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JUL 22 2010

Arbitration between

OFFICE OF THE ATTORNEY GENERAL
LABOR & PERSONNEL DIVISION

**Teamsters Local 117,
Grievant Marc Lemos**

FMCS No. 09-729-03586-8

Opinion and Award

Arbitrator Richard W. Croll

v.

July 19, 2010

Washington State

Department of Corrections

PROCEEDINGS

Teamsters Local Union No. 117 (Union) and the State of Washington Department of Corrections (DOC, Employer) are parties to a Collective Bargaining Agreement dated July 1, 2007 through June 30, 2009 (Agreement / Joint #1). The Parties have processed a grievance under the terms of the above Agreement as it relates to the suspension of Correctional Officer Marc Lemos (Grievant). The parties were unable to resolve the grievance through the grievance procedure and they requested a list of arbitrators from the Federal Mediation and Conciliation Service (FMCS). The parties then selected Arbitrator Richard W. Croll from the panel provided by the FMCS to hear this case. The parties stipulated that the case is properly before the Arbitrator for him to make a final and binding decision and award under the terms of the parties Agreement and the rules of the FMCS.

A hearing was held before the Arbitrator on March 31, 2010 at the Monroe Correctional Complex (MCC), Monroe, Washington. A written

record of this hearing was prepared by Vicky L. Pinson RPR-CSR, and copies were sent to the Union, the Employer and the Arbitrator.¹ The parties were provided a full opportunity to present testimony, evidence and argument to the Arbitrator. The Parties decided to send written argument to the Arbitrator on May 25, 2010 and the Arbitrator closed the hearing with the receipt of the written arguments on that date. The Arbitrator has sixty days from the close of the Hearing to mail his written award to the parties.

APPEARANCES

Union:

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Employer:

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ISSUE

The parties stipulated that the issue is whether the Employer had just cause to suspend the Grievant, Marc Lemos, for five days; and, if not, what is the appropriate remedy?

¹ The witnesses' names and the exhibits are found in the transcript.

PERTINENT CONTRACT LANGUAGE AND POLICIES

Agreement

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 reprimand, reductions in pay, suspensions, demotions and discharges.

Personnel Policy Summary – Updated 11/25/09

Policy 850.125 – Workplace Violence

Policy P. 2

I The Department is committed to providing a safe and secure working environment for all staff, interns, volunteers and contractors. Workplace violence will not be tolerated, including, but not limited to, any verbal assault, threatening behavior, or physical assaults occurring in or arising from the workplace. This includes any threats or actions that occur in the workplace as a result of domestic disputes, domestic violence, sexual assault, and or stalking.

II Disciplinary Action P. 4

Any staff who misuses state resources (e.g. work time, telephone, fax machines, mail, e-mail, etc.) to threaten, harass or **commit an act of violence in the workplace**, or while conducting state business, **may be subject to corrective or disciplinary action, up to and including dismissal.**²

Department Handbook – December, 2008

Department Expectations

As an employee of the Department of Corrections, **you will be expected to:**

- Treat fellow staff with dignity and respect.

² Emphasis added. The Grievant agreed that he had kicked Officer Willis, and he testified that his actions were inappropriate in the presence of Offenders.

It is also important as a new employee that you understand some of the specific prohibitions that the Department must enforce. You are not allowed to:

- * Use profanity or inflammatory remarks with offenders or individuals with whom you work.

800.010 Ethics

- * Engage in verbal assaults, threatening behavior, or physical assaults against staff, offenders, or the public.

BACKGROUND

The factual background for this dispute is not in question. The incident involved both physical and verbal contact between two correctional officers employed at the Monroe Correctional Complex (MCC). The setting for the incident which triggered the grievance is the Special Offenders Unit (SOU)³; the infirmary at the MCC. There is a front section to the infirmary and a back section. The Grievant and Robert Wills, the other person involved in the incident are both Correctional Officer in the SOU. The Grievant was stationed in the front section of the infirmary and Officer Wills was working in the back section. The incident occurred on January 13, 2009 in the front portion of the infirmary where the Grievant was sitting on a stool monitoring prisoners. At the time of the incident there were about four other people who were with the Grievant including a prisoner. (Tr., P.80)

When Officer Wills approached the front area of the infirmary, the Grievant said, "Oh here comes the head honcho of the infirmary." (Tr.,

³ It was agreed that the SOU is a very stressful assignment. The prisoners not only have committed crime(s) but they have serious mental health issues.

PP.81-82) It was at this point that Officer Wills walked over to the Grievant, grabbed his thumb and twisted it in a downward motion. The Grievant expressed his feeling of pain, and repeatedly requested his thumb be released. Also, at this time the Grievant, to keep from falling off the stool, grabbed and held onto Officer Will's pant pocket. (Tr., P.82) The Grievant related that Officer Wills released his thumb and went into the food staging area, a nearby location, and the Grievant followed him into that area. The Grievant came up behind Officer Wills and using his foot made physical contact with Officer Will's leg; the Grievant said he "kick the side of his shin".(Emp. 2, Att. E)⁴ Officer Wills then turned and threw a glass of water on the Grievant. Officer Norton placed his body between the two Officers. The Grievant then returned to his stool in the infirmary. Officer Wills came into the area where the Grievant was sitting on the stool, made a fist and pushed it into the Grievants face⁵ and said, "Don't ever kick me again." (Tr., P.83) The Grievant testified that at this point he called Sgt. Packwod⁶ and reported the incident.

Following an investigation, the Warden suspended without pay the Grievant for five (5) days and Officer Wills for fifteen (15) days.

⁴ The transcript relates a somewhat different story. The Grievant testified that after Officer Wills released him and left, he did not know where he went. The Grievant testified that he went into the food staging area to put water on his thumb. (Tr., P.91)

⁵ There was little or no force with this action, apparently more of a threat.

⁶ Sgt. Packwood was the Grievants supervisor.

DISCUSSION AND OPINION

The basic facts of the incident which took place in the SOU, MCC on January 13, 2009 are not disputed. The Union in their written argument discussed proof, burden of proof and connecting proof to appropriate discipline. This was unnecessary as there was no question as to whether the Grievant committed the violations of policy, procedure and contract. The Grievant on January 20, 2009 gave John Holman, the Superintendent's appointed investigator, an interview detailing his recollection of the facts of the incident. Additionally, the Grievant wrote the Superintendent a letter on February 13, 2009 apologizing to him and further the Grievant said he would "take full responsibility for my actions". (Emp. #4) The Superintendent testified that he considered the statements made by the Grievant to be truthful and sincere. While at different times the Grievant changed his recollection of events, most of his recollections were consistent. As the facts are basically undisputed, the only issue is the level of discipline imposed upon the Grievant for his role in the altercation with Correctional Officer Wills.

Inappropriate behavior by staff in the presence of offenders:

At least one offender and perhaps more were able to see the initial physical contact between the Grievant and Officer Wills. Lieutenant Richards⁷ and Superintendent Frakes both referenced offenders being present and witnessing the incident as a serious concern to them while deciding the question of the Officers' discipline. Lieutenant Richards

⁷ Lieutenant Richards is the Correctional Lieutenant for whom the Grievant works and he was called to testify at the Hearing.

testified that the behavior of the Grievant and Officer Wills was not appropriate in front of Offenders. He went on to relate that Officers should set an example for the Offenders of,

...“respectful treatment.” Prison riots start out with two offenders striking, hitting each other. It’s a dangerous situation to get into. We have infractions that prohibit even horseplay of inmates where they’re touching each other because of this reason.” (Tr., P. 29)

Regarding this same topic Superintendent Frakes testified:

Q. “Why is behavior as exhibited by Officer Lemos particularly concerning in a prison setting?”

A. Well, we want staff, we need staff to model the best of behavior.”
(Tr., P. 46)

Superintendent Frakes continued:

“And in the setting at SOU, you have an additional layer. You’re dealing with mentally ill offenders...A very fragile population.

It’s also a population that can be very spontaneous in their actions, can be very violent in their actions. And so when they see staff acting out of the norm, acting out of what should be their baseline of professional behavior day in and day out, it has a significant impact on them.” (Tr., Pp. 47-48)

The Grievant while responding to the State about why it is so serious a concern for the staff to demonstrate the type of behavior he and Officer Wills engaged in while Offenders were present said:

“Well, because, you know, you don’t want, like it’s an example, you know what I mean? We’re setting an example, you know. And that time, that one time that, you know, with the Jones incident that I got a Letter of Reprimand, that was strictly because we were so, I mean,

it got to the point where we couldn't handle it anymore. It was like 30 minutes of fighting with this guy. And he was, you know, and my remarks were inappropriate." (Tr., p. 92)

We not only have the Union, the Grievant and the Employer agreeing on the facts of the incident, we now have the Supervisor, the Superintendent and the Grievant testifying that the behavior of the Grievant in the presence of an Offender was inappropriate. In addition to this incident, the Grievant testified his receipt of an earlier discipline, a Letter of Reprimand, was basically for the same reason, inappropriate behavior in the presence of Offenders. (Tr., P. 92)

One of the factors substantiating an Employer's discipline for just cause is the question of progressive discipline. The rationale for progressive discipline is to insure that the employee is thoroughly alerted that the behavior for which he was disciplined was inappropriate and the employee would be disciplined, perhaps more severely, if the same or similar behavior was engaged in again. There is no doubt that progressive discipline was applied to the Grievant in regard to this incident, i.e., his previous discipline was for similar inappropriate behavior.

DOC Policies violated by the Grievant:

There are some employee infractions and behaviors that are so egregious, not only is progressive discipline not required, but the employee's behavior in a single incident on an otherwise good employee record can justify discipline without following all of the tenants of just cause. Among these infractions violence in the workplace is one⁸. This would be particularly

⁸ As noted above the Arbitrator determined that the Employer had provided progressive discipline even though the incident was of such a nature that it did not require progressive discipline.

true in the current situation where the Grievant's own testimony and written accounts admit to violating the Department's policies. The Grievant also agreed by his signature he had received the DOC Handbook and would familiarize himself with the policies it contained. (Emp. 1, Att. 2) Contained in the Handbook is the following:

- *"Treat fellow staff with dignity and respect.*
- *Conduct yourself and perform your duties safely;"* (Jt. 2, P. 15)
- *"You are not allowed to: Engage in verbal assaults, threatening behavior or physical assaults against staff, offenders or the public."* (Jt.2, PP. 15-16)

DOC Policy 850.125 references Workplace Violence:

POLICY:

The Department is committed to providing a safe and secure working environment for all staff, interns, volunteers and contractors. Workplace violence will not be tolerated, including, but not limited to, any verbal assault, threatening behavior, or physical assaults occurring in or arising from the workplace. (Jt. 3)

Additionally, the Grievant testified that he had received a Letter of Reprimand in the past for actions similar to those in the current incident between Officer Wills and himself.

The Superintendent was repeatedly pressed by Union Counsel to agree that the Grievant's culpability in the incident was significantly less than that of Officer Willis. If one was to use a tote board, we might see - Officer Wills' 1) finger bent, 2) throwing water, 3) punch in face; Grievant 1) kick on leg. At this point it could be 3 to 1. In the event one was to follow this logic, a degree of seriousness could be applied to each separate event; this of course is nonsense. The Superintendent denied quantifying each officer's

role as the basis of the disparity for their suspensions, the Grievant a 5 day suspension and Officer Willis a 15 day suspension. The task for the Arbitrator is not to determine if the Superintendent's suspension of Wills was appropriate, but to determine if the five (5) day suspension of the Grievant is appropriate under the terms of the Agreement and the circumstance of his admitted misbehavior. Again, the Grievant did not contest the facts surrounding the incident in the SOU, MCC. Therefore the job for the Superintendent was to determine what discipline was appropriate, in his judgment, for the Grievant's role in the incident. The Superintendent said he took into consideration the following factors in determining the Grievant's discipline.

"In determining the appropriate level of discipline, I considered the information available to me, including the allegations against you, your response, and your employment with the DOC. I reviewed your complete work history including your personnel file⁹ and you have been a Correctional Officer for 13 years. During your pre-disciplinary meeting on February 13, 2009, you admitted you kicked Officer Wills in the side of his shin and at a later time the same day grabbed his pants pocket." (Emp. # 1, p.3)

The Superintendent testified that the degree of physical contact by the Grievant was less than that of Officer Wills, but the culpability of the Grievant was not less than Officer Wills. (Tr., PP. 63-64) The Superintendent testified that when an officer being disciplined accepts responsibility for his actions, he takes this into consideration when

⁹ The Grievant's file contained two disciplinary letters, 1) a counseling letter about not reporting for overtime and 2) a Letter of Reprimand about an incident with an Offender citing "inappropriate and unprofessional comment", a discipline which the Grievant likened to the current incident. Additionally there were several certificates and letters of commendation in the Grievant's file (Un. 1).

determining the appropriate discipline. The Grievant cooperated with the Superintendent and Investigator Holman; he was very open and forthcoming following the incident. The Superintendent also took into consideration the positive letters and comments found in the Grievant's records and following a thoughtful investigation he determined that the appropriate level of discipline was a 5 day suspension.

Did the Superintendent have just cause for the discipline?

The issue here is whether or not to reduce the Superintendent's discipline of the Grievant; this is a question which arbitrators find very vexing. It is obvious that if Arbitrators were unable to modify an Employer's disciplinary decisions, arbitration would be useless. The very heart of arbitration in disciplinary cases is based on the fundamental concept that the employer has made a decision, the employee and/or the union believes the decision is unfair and both the union and the employer are asking a third part neutral to decide fairness or unfairness of the employer's decision. Arbitrators often articulate that where the employee is found to have violated a rule or contract provision and the employer has acted fairly and consistently in his penalty, an arbitrator should not disturb it. Arbitrator Whitley McCoy wrote:

The only circumstance under which a penalty imposed by management can be rightfully set aside by an arbitrator are those where discrimination, unfairness, or capricious and arbitrary action are proved – in other words, where there has been abuse of discretion.¹⁰

¹⁰ Stockham Pipe Fittings Co., 1 LA 160, 162 (1945)

For the Arbitrator to ascertain the Employer's disciplinary decision was for just cause, several factors must be taken into consideration and applied to the instant case: 1) Was the Grievant aware his behavior was inappropriate? *The Grievant was well aware that his behavior was inappropriate through the written policies of the Employer, the Grievant's previous Letter of Reprimand and by his own admission.* 2) Were the policies appropriate? *The Grievant testified that the policies he violated were appropriate policies and should not have been violated.* 3) Was there any question the Grievant was guilty of the charges against him? *The Grievant admitted his violation of the DOC policies, both in a letter to the Superintendent and in his testimony.* 4) Was the Grievant extended due process? *The Grievant was offered an opportunity to meet with the Superintendent prior to the Superintendent determining his guilt and his discipline.* 5) Was the discipline the Superintendent meted out reasonably related to the seriousness of the Grievant's offences and his record? *The Superintendent disciplined both of the Officers for this incident. The Union argued that the Grievant's role was so much less than Officer Wills; he should not receive a 5 day suspension. The Union agrees that the Grievant violated policies and he might deserve some other lesser form of discipline. However, the Grievant was on notice through written policies and his previous discipline, the Letter of Reprimand; that violation of those policies could result in discipline up to and including termination. It is uncontested that the Grievant's policy violation was extremely serious. The Superintendent, the Lieutenant and the Grievant all testified that the incident could have triggered that very "fragile population" in the SOU to violence. The Superintendent testified that his job was to keep everyone in the prison safe; the Grievant's action threatened that safety.*

Could the Grievant have done anything to avoid further confrontation with Officer Wills following the finger bending incident? *The Grievant could have immediately gone to his Sergeant and reported the incident, an action he was to take shortly after two more confrontations between himself and Officer Wills. Instead, he followed Wills and kicked him. If the Grievant had gone to his supervisor at the time Officer Wills left the area, according to the investigative reports that supported the Grievant's version of events, he would not have instigated any physical contact and the only thing which he had done was to comment¹¹ about Officer's Will's entry into the area.*

Employee conflict, fighting and horseplay:

All of the major players in this dispute: The Union Members, the Command Officers and the Superintendent work in the MCC. They are the experts in providing safety to not only the Offenders but the staff, volunteers and the community. It was admitted by all of the experts who testified that their actions or inactions set the stage for the behaviors of the Offenders. Other than news media reports very little information is provided to the public on the day to day operation of our correctional system. The atmosphere in our correctional system appears to be pacific at this point in time. It is obvious that the method of operation of the correctional facilities has a lot to do with this peaceful period; credit must be shared with all who are involved in the operation of the correctional facilities. All witnesses testified that the policies which the Grievant violated are important in the functioning of an institution such as MCC.

¹¹ The Superintendent, under cross examination, admitted that the statement (the Superintendent offered two versions of the statement) made by the Grievant as Officer Wills entered the area was not profanity as was the case in the Grievant's Letter of Reprimand. (Tr. P.64)

The list of offenses for which an employee can be disciplined has been negotiated into the labor agreement and also in the Employer's policies. An exceedingly serious employee infraction is what we have in the instant case; open physical conflict between two correctional officers. The seriousness of this conflict was exacerbated by occurring in the presence of offenders; not just any offenders, but offenders in the SOU. Both Lieutenant Richards and Superintendent Frakes testified without objection that incidents such as this incident could have triggered a serious situation in the MCC. The Grievant agreed with the analogy provided by his superiors, he agreed that his actions were inappropriate. The Arbitrator has taken into consideration that all parties agreed that the incident could have caused a major disruption within the MCC. The penalty for this offense could have been termination. Instead the Superintendent chose to follow a lesser penalty, suspension for both correctional officers.

Mitigation:

Effectively, the Grievant has requested the Arbitrator mitigate the disciplinary decision of the Superintendent, to reverse or reduce the suspension and if days suspended are reduced to make the Grievant whole. In this instance, the Superintendent has already applied mitigation for the Grievant's offences. The Superintendent sent a letter to the Grievant concerning the investigation of the incident on February 7, 2009 and he wrote he was "considering taking disciplinary action up to and including discharge." (Emp. 1, Att. 1, P. 1) The Superintendent clearly believed that the Grievant's offence was so serious that he considered it justified invoking the most severe employment penalty, discharge. The Superintendent disciplined both the Grievant and Officer Wills. The disparity in the

discipline of the two officers indicates he felt that Officer Wills was more at fault than the Grievant. While the Superintendent resisted quantifying the penalties, he stated during his testimony that when an officer owned up to a violation, he would take that into consideration in determining the officer's level of discipline. It was apparent during the Hearing that the Grievant owned up to his infractions while Officer Wills was characterized as being less open. The record clearly establishes that the Superintendent had just cause to discipline the Grievant; likewise nothing on the record clearly demonstrates that the Grievant's discipline was inappropriate and should be reduced by the Arbitrator. Had the Superintendent taken the position that both Corrections Officers were equally guilty, and then to have given them the same discipline could have led to a different result. However, the Superintendent testified that both men were culpable; his assessment of culpability was not so much as to the physical actions, but that the Officers were demonstrating very inappropriate behavior in front of Offenders. The Superintendent testified that their behavior might have led to serious consequences.¹² At the same time the Superintendent assessed differing penalties, taking into consideration that the Grievant and Officer Wills had differing levels of involvement in the incident, and further the Grievant readily reported the incident and took full responsibility for his role.

Conclusion:

The award the Grievant is seeking; to have his discipline reduced or eliminated is not supported either on the record, in the Agreement or past

¹² In his testimony the Grievant agreed with the Superintendent's assessment of the damage that could have occurred.

practice. There was no evidence offered that would indicate the discipline was in any way inappropriate or excessive. In point of fact the Union's major argument was that the Grievant threw himself on the mercy of the Superintendent; and because he was forthcoming and helpful in the Superintendent's investigation of the incident he should therefore have a lesser penalty. It is apparent that the Superintendent took these factors into consideration when he levied the Grievant's discipline.

AWARD

The decision of the Superintendent to suspend the Grievant for five (5) days is sustained. The grievance is denied.

Richard W. Croll

Richard W. Croll, Arbitrator

July 20, 2010
Date