, and eventually transferred that information into the app. Others had 14-hour deployments, which was impossible. They recorded "stand by" deployments. Grievant did not record stand-by situations as deployments. Grievant felt that any problems with his statistics could have been cleared up from the get-go, but he was not given the chance to create more of an apples-to-apples comparison.

As for the bear response, he did not decline to respond. He has dealt with hundreds

of bears over the years and did not think he was needed to respond immediately to that situation. At the time, he had other obligations. When Bahrenberg contacted him and told him the bear response was more important, he went to Spokane to respond but was told that the other guy had to go home. As a result of losing his status as a K-9 handler, Grievant was required to remove all marking and decals from his patrol vehicle denoting it as a K-9 patrol vehicle and to return K-9 equipment to his sergeant.

VII. DISCUSSION

Preliminary Matters

The employer bears the burden to demonstrate just cause exists for discipline. Just cause requires persuasive proof that the allegations are accurate and, if so, that the penalty imposed was not excessive, i.e., outside the zone of reasonableness based on the totality of circumstances.

The question of whether an adverse action constitutes grievable discipline is a matter of contract, i.e. an interpretation of the just cause provision and grievance procedure. Arbitrators focus on the parties' intentions, which may be established by the plain language of the contract. If that language is ambiguous, arbitrators typically consider evidence concerning past practice as well as any available bargaining history. If the employer establishes by probative evidence that it did not intend the adverse event to be disciplinary, the burden of proof shifts to the union to establish that discipline occurred despite the employer's intent.

Under applicable law, an employer unlawfully discriminates against an employee when it acts in reprisal for the employee's exercise of rights protected by the Chapter 41.56

RCW. *Educational Service District 114*, Decision 4361-A (PECB, 1994). To prove discrimination, the employee must first make a prima facie case by establishing the following:

1. The employee participated in an activity protected by the collective bargaining statute, or communicated to the employer an intent to do so;
2. The employer deprived the employee of some ascertainable right, benefit, or status;
3. A causal connection exists between the employee's exercise of a protected activity and the employer's action.

The burden remains on the employee to prove either that the employer's reasons were pretextual, or that union animus was a substantial motivating factor behind the employer's actions. *Port of Tacoma*, Decision 4626-A.

Retirement of K-9 as Disciplinary Action

The Guild's analysis acknowledges that Jax was an asset of the Department. It focuses instead on the plain meaning of the term "reduction in pay." Under the CBA, discipline includes "oral and written reprimands, *reduction in pay*, suspension, demotion, and discharge." (Emphasis added.) To the Guild, the term "reduction in pay" is clear and unambiguous. Because Grievant had less remuneration after he lost his canine handler position, the decision to retire Jax was a "reduction in pay" and thus a grievable action.

This well-reasoned contention is derived from the contract's plain language and is entitled to serious consideration. Grievant did experience a reduction in pay, a term which certainly could apply to this situation. However, the term "reduction in pay" is generally understood in the disciplinary context to refer to salary reductions imposed as temporary demotions, i.e. the placement of an employee on a lower salary step for a defined period. If

the term “reduction in pay” is read as expansively as the Guild contends, the term would encompass actions such as denial of overtime, removal from training duties, and a wide range of extra duty assignments. It would have no logical stopping point and could apply to situations which have no connection to what is traditionally viewed as discipline. For these reasons, there is a latent ambiguity which must be resolved.

As stated above, there can be no clearer evidence of the parties’ intentions than their course of conduct. Using this lens, past practice favors the employer. As the Chief testified without rebuttal, he has routinely removed officers from special assignments on an at will basis, for example, from FTO positions. On this record, the Guild has not grieved such removals from assignments, despite its position that just cause would apply to all such removals. The lack of any past practice applying just cause to assignment changes is an important piece of evidence.

Moreover, other elements of the contract support the contention that the removal of Grievant from the canine position was not a grievable event. The most persuasive provision is found in the compensation scheme itself. There is explicit language concerning removal of detectives from their assignments. In particular, the parties agreed to make such removals subject to just cause.² Because the parties included only this type of assignment, it is reasonable to infer that grievance rights did not extend to other assignment removals, such as removals from the canine team, FTO, etc. Reading the agreement considering this

² The parties’ agreement states “REFERENCE #67: Employees who are assigned by the Chief as Detective will receive their base salary plus four and half percent (4.5%). For employees who have successfully completed trial service and are employed as Fish and Wildlife Detectives at the time of execution of this Amended Agreement, the assignment of Detective shall continue unless: a. There is just cause to remove the assignment...”

past practice under the contract as a whole, the employer has the better argument that the decision here was not disciplinary and therefore not grievable. This is so despite the Union's plausible argument that any reduction in pay is grievable.

Moreover, the Guild failed to establish that the true purpose of retiring Jax was disciplinary. Despite Grievant's contentions, the decision was not "out of the blue." The process of evaluating the K-9 program was a state-wide endeavor which had been going on for months. It was not limited to an evaluation of Grievant's statistics. Because of this history, Grievant knew, or should have known, that failure to increase use of the dog could result in termination of the program in his region. When he failed to deploy Jax in response to the bear incident, this was the last straw. It was foreseeable upshot of a process which had been months in the making and previously disclosed to Grievant.

For these reasons, the decision to retire Jax was not a grievable discipline. As the Department asserts, certain decisions are inherent functions of management's reserved or residual rights. Under this theory, the employer "retains unilateral authority to make decisions affecting employees, except as limited, more or less expressly, by the contract." Decisions regarding "operating the business" fall into this category, which are generally not considered mandatory subjects of bargaining. St. Antoine, Theodore, *The Common Law of the Workplace: The Views of Arbitrators* (2nd Ed. 2005) at 101-102.

Here, Department policy states that "The WDFW Canine Program exists and operates at the sole discretion of the Chief." Although Grievant was understandably upset about a decision about his dog made over his head and without his input, the decision involved the retirement of a Department asset. Analytically, this is no different than a

decision regarding other state property, which the Department owns and disposes of at will. On this record, the weight of the evidence establishes that the just cause clause did not apply to the decision at issue. This portion of the grievance must therefore be dismissed.

Guild Activity

In the alternative, the Guild contends that the retirement of Jax constituted discrimination for Guild activity, which is prohibited under the parties' CBA. On this point, the fact that the action was not disciplinary is not determinative. Rather, the question is whether the decision was an adverse action which was based upon discrimination rather than a legitimate business reason.

Here, the Guild has established a prima facie case of discrimination. First, the record supports Grievant's claim that the decision deprived him of compensation over and above his base rate. It also removed his status as a canine officer. Grievant clearly wished to continue as a K-9 officer. The dog was not ready for retirement based upon health or ability. Removing Grievant from this special assignment was predictably unwanted and disturbing, because no other handlers had their dogs retired against the handler's will while the dog was still able to work. Grievant suffered tangible economic loss. Therefore, the decision constituted an action which, if based upon union animus, could well violate the parties' agreement.

In this claim, the burden of proving protected activity is on the Guild. On this record, Grievant engaged in protected union activity by filing a grievance and working with the Guild to establish a robust defense of his actions in a recent investigation process. This protected activity was reasonably close in time to the adverse action. Accordingly, the analysis shifts

to the issue of whether management's decision was motivated in good faith by legitimate business reasons or by bias.

On this point, the Employer has provided ample evidence of a legitimate business reason for its actions. Jax's usage stats were the lowest in the state. Grievant showed ongoing resistance to using Jax for bear removal. Moreover, although Grievant disputed the statistics, his supervisor Bahrenburg confirmed that his use of the dog was on the low end. The recent event involving a bear in a residential area did not paint Grievant as eager to deploy the dog whenever possible, despite being told the program was on the line. This was the "last straw" that resulted in Jax's retirement.

In addition, the employer readily established that the decision to retire Jax was not personal or based on union activity. Captain Anderson testified that Grievant failed to improve Jax's usage record even after having reasonable notice that he was expected to do so. Anderson held both a private and group meeting with Grievant to demonstrate how important it was to increase Jax's use statistics. Grievant therefore knew, or should have known, that the program might be eliminated in Region 1 if he failed to involve Jax in activities for which he was trained, such as rousting bears from residential neighborhoods. Because Grievant did not aggressively pursue the bear incident, management took it as conclusive evidence that Grievant would not do whatever he could to increase Jax's deployments. Whether or not Grievant agreed with this judgment call, it was not based upon Union activity.

The evidence thus establishes a neutral, non-discriminatory reason for its actions. This shifted the burden of proof to the Guild, to demonstrate that the reason given was

pretextual or that the decision would not have been made absent union activity. The record does not include such rebuttal evidence. Accordingly, the Guild did not meet its high burden of proving that the decision to retire Jax was based upon by discrimination. Therefore, this portion of the grievance must also be dismissed.

AWARD

Both parties did a fine job presenting their cases. Any facts or arguments presented in documents admitted into evidence or the briefs which are not cited within this Award were found to be non-persuasive, irrelevant or immaterial.

Based upon careful consideration of the evidence and arguments of the parties, the undersigned issues the following AWARD:

The grievance is DENIED. As required by the parties' agreement, they shall share equally in the costs and expenses of the arbitrator.

Respectfully submitted,



Barbara J. Diamond, Arbiter
May 1, 2025
Portland, Oregon