

the Matter of the Arbitration between

Washington State Department Of Corrections

and

Jerri Bos Termination
FMCS #100708-04074-B

Teamsters Local Union 117

Introduction

Teamsters Local Union 117 (Union) was represented by Daniel Swedlow, Esq.
Washington State Department of Corrections (Department) was represented by Robert McKenna,
Attorney General and Don Anderson, Assistant Attorney General. A hearing was held on January
10, 2011 in Tumwater, Washington. The parties submitted briefs in lieu of closing argument.

The Issue

The parties stipulated to the following issue:

1. Was the termination of Ms. Bos for just cause?
2. If not, what shall be the remedy?

Background

Jerri Bos, the Grievant, began her employment with the Department of Corrections in 1998 as a Correctional Officer 1 at the Clallam Bay Corrections Center (CBCC). She was promoted to a Correctional Officer 2 position.

A series of events occurred on July 15, 2009 which led to her termination. That morning, she began work at her normal start time of 5:45 a.m.. At some point, her immediate supervisor, Sergeant Paul Aguilar gave her fitness for duty forms from Superintendent Fraker. The Department was requesting that her physician fill out information regarding her fitness for duty given a number of absences due to her illnesses. At that point, she was approved for FMLA due to her daughter's illness. She noticed that the fitness for duty forms she had just received were due back on July 7 and were already late. She started to get upset over the letter's delay and the issue of personal sick time versus family use of FMLA.

On her morning break, at about 8:00 am, she went to the Human Resource office to examine her employee health records file. She discovered the letter that directed her to provide her medical information. She spoke with Jennifer White, Human Resource Assistant, about the alleged excessive use of sick leave issue. Gina Maines (now Monger) the Human Resource Manager, came out of her office and asked her some questions. Ms. Bos became agitated and angry about being asked to provide information in relations to her sick leave usage. The two conversed about the sick leave usage for approximately five minutes. According to both Ms. Maines and Ms. White, Ms. Maines spoke to the Grievant in a calm and professional manner (Tr. at 21). They testified that the Grievant was irritated and stated that she refused to bring in the paperwork three times (Tr. at 21) Ms. Maines described the Grievant as agitated, real agitated

and becoming angry (Tr. At 32). In contrast, the Grievant testified that the conversation was heated with both sides yelling at each other (Tr. at 169).

The Grievant returned to her work area. According to the Grievant she was crying and shaking from her interaction with Ms. Maines. She told her supervisor Sgt. Aguilar that she was upset and unable to calm down. She testified that she then told him that she felt like punching Ms. Maines and that she did not know why she was so upset (Tr. at 171-2). She then went to call the Counselor Tricia Burks¹ from the Staff Resource Center so she could go and talk to her about the matter.

According to Sgt. Aguilar, the Grievant told him she was suffering from work related stress caused by being required to provide a physician's note requested by HR. He observed that she was angry, irritated and pretty upset about the paperwork (Tr. at 45). He made no mention of her crying. Unlike the Grievant's testimony, Sgt. Aguilar testified that the Grievant did not say she wished to punch Ms. Maines until after she returned from seeing Ms. Burks later that morning.

The Grievant then went to see Ms. Burks at her office in the Staff Resource Center off site at about 11:00 a.m.. Ms. Burks reviewed the consent and disclosure form. The Grievant was aware that Ms. Burks was a mandated reporter. Ms. Burks testified that the Grievant was very angry then tearful and then very angry again throughout the entire therapy session (Tr. at 71-2). She never calmed down. Ms. Burks said that the Grievant told her she "was very close to punching her (Maines) in the face but was able to walk away" (Tr. at 73). The Grievant then said, "If she gets near to me or says something to me, I will kick her ass." (Tr. at 73). Near the end of

¹ Ms. Burks name in the record is spelled two ways Burks and Burkes.

the seventy five-minute session, Ms. Burkes attempted to determine whether she needed to break confidentiality by asking the Grievant questions. The Grievant stated, “I may not do it up the hill, but if I see her down the hill I’ll kick her ass.” (Tr. at 74).

On the other hand, the Grievant testified that she said she was not going to hurt anyone but that if Ms. Maines got in her space, she would defend herself (Tr. at 174). The Grievant stated at hearing that she told Ms. Burks what she wanted to do, not what she intended to do.

The Grievant returned to her work area and spoke with Sgt. Aguilar. She testified that she told him what happened at the counselor. He testified that she was still pretty wound up and told him that she would punch Monger (Maines) in the face if she got in her personal space. Sgt. Aguilar reported:

As indicated in my report I cringed and I asked her, I said, ‘What?’ She said. ‘Yeah, I told her [Monger], if she got in my personal space, I would knock her on her ass,’ at which point I was kind of floored. So I said, ‘You did not say that?’ She replied, ‘Yes, and if I see her off the hill away from the facility, I’ll beat her ass.’ (Tr. at 48)

Sgt. Aguilar testified that he would have been obligated to make a written report documenting the Grievant’s threats if he had not been escorting her elsewhere. He took the threats seriously.

In the mean time, Ms. Burks was speaking with her more senior co-workers about what had transpired. She believed that she was obligated to report the threats to Ms. Maines and the Superintendent. They confirmed that she was obligated to break confidentiality and report the threats to Ms. Maines, the Superintendent and to the Clallam County Sheriff. The Correctional Program Manager directed Sgt. Aguilar to escort the Grievant to a meeting in the Superintendent’s conference room. Sgt. Aguilar reported that the Grievant was still pretty wound up. At the meeting, the Grievant was assigned to home with full pay pending a workplace

investigation. She was specifically told not to go down to the counselor's office.

Sgt. Aguilar was assigned to escort the Grievant off the grounds. He testified that the Grievant was ranting and raving loudly. Officer Faye Nicholas, who was leaving work at the time, testified that the Grievant was a lunatic. She overheard the Grievant say, "I'll kill her. Now I can do what I have always wanted to do" (Tr. at 93-4). She explained that the Grievant was enraged and was not venting.

The Grievant was informed a second time on her way out (this time by her supervisor) not to go to Ms. Burks' office. However, the Grievant immediately went to Ms. Burks' office. Ms. Burks saw the Grievant coming and was concerned about her own safety. She made a point of making sure she was in an area with an exit and where another employee was present. Ms. Burks considered the Grievant to be a real threat to Ms. Maines and did not believe the Grievant was just venting (Tr. at 81). After a brief discussion the Grievant left.

The Department conducted an investigation into the alleged workplace misconduct. Assistant Superintendent Obenland submitted his fact finding report on September 14, 2009. He interviewed the Grievant in the course of his investigation. He explained that the Grievant did not express any remorse over her threats and still insisted that she had the right to strike Ms. Maines if she got in her space. After receiving the report, Superintendent Fraker convened a predisciplinary hearing. The Grievant attended with Union representation.

On December 7, 2009, Superintendent Fraker decided to dismiss the Grievant from her position for threatening to physically assault Ms. Maines during conversations with Ms. Burks and Sgt. Aguilar. Those threats were in violation of the Department Expectations as outlined in the DOC Employees Handbook and the DOC Workplace Violence Policy.

Position of the Department

The Department contends that it had just cause to dismiss the Grievant for threatening to assault Ms. Maines. The Grievant's actions violated the Department's Workplace Violence Policy as well as the Department Expectations. The Department has established the just cause by clear and convincing evidence.

The Department contends that the Grievant was not a reliable witness. Her version of the events is not believable. Further, her story is contradicted by many Department witnesses including Ms. Burks, Sgt. Aguilar, Ms. Nicholas, Ms. White and Ms. Maines. The Grievant's argument that she was only "venting" is not believable and it was incredible. Three witnesses directly contradicted her testimony that she was only venting. Those witnesses were reliable, disinterested individuals who had no motive to lie. On the other hand, the Grievant's testimony was self serving.

The Department asserts that the Grievant's misconduct violates the DOC's Employee Handbook and Workplace Violence Policy. Threats are clearly prohibited in the workplace. Those credible threats constituted just cause under the contract to terminate the Grievant.

The Department maintains that the Union has failed to establish any relevant mitigating factors that would override the seriousness of the charges. The Grievant's behavior was so extreme that termination was appropriate. She failed to express any remorse and did not understand the error in her ways. Her testimony was simply not truthful. The seriousness of the misconduct requires the degree of discipline imposed here. Simply put violence cannot be tolerated in the workplace.

Position of the Union

The Union contends that the Employer bears the burden of proof in a disciplinary case. It must show that it had just cause to terminate the Grievant's employment by compelling evidence. The Employer has failed to meet its burden. It has not shown that the Grievant threatened Ms. Maines. The Grievant did not communicate any threats to Ms. Monger directly. Nor did the Grievant make any threats about Ms. Monger to anyone. She merely vented her frustration in a confidential therapy session. She spoke to her immediate supervisor and a mental health counselor about her feelings in order to obtain help. Again she was only venting her feelings. She consistently took that position throughout the disciplinary process.

Even if she is found to have made a threat, any threat was made in the course of seeking mental health treatment. Arbitrators have overturned discharges for more serious threats made to mental health professionals. By looking for help, the Grievant showed that she did not want anything to come from her anger and rage. In addition, the Grievant made the statement to a third party and did not communicate the threat directly to Ms. Maines. A distinction must be drawn between a direct and an indirect threat. In *Save Mart Supermarkets*, 126 LA 1018 (Riker, 2009) and in *Phillip Morris USA* 109 La 299 (Wahl, 1997) the arbitrators reinstated the Grievants where they made the statements in the context of seeking mental health treatment, the threats were indirect and they were thereafter cleared to return to work.

In addition, Union avers that the Department did not apply discipline evenhandedly. Just cause requires that all employees be treated in a similar manner. The Union presented several instances where employees made threats and were given a suspension in lieu of termination. One employee who will be referred to as W received a four-day suspension for a credible threat. Another employee received a letter of reprimand for offering to fight his coworker off the hill (or

off Department property). The Grievant also testified that officers fight on and off the hill without losing their jobs.

In another case, employee S was given a thirty-day suspension for threatening to kill another staff member while on the phone with a plant manager. His suspension was based on other matters as well including yelling and cursing at other staff members. The Department failed to show that there was any significant difference in the fact patterns of these two cases and those facts in the Grievant's case, yet she was terminated which was unjust and disparate treatment.

The Union alleges that Department failed to consider mitigating circumstances when it imposed the termination penalty. The Grievant has eleven years of unblemished service. It would be inconsistent with just cause for the Department to ignore her record of service. Another mitigating factor of note is that the Grievant stopped her argument with Ms. Maines before it got physical and walked away. The Grievant did not make any threats or gestures directly to Ms. Maines. She immediately sought treatment for her anger as well. She expressed her anger in the therapy session and was merely venting. The Grievant was dealing with significant medical issues for herself and her two daughters. Both of her daughters were dealing with a hereditary form of bone cancer and the younger was dealing with what turned out to be celiac disease. Her older daughter returned home from the military with 37 stress fractures and was unable to care for herself. She was eventually diagnosed with cancer shortly after the Grievant was placed on administrative leave. The Grievant had previously suffered a mini stroke in conjunction with an undiagnosed ear infection. In addition, the Grievant had been prescribed several new

prescriptions several days before this incident.² In retrospect she felt that the medications were making her “bitchy,” unusually aggressive and unable to calm down. She testified that on the day of the incident she could not calm down. The Department should have considered all of these factors and mitigated the penalty to something less than termination

Opinion

The Department must establish by clear and convincing evidence that it had just cause to terminate the Grievant’s employment. The Department’s first obligation is to establish the facts underlying the charges.

² She had been taking an antidepressant, diet pills, allergy pills, hormone and bladder pills and used an inhaler to address mold at the DOC facility. She was given a prescription for sleeping pills and an antidepressant enhancer several days before the incident. In addition she testified that she found it difficult to wake up in the morning with the sleeping pills so she began taking three or four shots of tequila at night to help her sleep.

In a case like this one, where statements from witnesses are contradictory, it is necessary to make credibility determinations. At the beginning of the day in question, the Grievant's statements about what occurred in the Human Resources office conflicted with the statements from Ms. Maines and Ms. White. The Grievant insisted that Ms. Maines was yelling at her. The other two witnesses testified that Ms. Maines did not raise her voice. I note this discrepancy. The Grievant testified that she never verbally threatened to harm Ms. Maines³. Her statements were directly contradicted at hearing by three witnesses: Ms. Burks, Sgt. Aguilar and Ms. Nicholas. If I found the Grievant credible, I would have to discount the testimony of a total of five witnesses: Ms. Maines, Ms. White, Ms. Burks, Sgt. Aguilar and Ms. Nicholas. Those five witness were unbiased and had no motive to fabricate testimony. Put a different way, I would have to say those five witnessed were not believable which I am not inclined to do in order to find the Grievant 's testimony believable. Further, three witnesses testified that the Grievant was enraged, very angry and basically out of control. I do not believe that the Grievant had the ability to assess her own conduct. Ms. Nicholas referred to her as a lunatic. Given the condition the Grievant was in, I question the reliability of her memory and her ability to assess her own demeanor. The Grievant was simply out of control and in an agitated state which calls into question the reliability of her memory. In sum, given that the Grievant cannot be considered an unbiased witness, that her statements were contradicted by five unbiased witnesses, and that she was in an agitated state, I find her statements unreliable. I credit the testimony provided by the five witnesses. Their testimony was reliable, not self serving and consistent throughout the

³ The Grievant did not communicate the alleged threats to Ms. Maines directly. The alleged statements were told to other employees.

process.

Turning now to the facts in this case, three witnesses testified that the Grievant threatened to harm Ms. Maines. During the counseling session, Ms. Burks was not agitated. However, the Grievant clearly was even after a period of seventy-five minutes. After the counseling session ended, Ms. Burks stepped back from the situation and sought clarification from more experienced counselors as to whether she was obligated to report the Grievant's statements. They confirmed that she had that obligation. Ms. Burks did not consider the Grievant's statements as venting. She took them as threats and took them very seriously.

Approximately two hours after the Grievant had the confrontation with Ms. Maines, she was still agitated. At that point, she again repeated her threat about harming Ms. Maines to Sgt. Aguilar. He was surprised and taken aback by her statement. He did not consider her threat to be venting either. At that point several hours after the incident, the Grievant had enough time to calm down. She was no longer in the heat of the moment. I note that seventy-five minutes of therapy was insufficient to calm her down.

As the Grievant was escorted off site, Ms. Nicholas saw her behaving like a lunatic and testified that if the Grievant had been an inmate she would have called for backup. I credit Ms. Nicholas' statement as it was reliable and dependable.

The Grievant was told twice not to return to Ms. Burks' off site office. However, the Grievant went there immediately after leaving the facility. Clearly, her impulse controls were not working properly. Ms. Burks reasonably went to a safer area of the office with an exit and a coworker because she was afraid of the Grievant and concerned for her own safety. Ms. Burks' actions here are totally consistent with her belief that the Grievant was serious about her threats

and was a potential danger. Ms. Burks was aware how out of control the Grievant was over a long period of time. Her testimony was very reliable. Ms. Burks' actions as noted above in a heated moment were totally consistent with her testimony and statement that the earlier threats were serious. The Grievant's decision to visit Ms. Burks reveals that she was unable to follow instruction and was out control. She was not thinking clearly or rationally.

These three witnesses, Ms. Burks, Sgt. Aguilar and Ms. Nicholas corroborated that the Grievant was out of control and threatening. I do not find that she was merely venting. Her statements along with her demeanor convince me that she was making real threats. These threats did no happen just once, the Grievant made them over a period of more than two hours to three different people two of whom were not counselors..

The Department acted properly throughout the incident. It allowed her to go to therapy in the hopes that she would calm down and get a grip. Ms. Burks wisely sought outside counsel. She properly call Ms. Maines and alerted her to the potential danger. The Department appropriately and had the Grievant escorted to the Superintendent's conference room where she was placed on immediate home leave. She was properly escorted off the property. The Department acted wisely in diffusing a potentially dangerous situation. The fact that the Grievant showed up at Ms. Burks' office having been told twice not to go there tells me how out of control she was at the time. She was incapable of following basic instructions. Her impulse control was non existent. Given her irrational state, the Department took the only action it could to safeguard the workplace. In sum, the Department has established by clear and convincing evidence that the Grievant made serious threats at work to harm another employee.

The next issue to examine is whether the penalty chosen, discharge, was appropriate

given all of the circumstances. There are some factors that work in the Grievant's favor. She had eleven years of service with only minor discipline (a warning). While I would not classify her as a long term employee, she did have a number of years of service. Undoubtedly she was stressed and concerned over her two daughters' health issues as any parent would be. She did seek therapy immediately after the confrontation.

On the other hand, the Department had clearly put her on notice that threats would not be tolerated in the workplace and that all employees deserved to feel safe while at work. The Department is rightly concerned that the threats were not a one time occurrence. The threats continued over several hours. The Grievant was irrational and out of control during that time frame and later when she went to Ms. Burks' office. The Grievant never offered an apology. Particularly concerning is the Grievant's lack of remorse.

I note that the Grievant's workplace was a Correctional Facility where inmates are housed. Correctional Officers need to be able to rely on other Correction Officers to protect them. This is an important point that cannot be overlooked. In addition, the Correction Officers are caretakers of inmates and have a degree of power over them. The environment is potentially a dangerous place to work. The Department has to rely on its Correction Officers to keep order and maintain calm.

The charges here are very serious. All employees are entitled to feel safe and free of harm from other employees in the workplace and off site. Here the Department had published policies that the Grievant had seen prohibiting threatening behavior.⁴ The Grievant's behavior was so

⁴ Even if the Department had not adopted a Workplace Violence Policy or its Rules of Conduct, the Grievant was on notice that threats of violence were not acceptable. This is a basic

extreme that the Department has shown that termination was appropriate under the circumstances. Even if she had thirty years of service, her behavior justified termination particularly when she exhibited no remorse. She never seemed to fully understand the seriousness of what she had done.

The Union has argued that the Grievant was subjected to disparate treatment in that other employees have made threats in the workplace and have not been fired. However, having reviewed those cited examples, I do not find them to be comparable. Here, the Department believed imminent harm was clearly possible and that it needed to protect another employee in the workplace. In addition, here there were repeated threats over a several hour period. The facts in the cases are not comparable. The Union has not shown that the Department treated the Grievant in a disparate manner.

tenant of living in our society. There are criminal statutes which prohibit threats of violence.

The Union maintained that the Grievant continued with counseling and stabilized her mood by ceasing medications. For the Grievant's sake this is good news. However, given the facility where she worked, returning her to her position would be improper. Her behavior was so extreme and out of control that the Department cannot assure other employees' safety⁵.

The Union has also alleged that arbitrators have overturned discharges where vastly more serious threats have been made to mental health professionals. Having reviewed the cited cases, they can be distinguished. Here, the Grievant made repeated serious threats not only to a mental health counselor but to her supervisor and another employee over the course of several hours. She never showed remorse or apologized. She continued to feel justified in her conduct. The Union points out that her threat was not made directly to Ms. Maines. Nevertheless, employees were put in a position of fear because their workplace was potentially unsafe. The cited cases are not persuasive.

In conclusion, given all the circumstances in this case, the Department had just cause to terminate the Grievant. The Department has shown that the reasons for the discharge were fair and just under the circumstances.

⁵ Again the Grievant worked in a Correctional Facility where other employees must rely on their coworkers to maintain a safe and secure environment. Given the nature of the workplace, the Department rightly determined that termination was appropriate.

Award

1. The Department has just cause to terminate the employment of Jerri Bos.
2. The grievance is DENIED.

August 2, 2011

_____/s/_____
Marsha M. Saylor, Arbitrator