OPINION AND AWARD
BEFORE
RICHARD L. AHEARN

FMCS NO. 170131-00822-6
(JASON PARKER GRIEVANCE)

Teamsters Local Union 117
Union,

and

State of Washington, Department of Corrections
Employer.

Appearances:

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OPINION

I. Introduction

Teamsters Local 117 (Union) and the State of Washington (Employer) are party to a collective bargaining agreement (CBA) that was in effect at all times material to this arbitration. Jason Parker (grievant) was employed by the Employer as a Perimeter Security Correctional Officer 2 (CO2) at the Employer's Walla Walla prison facility (the prison or facility) for approximately ten (10) years and was represented by the Union in the bargaining unit at the prison. On October 13, 2016, the Employer terminated grievant's employment for violating the Employer's expectations, ethics rules, and policies by "off duty conduct that resulted in being arrested" as well as conduct that occurred during the ensuing booking process at the Benton County jail.[1] On October 26, the Union filed a grievance (No. 86-16) over the termination, alleging that the Employer's action violated Article 8 of the CBA, that precludes discipline by the Employer "without just cause." Subsequently, on November 23, the Union filed an additional grievance (86-18) alleging that the discharge violated Article 2.6 (Non-Discrimination), Article 4.3 (Privacy and Off-Duty Conduct) and Article 8 of the CBA.

With no mutual resolution of the grievances, the Parties selected me as the arbitrator to decide the matters. On April 10, 2017, in reliance on Article 9.1 (L) of the CBA, the Union requested that the two grievances be consolidated for hearing. On April 26, 2017, the Employer submitted to me its written opposition to the Union's request. On May 8, 2017, I issued an Order granting the Union's request for consolidation of both grievances for hearing.

At the hearing held on July 10, 11, 12 and 24 in Kennewick, WA, the Parties had full opportunity to call witnesses, to make arguments and to enter documents into the record. Witnesses were sworn under oath and subject to cross-examination by the

[1] All dates herin 2016 unless otherwise indicated.

opposing Party. Both Parties stipulated that the grievance is properly before me for decision on the merits and following issuance of my Opinion to aid in the implementation of any remedy, should that be necessary. Following the close of testimony I received timely-filed, comprehensive and well written post-hearing briefs from each Party and the record closed effective September 18, 2017.

II. Statement of the Issue

At hearing the Parties stipulated to the following statement of the issue:

Did the Employer violate the CBA when it terminated the grievant?

If so, what shall be the appropriate remedy?

III. Relevant Provisions of the CBA

ARTICLE 2
UNION RECOGNITION, UNION SECURITY AND DUES DEDUCTION

2.6 Non-Discrimination

There will be no discrimination against any employee because of lawful Union membership activity or status, or non-membership activity or status.

ARTICLE 3
MANAGEMENT RIGHTS

3.1 Management Rights

It is understood and agreed that the Employer possesses the sole right and authority to operate the institutions/offices and to direct all employees, subject to the provisions of this Agreement and federal and state law. These rights include, but are not limited to the right to:

F. Discipline or discharge for just cause;

ARTICLE 4
EMPLOYEE RIGHTS

4.3 Privacy and Off-Duty Conduct

Employees retain the rights afforded to them by the Constitution of the United States and the State of Washington, as well as all of the protections of the statutes of

Washington State, which includes those regarding the right to privacy in their personal life and activities. The Employer retains all of the Employer's rights to correct or discipline an employee for off-duty conduct, which has a nexus to their employment, subject to the just cause provision in Article 8. Employees will be required to report all arrests, criminal citations, and any court-imposed sanctions or conditions that may affect their fitness for duty to their Appointing Authority or designee within twenty-four (24) hours or prior to their scheduled work shift, whichever occurs first.

ARTICLE 8
DISCIPLINE

8.1 Just Cause

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

8.2 Forms of Discipline

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

8.3 Investigation Process

A.The Employer has the authority to determine the method of conducting investigations, subject to the just cause standard.

IV. Evidence

GRIEVANT'S WORK HISTORY

As a CO2, grievant was primarily responsible for monitoring and coordinating inmate activities and movement into, out of, and within the prison. In the course of his responsibilities grievant used cameras, patrolled vehicle gates and personnel gates and moved around the perimeter to advance security. Grievant's duties required the ability to carry a firearm and to possess a driver's license, but generally involved no direct contact with inmates. Likewise, he only rarely interacted with local law enforcement.

Grievant's performance evaluations were uniformly positive, including the most recent one dated October 15, 2015, in which his supervisor described grievant's work as "of a high standard," observed that he worked "efficiently," had become a "valued asset" to the team and that he learns "very quickly." The supervisor also recommended that

grievant "should consider promotional opportunities as they become available." Further, grievant's disciplinary record was clean.

THE INCIDENTS

AT THE FESTIVAL

On May 14, grievant, accompanied by a long-time friend, Stephanie Hanson (Hanson), and several of her friends whom he had not previously met, attended the Untapped Blues and Brews Festival (Festival) at the Benton County Fairgrounds in Kennewick, Washington. The festival provides an opportunity for attendees to sample different beer and wine and to enjoy live music. According to Hanson and Sonja Steel (Steel), a friend of Hanson's, the concert was boisterous, with people dancing, bumping into each other and often spilling drinks. Hanson and Steel testified that throughout the evening grievant enjoyed himself appropriately, without drinking to excess or engaging in any disruptive behavior. According to grievant, he consumed about six beers that evening.

On the other hand, two other Festival attendees, Victoria Field (Field) and Bryce Christensen (Christensen), testified that grievant's group appeared to be rowdy and grievant appeared intoxicated. Further, at various times he was aggressively attempting to push his way through the crowd, apparently to get closer to the stage where the music was playing.[2] At one point, after Christensen explained that grievant would have to find another route to the stage, grievant left the area, but returned approximately 10 to 15 minutes later, and again attempted to push his way through. According to their testimony, grievant's actions were consistent with someone who was instigating a fight.

Matthew Wubben, another attendee who met grievant that evening through Hanson, testified that late that evening it appeared that grievant and some other unidentified individuals were involved in a heated argument. Concerned that a "scuffle" might soon

[2] Neither Christensen nor Field had met grievant prior to the evening of the Festival.

occur, Wubben and his wife moved away from the immediate area to avoid being embroiled in the apparently escalating conflict.

At approximately 10:50 p.m. that evening, an unidentified (but very tall and large) individual swung at and struck grievant in the face, causing him to land on his back and on the ground.[3] According to eyewitnesses, grievant appeared to have been knocked unconscious for at least a couple of minutes. Summoned by various Festival attendees who described a male on the ground and seeming to be unconscious, Kennewick Police Department (KPD) Officers Isaac Merkl (Merkl) and Aaron Hamel (Hamel), who were clothed in uniforms identifying each as members of the KPD, arrived promptly and observed grievant lying on the ground with his eyes open. As Merkl was receiving information from Christensen and Fields about the incident, Hamel proceeded to check on grievant.[4] According to Hamel, grievant had some blood coming out of his mouth, his eyes were open but not moving, his pulse was steady, he smelled "pretty heavily" of alcohol and was not responding to any questions. In short, grievant did not appear to be conscious. In addition, as the band was playing, it was difficult to converse. According to Hamel, before Merkl reached him, grievant gave his middle finger to a male standing near Hamel.

According to Merkl, after calling for the medics and then arriving at grievant's location, grievant gave him the middle finger. Next, as Merkl was bending over grievant to explain that the medics were on their way, grievant, although still on his back, raised his right arm and struck the right side of Merkl's jaw with his fist. According to Merkl, he was able to prevent grievant from any further attempts at striking him by grabbing grievant's right arm and rolling him over to his stomach.

[3] Grievant's assailant was never discovered.
[4] Although the evidence is in conflict on whether Merkl's conversation with Christensen and Fields occurred before or after grievant struck Merkl, I find resolution of this issue immaterial.

Although on his stomach, grievant, who was resisting restraints, was placed into handcuffs by Merkl and Hamel as he had continued to resist. With a crowd of about 50 attendees closely surrounding them and after a female concertgoer attempted to push Merkl off grievant, Hamel and KPD Officer Mikael Brakebill (Brakebill) carried grievant to a safer location. According to Merkl, grievant appeared intoxicated as he could not walk, was slurring his words and was uncooperative. Hamel corroborated the essential elements of Merkl's testimony and asserted that grievant's actions were consistent with those of a very intoxicated person. Upon being informed that he had struck a police officer, grievant repeatedly asserted that he had not. As a result of these events, the officers charged grievant with Assault in the 3rd Degree.[5]

According to grievant, he did have a few drinks at the festival, but was not intoxicated and was not causing problems. Rather, he was assaulted without provocation ("sucker punched"), falling to the ground in an unconscious state. Upon opening his blurry eyes, he felt pain on his chin, tasted blood in his mouth and was unable to hear or see anything. He next observed a dark silhouette hovering over him, but was unable to see what the person was wearing. Although Merkel and Hamel were wearing uniforms that identified them as Officers of the KPD, in grievant's confused and disoriented state and with the lack of illumination, grievant asserted that he did not recognize the clothing as a police uniform. Fearing that the individual kneeling above him was his unknown assailant who represented a further threat to his personal safety, grievant acted to protect his space by raising his arm while still on his back and striking the person (who turned out to be Merkl) in self-defense.[6] Grievant also denied "flipping" anyone off.

After being turned over on his stomach, grievant first recalled the sound of handcuffs and a statement that he was going to jail. Responding that he was a correction officer,

[5] Assault on Law Enforcement.
[6] Grievant asserted he acted in accord with the Employer's training to do whatever it takes to survive in a dangerous situation.

he asked why he would assault a police officer and denied he had done so. According to grievant, he did not understand fully what had occurred until the following evening.

THE HOSPITAL

Handcuffed to a gurney, grievant was transported to TRIOS Hospital by paramedics who assessed that grievant had ETOH intoxication and possible mild traumatic brain injury (TBI). They noticed a "heavy alcohol like odor" on grievant and further determined that he had a high level of consciousness. In the emergency room at the hospital, grievant was found to be alert and oriented to person, place and time, with an appropriate mood. After grievant invoked his constitutional right to an attorney and to remain silent, grievant was read his rights.

AT THE JAIL

KPD Officer Joshua Sullivan (Sullivan) arrived at the hospital and transported grievant to the Benton County jail (jail), during which transport grievant was cooperative and repeated that he did not do anything. Sullivan also contacted grievant's wife to inform her of his status.

According to Sgt. James Brooks (Brooks), upon grievant's arrival at the jail, he walked without assistance and was cooperative, complying with instructions for an initial pat-down search. However, upon being told to open his mouth, grievant ran his fingers through his hair, refused to open his mouth and crossed his arms. Jail staff attempted twice to turn him around to be placed in restraints, but grievant refused by standing with his arms crossed.

Grievant next began to resist further, yelling that he was "being static."[7] Turned around by two officers, grievant was directed to put his hands behind his back. However, he again refused by keeping his arms crossed and tensing his arms. Finally, put in

[7] "Static" signifies use of muscle tension to refuse an order.

restraints, grievant began hitting his head against the wall. Jail staff physically restrained grievant from hitting his head further and then placed him in a restraint chair.

According to Benton County Jail Officer Jordan Croskrey (Croskrey), when officers were restraining grievant from banging his head against the wall, he yelled he was a Corrections Officer and if they "Fucked up" he would know. In addition, grievant allegedly continued to use profanity while in the restraint chair and explained he was a Corrections Officer and that he wanted to see a "Fucking" Sargeant. The numerous statements attributed to grievant while in the restraint chair included:

"You fuckers don't know what you are doing."

"If you knew what you're doing you would be a Department of Corrections Officer."

"You are just County bitches."

"Fuck you guys, real corrections officers work in prisons."

According to officers in the jail, grievant voiced the above comments and similar remarks repeatedly and so loudly that his profanity was heard well beyond the immediate area to which he was confined. Indeed, his yelling could be heard over the telephone during a call to DOC Shift Commander Lieutenant Harmon informing him of grievant's status.

After about two hours in the restraint chair, grievant eventually calmed down and was processed into a holding cell. The following day grievant apologized for his behavior. While grievant was in jail the Union invoked Article 14 of the CBA, that addressed alcohol and substance abuse. Following his release, grievant explained to the Employer that the Union was incorrect, that he did not have an alcohol problem and that he was not invoking Article 14.

The jail now uses grievant's misconduct as a training tool for new officers on conduct they should avoid if they are ever subject to arrest.

GRIEVANT'S TESTIMONY ABOUT THE JAIL EVENTS

Grievant testified that he was confused and disoriented from the blow to his chin by the unknown assailant at the Festival. He did recall tapping his head against the wall out of frustration and being placed in a restraint chair. Although he did not recall using profanity at the jail, he admitted he "could have said F bombs." However, because he was demanding a phone call, grievant believed it was very possible he stated that he wanted to speak to a "F-ing sergeant." In particular, because he was seeking to speak to either his wife or an attorney, grievant recalled asking what the WACs or RCWs were on that issue. In any event, grievant believed that he was extremely confused at jail and that things quickly escalated. Grievant further asserted that his explanation of his status as a DOC employee was for his personal safety and security and that of the staff at the jail. Moreover, he did not understand how as a correction officer anyone would believe that he would assault a police officer on purpose.

THE CRIMINAL PROCEEDING

On May 16, grievant appeared in the District Court of Benton County and was released without bail by the Judge upon a stipulated Order of Continuance. At the hearing Judge Tanner provided his impression of the incident at the Festival:

"It sounds like you just maybe came to and… But sounds like you came to and hit the first person that was there… so that's what it looks like to me. So I don't think there was any -- there was no intent."

On December 1, grievant entered a Stipulated Order of Continuance, that will result in dismissal of the assault charge upon satisfaction of the conditions in the agreement.

THE EMPLOYER'S INVESTIGATION

Scott Svoboda (Svoboda), an Investigator in the Employer's Workplace Investigations Unit, was assigned to investigate the above incidents and to prepare a report for WSP

Superintendent Donald Holbrook (Holbrook).[8] In addition to reviewing the incident reports and other documents, Svoboda met with and took statements from nine (9) individuals, including Officers in both the KPD and the jail, as well as from grievant.

Svoboda's Report included the result of his July 6 interview of grievant, conducted in the presence of 3 union representatives, at which Svoboda shared with grievant all the evidence then in the Employer's possession, including reports and interviews. Grievant provided a 20-page response prior to the interview, as well as witness statements from certain Festival attendees.

On August 15, the Employer served on grievant a pre-disciplinary letter, followed by a pre-disciplinary meeting on August 22. Present at the meeting were the Employer's Superintendent Donald Holbrook (Holbrook), grievant, union representative Tawny Humbert (Humbert), shop steward Eric Villaro (Villaro) and Human Resource Consultants Craig Hamada (Hamada) and Alicia Phillips (Phillips). Grievant provided an additional 71-page response to the pre-discipline letter, disputing the police and correctional reports and attaching an article that purported to show disparate treatment. The audio recording from grievant's hearing with Judge Tanner was also played at the meeting.

THE TERMINATION DECISION

On October 13, based primarily on the results of Svoboda's investigation, including the documents submitted by grievant at the pre-disciplinary meeting, Holbrook by letter informed grievant that his off-duty conduct that resulted in his arrest and his subsequent behavior at the jail warranted termination. Holbrook mentioned that he had given consideration to grievant's concerns and explanations, but that he did not find them credible. Rather, Holbrook variously described grievant's behavior as "very or highly intoxicated, very drunk, and not coherent," "unacceptable and incorrigible" and "in

[8] There is no evidence that Svoboda was encouraged to reach any particular outcome.

direct conflict with the mission of the agency." He also found that grievant's lack of prior discipline did not mitigate the seriousness of his misconduct.

In concluding that grievant violated agency policies and procedures, Holbrook relied on the Employee Handbook that expresses in part employees' responsibility to:

"Be a good citizen, obey laws while on and off duty. Your conduct off-duty may reflect on your fitness for duty."

Holbrook also explained that the Core Competencies for grievant's position include:
"Ethics and Integrity -- Earns the trust, respect, and confidence of stakeholders and co-workers through consistent honesty, forthrightness, and professionalism in all interactions.... Tells the truth and is honest in all dealings. Earns the trust of others by consistently being an exemplary role model... Avoids inappropriate situations and actions which will result in and or present the appearance of impropriety. Adheres to appropriate and effective core values/beliefs and acts in accordance with those values at all times…"

Holbrook also asserted that grievant's conduct was prohibited by policy 800.10, that provides in part:

"The Department expects employees/contract staff to act with unfailing honesty, respect for human dignity and individuality, and commitment to professional and compassionate service. Employees/contract staff will maintain high professional and ethical standards at all times, in keeping with the role and responsibility to serve the people of Washington State and comply with governmental statutes and regulations."

Concluding that any lesser sanction would not reflect the seriousness with which he viewed grievant's offenses, prevent recurrence, deter others or maintain respect for the Employer's program, Holbrook determined that termination was the appropriate level of discipline.

HOLBROOK's TESTIMONY

The sole decision-maker regarding grievant's termination, Holbrook testified that grievant's credibility could be compromised at work as a result of the festival and jail incidents and noted that grievant was intoxicated that evening. In particular, Holbrook

noted that correctional officers need to be role-model citizens, and that violating laws would compromise their credibility in directing offenders who have committed felonies. Further, as public servants they are expected to obey laws and policies and to respect members of the public. In his view, engaging in unethical behavior, even off-duty, would fracture the relationship between the department and its law enforcement partners and compromise grievant's ability to perform his assigned duties.

PSYCHIATRIC REPORT

Dr. Russell Vandenbelt (Vandenbelt), a board-certified psychiatrist and a specialist in addiction medicine, was contacted by grievant's attorney regarding the criminal matter. On October 4, Vandenbelt interviewed grievant and reviewed the public records from the KPD, as well as records from the hospital. According to Dr. Vandenbelt's professional judgment, grievant was "possibly intoxicated" at the time of the May 14 assault and "had either suffered a loss of consciousness or a transient alteration of consciousness as a result of a head injury." He further concluded that the blow to grievant's jaw "possibly, if not probably, rendered him unconscious" and that "More probably than not," grievant "was cognitively incapacitated at the time he reportedly swung at an officer and was engaging in a self-defense action." Based on grievant's apparent cognitive condition, lack of understanding of his surroundings, and the darkness at the time, Vandenbelt also concluded that "More probably than not," grievant "did not realize that the individual hovering over him was a police officer." This report was first presented to the Employer at the December 8 step one grievance hearing.

As a result of a subsequent telephone contact, Vandenbelt addressed grievant's behavior at the jail by emphasizing that the likely concussion and compounding factor of the influence of alcohol would alter grievant's "perception, understanding of the

situation, and ability to formulate an appropriate behavioral response."[9] This additional report was provided to Deputy Director-Command Robert Herzog (Herzog), the appointing authority at stage one of the grievance process. Herzog reportedly gave both reports of Vandenbelt the consideration he deemed appropriate.

CO-WORKER TESTIMONY

Two Correction Officers of the Employer, Kevin Davis (Davis) and Tim McKeown (McKeown), who worked at various times with grievant, and who depend on trust among the correction officers for everyone's safety, testified that they found grievant consistently reliable and trustworthy and that despite the festival and jail incidents, they had no concerns about working with him again.

V. Parties' Positions Summarized

EMPLOYER

The Employer argues in summary:

- The Employer agrees it has the burden of proof with respect to the grievance alleging a lack of "just cause" for the termination, with preponderance of the evidence as the proper standard.
- On the other hand, the Union bears the burden of proof with respect to its allegation that the Employer violated the CBA by disciplining grievant prior to the conclusion of his criminal case.
- The investigation and reports establish that grievant was intoxicated and punched a police officer in the face on May 14 while attending the Festival.
- Following his arrest grievant refused to comply with reasonable directives from the officers at the Benton County jail and instead engaged in disorderly and defiant misconduct.

[9] In contrast to the incident with the police officers at the Festival, Dr. Vandenbelt did not review any records from the jail, but based his assessment on the verbal descriptions from grievant.

- Based on a fair and appropriate investigation, the Employer concluded that grievant's misconduct was completely beyond any level that could be considered acceptable for an employee.
- Grievant knew or should have known that engaging in such misconduct could result in discipline.
- The Union's contention that the CBA required the Employer allow grievant to remain on home assignment until the end of his criminal court case is not consistent with the CBA.
- Grievant's penalty of discharge is fair and proportionate to his gross misconduct.
- The Employer had just cause to terminate grievant's employment based on his off-duty misconduct that was in direct conflict with the interests of the Employer, thereby establishing the necessary nexus between grievant's actions and the Employer's needs.

UNION

The Union counters:

- The Employer must prove by the beyond a reasonable doubt standard that grievant engaged in the misconduct alleged and that it had just cause for the penalty of termination.
- The Employer failed to establish the necessary nexus between grievant's conduct and his employment.
- The Employer failed to demonstrate a violation of a reasonable work rule.
- The Employer failed to engage in a fair investigation.
- The punishment of termination is not reasonably related to grievant's conduct in light of all the mitigating circumstances.
- The Employer failed to treat grievant similarly to the discipline it issued to other employees who engaged in comparable or more egregious misconduct.
- The Employer lacked just cause because it violated Article 4.3.

- The Employer terminated grievant for his repeated, protected complaints about working conditions.
- The policies that grievant allegedly violated are not reasonably related to the orderly, efficient and safe operation of the Employer's business.
- The Employer failed to give full consideration to all the facts and imposed a penalty that is disproportionate to the seriousness of the alleged misconduct.
- The psychiatric testimony demonstrates that grievant suffered a concussion and more probably than not could not have formed an intent to strike a police officer.
- The Employer terminated grievant prior to the disposition of his legal proceedings in violation of Article 4.3 of the CBA, as on December 1, the District Court favorably disposed of grievant's criminal charge.
- Grievant should be reinstated and made whole.

VI. Analysis

Article 8.1 of the CBA instructs that the Employer will not "discipline any permanent employee without just cause." More specifically, Article 4.3 of the CBA recognizes the Employer's right to discipline employees for off-duty conduct that has a nexus to their employment and that satisfies the just cause standards in Article 8. One foundational tenet of the well-established standard of "just cause" is that the Employer bears the burden of proof. Although arbitrators have long recognized that "just cause" is a term of art incorporating numerous principles of arbitrable jurisprudence, the following factors generally predominate in any analysis:

- Did the Employer establish by adequate proof that the grievant committed misconduct or dereliction of duty on which the discipline was based?
- If the above is established, is the penalty imposed reasonable in light of the nature and severity of the offense and in consideration of any mitigating circumstances?

Factors influencing whether a specific level of discipline meets the "just cause" principle include the nature of the offense, clarity of rules, consistency of treatment, and the quality of the grievant's work record.

With respect to the standard of proof, I do not agree with the Union that the beyond a reasonable doubt standard, appropriate for criminal proceedings, applies here. In that regard I concur with the majority view of arbitrators, reflected in the observation that "the rules of criminal procedure are highly technical and adopted for reasons of liberty and not industrial justice." Brand and Biren, *Discipline and Discharge in Arbitration,* 432, (2nd Ed, 2012), citing *Albertsons, LLC,* 123 LA 1349 (McCurdy, 2007). Further, although the preponderance of the evidence standard, as urged by the Employer, often applies in matters involving common work rules such as attendance policies, the nature of the alleged misconduct here involves more serious allegations that were either the subject of criminal prosecution or evidence of flagrant misconduct. As such, I am persuaded that a heightened level of scrutiny is appropriate where the charges, if established, would likely damage an employee's reputation and could result in summary discharge. As the Employer's termination letter referred to grievant's arrest, and inappropriate, uncooperative and unprofessional behavior directed at law enforcement, I am persuaded that the "clear and convincing" standard is appropriate. *The Common Law of The Workplace,* 192, 2nd Ed., (St. Antoine, 2005). Ultimately however, I agree that:

> In short, the employer must supply convincing evidence that the employee committed the offense for which he was discharged. It is up to the employer to prove the employee "guilty," and not the employee who must prove himself "not guilty." *Midwest Telephone,* 66 LA 311, 314 (Witney, 1976).

In addition, I am mindful that my function as the arbitrator is not only to determine whether grievant:

> "... is guilty of wrongdoing and, if so, to confirm the employer's right to discipline where it is essential to the objective of efficiency, but also to safeguard the interests of the discharged employee by making reasonably sure that the causes for discharge were

just and equitable and as such would appeal to reasonable and fair-minded persons as warranting discharge." *Riley Stoker Corp.* 7 LA 764 (Platt, 1947).

More particularly, as analyzed below, the stringent standards for establishing just cause in the context of off-duty conduct apply here.

In a separate argument, the Union contends that Article 4.3 of the CBA prohibits the Employer from terminating grievant prior to the conclusion of his criminal proceedings. With respect to this contractual issue, the Union bears the burden of proof on a preponderance of the evidence standard.

Proof of Misconduct

The Festival

As my task requires reconciliation of various evidence and accounts to arrive at an overall understanding of what actually transpired, I ..."must determine whether and to what extent the testimony of each witness is to be believed as well as the significance of the facts educed." *HBI Automotive Glass,* 97 LA 121 (Richard, 1991).

With regard to events at the Festival, apparently unbiased witnesses, Christensen and Fields, testified that prior to the incident involving Merkl, grievant had appeared intoxicated and had been bothering numerous other attendees with his aggressive behavior, to the extent he appeared to be instigating a fight. Other witnesses, including grievant's long-time friend, Hanson, and 2 of her friends, testified that while in their presence at the Festival, grievant enjoyed some alcoholic beverages, but that his behavior nevertheless remained calm and appropriate.[10] As only Christensen and Fields were in a position to observe grievant shortly before and at the time he was knocked to the ground, and as they have no evident bias, I credit their testimony to the extent that grievant's behavior was bothersome to at least some of the attendees at

[10] Hanson and friends did not, however, observe grievant during the minutes immediately prior to the strike on his jaw from the unknown assailant.

the festival. Wubben's testimony provided further credible corroboration of grievant's aggressive actions.

Unquestionably, grievant struck Merkl without provocation. However, in analyzing whether grievant intended to strike a police officer, I am persuaded that grievant's state of intoxication or appearing intoxicated, followed by a brief period of at least altered consciousness, in combination with the loud music, boisterous crowd and dark lighting, all provide a plausible explanation that grievant's act represented a spontaneous effort at self-defense, rather than a purposeful assault against another human being.[11] I further recognize the argument that grievant was acting in self-defense is arguably supported by training he had received.[12] In any event, as grievant's criminal proceeding did not result in a finding of guilt, for purposes of my analysis, I consider grievant's actions at the festival as serious (but not criminal) misconduct, understandably embarrassing to Holbrook and the Employer.

Concerning grievant's activities at the jail, resolution of what occurred demands a credibility determination, as grievant denies much of the misconduct of which he is accused. As an aid in resolution of conflicting evidence, arbitrators frequently consider the existence or non-existence of bias, interest, or other motive that would influence a witness's testimony. Here, I am persuaded that there is no basis whatsoever to suggest that the Benton County Officers held any bias against grievant or any other motive that might reasonably cause them to fabricate or exaggerate their testimony. Indeed, there is no evidence that any of the Officers had any prior association of any sort with

[11] With respect to the observations of the officers that grievant appeared intoxicated at the Festival, they acknowledged that they did not conduct a breathalyzer and/or blood test because grievant was not operating a motor vehicle. However, based on his slurred speech, inability to walk properly and repetitive questions, he exhibited the traits of intoxication, leading them to form a reasonable conclusion that grievant appeared intoxicated.

[12] In reaching my assessment I do not consider the evaluation of Dr. Vandenbelt conclusive, but find it helpful as it confirms my assessment of the likely impact of the blow to grievant. On the other hand, I place no value on the observations of Judge Tanner, as it appears that he had very limited information about the relevant events. Finally, the conclusions at the hospital, although instructive, are also of limited value as they were intended for a limited purpose.

grievant. Stated otherwise, in order to discredit the officers, I would have to conclude that they all conspired to concoct a scenario in order to harm grievant, a conclusion for which I find no support. I also recognize that although the various officers from the jail were not consistent in their recollection, each understandably observed different portions of the events.

Further, unlike the officers, grievant is the only person with a tangible stake in the outcome of this proceeding. In addition, grievant was understandably under great stress. In that regard, although during transport to the jail and during the initial booking grievant did exhibit cooperative, lucid behavior, I find it understandable that the effects of all the events at the festival could have compromised his ability to recall subsequent events at the jail. In light of the foregoing and in the context described above, I am persuaded that the officers' composite description of grievant's wild and erratic behavior at the jail is substantially accurate.

Off-Duty Conduct

Basic Principles

A leading treatise captures the fundamental principles regarding an employer's right to discipline employees for off-duty conduct as follows:

> "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." *The Common Law of the Workplace*, supra at 181.

In order to overcome the presumption and to discipline employees for off-duty conduct, arbitrators require... "**hard evidence** of a nexus showing that the off-duty conduct adversely affected the Employer's operations or important interests." *Wyandotte Cnty.,* 131 LA 1209, 1221 (Bonney, 2013).

In analyzing whether particular evidence supports finding the required nexus, arbitrators have long and consistently required proof that at least one of the following conditions has been established:

1. The employee's conduct harmed the employer's reputation or product,
2. The conduct rendered the employee unable to perform his work duties or appear at work,
3. The conduct caused a refusal, reluctance, or inability of the employee's colleagues to work or collaborate with the grievant. *W. E. Caldwell Co.*, 28 LA 434, 436-37 (Kesselman, 1957).

In applying the above standards arbitrators recognize that a higher standard of compliance by certain public sector employees is appropriate. Elkouri & Elkouri, *How Arbitration Works,* 21-30, (7th Ed., 2012). Nevertheless, from a case involving firefighters, the same treatise observed: "It is a fundamental principle of workplace justice that an employee's private life is none of the employer's concern save in those instances where there is a **demonstrable deleterious impact** in the workplace,"...Id. at 21-32, citing *City of Quincy, Ill.*, 126 LA 534, 538 (Finkin, 2008). (emphasis supplied).

I also recognize that by incorporating in Article 4.3 of the CBA "just cause" as the requisite standard which governs the Employer's right to discipline for off-duty conduct, the Parties have acknowledged the general principles described above. Although the terms "hard evidence" and "demonstrable deleterious impact" are not mentioned in the CBA, the decided cases relied upon by the Parties as discussed below, although advisory only, offer valuable and consistent insights regarding the type and quality of evidence arbitrators routinely require to establish the requisite nexus. Moreover, one cardinal principle is that arrests (as opposed to convictions) for allegedly illegal off-duty conduct and off-duty intoxication are generally insufficient to support just cause for discharge. *Discipline and Discharge in Arbitration,* supra, Ch. 9.I.B.

Harm to the Employer's Reputation or Product

In this regard proof of such harm must be tangible and directly related to the employer's reputation or product. Media coverage, or the lack thereof, and the size of the

community are factors that are often determinative. For instance, in *In re Dakota Cty. and Human Services Supervisor's Ass'n,* 131 LA 1776 (Jacobs, 2013), grievant was a Probation Supervisor whose duties required interaction with judges, prosecutors, defense attorneys and offenders. Grievant's misconduct of aiding and abetting a drug-related crime was the subject of intense media coverage in local news outlets and even national and international news outlets. On these bases the Arbitrator found that the media stories "badly hurt the reputation" of the employer, damaged "grievant's relationship" with her coworkers and would make it difficult for her to work effectively with her co-workers. By contrast, there is not one iota of evidence here that the crowd at the festival was generally aware of grievant's employment status or that anyone beyond the officers at the jail became familiar with grievant's misconduct.[13]

Similarly, *In Re City of Fairborn*, 119 LA 754 (Cohen, 2003), involved a police officer who had been appointed to a position as a D.A.R.E. Officer. His duties would involve educating schoolchildren about the dangers of drug and alcohol abuse. Grievant was found driving while intoxicated, speeding, and nearly hitting a truck. Taking constructive notice that "media attention ...to the criminal offense of driving under the influence has been unrelenting during the past decade," the Arbitrator found that the department would lose community respect and would be ineffective if its officers could disregard laws they are commissioned to enforce. Accord, *Polk County, Iowa*, 80 LA 639 (Madden, 1983), and *Inspiration Consolidated Copper Co.*, 60 LA 173 (Gentile, 1973). Unlike these cases, grievant did not disregard any laws he is expected to enforce and there has been no media attention connecting grievant to the Employer in the public mind.

Another case cited by the Employer, *Minnesota Department of Corrections,* 130 LA 235 (Daly, Pagel, Lipman, 2011), is also informative. The grievant there pled guilty to 5 criminal misdemeanor counts, his felony false imprisonment charge was deferred and

[13] Walla Walla, WA, the community in which grievant was employed, is approximately 40 miles from Kennewick, WA, site of the Festival and the jail.

he was required to register as a predatory offender for a period of 10 years. In addition, he violated Department policy by failing to notify the department of his arrest. The charges arose from an incident in which he broke down the door of his ex-girlfriend with a hammer, terrorized and threatened the occupants, smashed windows, tampered with the brake line on one victim's vehicle and fled after learning that the police had been called. As a consequence he was denied possession of a firearm, a requirement for his position. As grievant's misconduct here is much less egregious and readily distinguishable from the scope, character and nature of the "*Minnesota"* grievant's gross misconduct, multiple guilty pleas, and resulting prohibition against carrying firearms, I must find that it provides no support for a conclusion that grievant's conduct here caused tangible harm to the Employer.

Grievant Unable to Appear at Work or Perform His Duties

In *Cuyahoga County Sheriff's Office*, 132 LA 13 (D'Eletto, 2013), grievant, a police officer, violated a work rule that specifically barred the improper use or handling of firearms while off-duty, and was dishonest in claiming she fired the weapon in a "struggle." Consequently, the department confiscated her service revolver, rendering her incapable of performing all of the essential functions of her position. Here, by contrast, grievant did not have his license to carry a firearm or his driver's license curtailed and there is no evidence that he would be unable to fulfill all the essential functions of his position.

Also*, In Re City of Fairborn*, supra, the Arbitrator further found that grievant's credibility "in participating in the criminal justice system for the purpose of obtaining a conviction of a citizen for driving under the influence has been seriously undermined." In that regard, *Maryland v. Brady* requires prosecutors to provide exculpatory evidence, including information that could impeach the credibility of an arresting police officer, to attorneys representing defendants. By contrast, grievant's duties here do not involve testifying on

behalf of a prosecution, and there is no evidence of any tangible impairment to grievant's ability to fulfill his responsibilities.

Grievant's Conduct Caused a Refusal, Reluctance or Inability to Work with Grievant
City of Quincy, supra. The necessary nexus was based upon the testimony of the husband of a co-worker with whom grievant, a fire Department Lieutenant, had a clandestine, sexually charged email exchange, where the husband testified he would be unable to work with Lieutenant. Given the small size of the department, it would be inevitable that he and the co-worker would be called upon to work together. Here, to the contrary, there is no evidence that grievant's colleagues would have any difficulty working with him. Rather, co-workers Davis and McKeown both testified to their trust in grievant and to a desire to continue working with him.

Although the above cases present disparate factual circumstances, each required evidence, not inferences, of a rational, tangible connection with at least one of the established nexus conditions. Absent such a requirement, employers would be allowed to remove individuals who engaged in conduct management considered subjectively immoral or distasteful, a stark violation of cardinal principles of just cause.

With regard to cases cited by the Union, in *Broward County Sheriff's Office*, 121 LA 1185 (Wolfson, 2005), grievant, a firefighter, engaged in a public altercation with his girlfriend in which he "savagely" beat her. Grievant pled nolo contendere to his criminal charge and was ordered to alcohol and anger-management courses. Finding that grievant's arrest and off-duty actions failed to support any of the established factors that demonstrate work-related consequences, the Arbitrator sustained the grievance and reinstated the firefighter. Similarly here, grievant's arrest and misconduct do not directly implicate any of his duties.

In *Jackson Township*, 112 LA 811 (Graham, 1999), grievant, a police officer, while playing on a softball team known as the police officers team, engaged in verbal sparring with a member of the other team, resulting in a physical melee. Although one citizen wrote a letter to the local paper complaining of grievant's behavior, the absence of evidence that any other officers were reluctant to work with grievant and the fact that the other player was the primary provocateur, led the Arbitrator to find no nexus to support the two-day suspension. Here grievant's co-workers expressly look forward to working with him and the initial catalyst for all that transpired was the sudden punch to grievant's jaw.

The crucial distinction between demonstrated, discernible evidence of nexus versus speculation or inference is illustrated in *Elyria Board of Education,* 86 LA 921 (Cohen, 1985). In that case the Arbitrator found the necessary nexus for the discharge of a high school "home counselor" upon a misdemeanor conviction for knowingly permitting her husband to use her house for the commission of a felony drug abuse offense, as her conduct was directly related to her duty to counsel students and parents on matters including substance use or abuse. The case was also publicized by the local news media.

By contrast the Arbitrator found no inconsistent treatment by the employer's continued employment of a secretary who had been convicted of shoplifting on three occasions and whose conviction appeared in the local newspaper, and by the continued employment of a teacher who had been also convicted of shoplifting. Reasoning that the general and specific job duties of a secretary and a teacher are not directly related to their misconduct, and that the employer-employee relationship had not been irrevocably damaged, the Arbitrator concluded that the employer was not inconsistent by terminating grievant from the "sensitive and intimate duties required of the home counselor."

Perhaps most comparable to this matter, in *State of Washington, Dept. of Corrections,* unpublished (Paulson, 2011), grievant, a parole officer, was responsible for overseeing the conduct of felons after their release from incarceration. He was arrested and charged with domestic violence assault. The court, on the basis of the plea negotiation, entered a dismissal with prejudice. In finding no examples of problems grievant had on the job subsequent to his arrest, no evidence that the arrest diminished the image of the agency and no evidence of notoriety, the Arbitrator sustained the grievance over the two-day suspension. Similarly, the record here contains no evidence of any notoriety or actual impact on the department's image as a result of grievant's arrest and subsequent behavior.

In analyzing the entire record here, I appreciate Holbrook's sincere and laudable desire to ensure the credibility and integrity of the Employer, both with respect to its relationship with the public, as well as with other law enforcement agencies. I also recognize that grievant's conduct at the Festival was highly problematic and that his actions at the jail were deeply offensive to the officers. However, my inquiry must be governed by application of the long-accepted standards described above to the evidence before me. In that context I am persuaded that any concerns about impact on the workplace here remain largely speculative or inchoate. In reaching my conclusion, I find:

- No evidence of any media publicity or extreme or sustained misconduct that would cause inevitable or actual damage to the Employer's reputation. Although the jail initiated a training exercise as a result of grievant's behavior, such activity is a self-contained, private matter; does not involve individuals with whom grievant has any working relationship; and does not provide the type of notoriety commonly associated with widespread public publicity. In sum, there is only surmise rather than demonstrated, discernible effect on public perception.
- No linkage between grievant's behavior and his responsibilities. For instance, unlike the person responsible for overseeing individuals who have been

convicted of DUI, and who administered breathalyzer tests as part of her duties and then herself committed DUI and refused to comply with a breathalyzer test, there is no similar connection between grievant's responsibilities as a CO2 and his misconduct. Moreover, grievant's misconduct was not nearly as egregious or sustained as others whose discharges were upheld.

- No evidence that grievant's colleagues would fail or refuse to continue to work with him. To the contrary, 2 of his colleagues testified to his reliability and of their desire to continue working with him.

In sum, although it is theoretically possible that the Employer will experience some effect as described by Holbrook, I am able to find only mere speculation that grievant's conduct could impact any of the Employer's interests. In light of the foregoing, and as presumptions and inferences are not an adequate substitute for evidence, in the absence of "hard evidence" or "demonstrable deleterious impact" on grievant's workplace, I am precluded from finding the requisite nexus to support discharge.[14]

CONCLUSION

Although the Employer at hearing and in its comprehensive brief made a strong argument in support of its position, and although Holbrook exhibited sincere concerns, based on a careful review of the exhaustive record, and for the rationale discussed above, I am compelled to conclude that the Employer has failed to present clear and convincing evidence that the discharge of grievant satisfied its "just cause" requirements under Articles 4.3 and 8.1 of the CBA. Accordingly, I will enter an Award sustaining the grievance and directing that grievant be reinstated and made whole.

[14] In light of my conclusions regarding the lack of nexus to off-duty conduct, I will not burden the record with an analysis of the Parties' vigorous arguments regarding the Union's other positions described above.

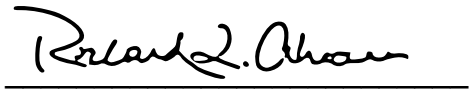
In reaching my conclusions, I addressed only those matters I deemed necessary for a proper resolution, although I did evaluate all the well-expressed arguments of the Parties, including the authorities and evidence on which they relied, even if not specifically addressed in this Opinion.

AWARD

(Parker Grievance)

1. The grievance is sustained.
2. The Employer will promptly reinstate grievant to his former or similar position, with no loss of seniority or other benefits.
3. The Employer will make grievant whole for any loss of pay and benefits.[15]
4. In accord with Article 9.6 of the CBA, the Parties will be equally responsible for the cost of the arbitration.
5. I will retain jurisdiction for the purpose of resolving any disagreements between the Parties regarding the implementation of the Remedy.

Respectfully submitted,



Richard L. Ahearn

Arbitrator

October 4, 2017

[15] Although the Union's request for interest on the backpay award contains much logic and appeal, I recognize that "in the absence of an express contract provision to the contrary, arbitrators traditionally do not award interest on backpay or other monetary awards." *The Common Law of the Workplace,* supra, at 393. As this rule has informed most arbitrators and labor relations professionals for decades, I feel compelled to follow their understandable expectations. Moreover, there is no evidence here of any exception to the general rule, such as bad faith, unjustified delay by the employer or an affirmative provision in the CBA. In light of the foregoing, I am unable to award interest in this matter.