

WASHINGTON DISCIPLINE CASES

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DISCIPLINE – WASHINGTON CASES

AXON (2006), ARBITRATOR AXON SUSTAINS GRIEVANCE CHALLENGING INSUBORDINATION

Arbitrator Gary Axon sustained the grievance filed by IAFF Local 452 challenging the demotion of a Fire Captain. The Captain was demoted for insubordination following a series of disciplinary actions in 2004. The discipline included 2 letters of reprimand and 2 suspensions. In sum, he was disciplined repeatedly for failing to maintain required certifications needed to work as a paramedic. Ultimately, he was demoted for failing to complete a required paramedic class and for failing to complete a “punishment project” assigned as a result of an earlier failure to maintain paramedic certifications.

Initially, the City described the reason for the demotion as being inattention to detail. However, after Local 452 grieved the demotion, the Fire Chief changed the reason for demotion to insubordination. Arbitrator Axon observed that generally insubordination means “the refusal by an employee to work and obey an order given by employee’s superior.” He cited the fundamental principle of labor relations that employees “must work now, grieve later.” Arbitrator Axon added that commonly arbitrators require evidence of six tests in order to find insubordination:

1. The employee’s refusal to work must be knowingly willful and deliberate (negligence and insufficient),
2. The order must be explicit and clearly given,
3. The order must be reasonable and work related,
4. The order must have been given by someone with appropriate authority,
5. The employee must be made aware of the consequences of failure to perform or follow the directive, and
6. If possible the employee must be given time to correct his alleged insubordinate behavior.

Arbitrator Axon concluded that the Captain’s behavior was not willful. He noted that a July 2004 disciplinary letter set forth a specific deadline for completion and training needed to complete the punishment project and that the Captain met that deadline. The Arbitrator credited the Captain’s testimony that he intended to complete the required assignments, but did not do so because of a combination of events (he was on leave for an extended period in late 2004, there were problems with the Department’s e-mail delivery, and he had stress related memory problems). In sum, the evidence demonstrated a performance problem concerning Captain’s attention, not willful and deliberate insubordination.

The Arbitrator also concluded that the City failed to give explicit and clear directives. Deadlines were changed and orders were less than clear.

In conclusion, the Arbitrator described the charge of insubordination as “the fatal flaw” in the City’s case. He ordered that the Captain be reinstated to his position with an appropriate award of back pay, seniority and benefits as requested by Local 452.

GAUNT (2008) ARBITRATOR JANET GAUNT UPHOLDS TERMINATION OF BELLEVUE DETECTIVE

The City of Bellevue, Washington terminated grievant, a detective with more than 10 year’s service, following 3 investigations. The first investigation focused on allegations involving workplace conflict with grievant’s fellow detectives and allegations of poor service to a domestic violence victim. The second investigation focused on allegations of dishonesty arising out of the incident at issue in the first investigation. The third investigation addressed alleged misconduct while grievant was on administrative leave. Although the Arbitrator rejected the City’s allegations of no less than 6 incidences of dishonesty and found that grievant’s performance did not support termination, the termination was upheld based upon grievant’s conduct *after* she had been placed on administrative leave for several months.

The Arbitrator declared that the City would be required to establish the alleged misconduct by “clear and convincing” evidence in light of the fact that termination for dishonesty would not only end grievant’s employment with the City, but also effectively end her career in law enforcement. The Arbitrator analyzed each of the 6 of allegations of dishonesty in detail and concluded that the City had failed to establish *any* of these allegations by clear and convincing evidence. While the investigations revealed discrepancies between grievant’s statements and other persons who were interviewed, the Arbitrator stressed:

“The critical issue is not whether statements were incorrect, but whether they were *knowingly* incorrect. It is important to remember that inaccurate statements are not automatically lies. The City must prove not only a misstatement of fact, but also that the misstatement was intentional to deceive the City.”

The Arbitrator quoted a 1998 decision in which another arbitrator declared:

“An employee or witness can in good faith give answers or provide information that is ‘dead wrong’ without being guilty of misconduct or ‘falsifying’ statements or documents. People can sincerely believe something happened, even if it did not. People ‘misremember’ all the time. This does not automatically make them liars. The human mind is a fallible instrument.”

Several of grievant’s statements in her interview were contradicted by a citizen who claimed that grievant had ignored her domestic violence case. The Arbitrator found that the citizen was not as consistent as the City argued. Moreover, the Arbitrator found that

the citizen's complaints of poor service by the grievant were implausible given grievant's work history which demonstrated that she was "a dedicated, hard working officer." Finally, the Arbitrator found no plausible reason why grievant would refuse to provide information that the citizen claimed grievant withheld over a period of several weeks.

The Arbitrator found that instances of workplace conflict between grievant and other detectives and allegations of substandard performance did not support termination.

However, the Arbitrator found that an incident that occurred while grievant was on administrative leave pending the results of the 3 investigations supported her termination. Grievant saw several other fellow officers leaving to plan a suspect's arrest. Grievant approached the group of officers and proceeded to complain both about the department and its slow investigation process, and also to specifically complain profanely, about a fellow detective. The Arbitrator found that grievant's conduct supported termination. She had been on administrative leave for several months and had been encouraged to focus on stress relief and avoiding individuals with whom she had been having conflict. Although one of the officers she met had tried to change the subject of their conversation, grievant persisted in attacking the department and her fellow detective. The Arbitrator concluded that grievant's attacks on the department and her fellow detective were a calculated matter and supported her termination.

Editorial Comment: Given the Chief of Police's sworn testimony at the arbitration hearing that grievant would not have been fired but for the sustained allegations of dishonesty (sic!), Arbitrator Janet Gaunt's decision to sustain the termination on other grounds was unexpected. However, given that the Arbitrator rejected the allegations of dishonesty it is anticipated that grievant will be able to pursue her career in law enforcement in Washington with other employers. The Arbitrator's discussion of the dishonesty allegations is remarkably detailed. This decision, along with the recent Josephine County arbitration award issued by Arbitrator Tim Williams, suggests that arbitrators will demand genuinely clear and convincing evidence of dishonesty in light of the career ending nature of such allegations.

HENDERSON (2006), ARBITRATOR JOE HENDERSON UPHOLDS 1 DAY SUSPENSION OF VANCOUVER POLICE OFFICER

The Vancouver Police Department suspended grievant for one day without pay as for violation of the Department's pursuit policy. The officer initiated a pursuit after the driver of a parked van sped away, ignoring the officer's commands. A short pursuit ended when another officer pitted the van. After the pursuit was concluded and both officers were approaching the van on foot, the driver suddenly attempted to flee. One officer fell to the ground. The other officer, fearing that his fellow officer would be run over and killed or seriously injured shot and killed the driver.

The Department found no violations of its use of force policy, but found that both officers violated its pursuit policy. Grievant was found to have violated the policy by improperly initiating the pursuit and improperly failing to terminate the pursuit.

The Vancouver Police Officers Guild grieved the one day suspension. The Guild argued that the grievant was an excellent officer with no prior discipline. Grievant made a good faith decision to initiate the pursuit in the heat of the moment. The Guild argued that this was the first time any officer had been suspended for his first violation of the pursuit policy. The Guild offered evidence of 12 prior sustained violations that resulted in supervisory counseling or at most a written reprimand. The Guild asserted that the suspension of grievant constituted disparate treatment and was not supported by just cause.

Arbitrator Henderson denied the grievance. He concluded that this pursuit was unique and that the one day suspension was “not arbitrary, capricious or discriminatory.”

Editorial comment: The arbitrator's analysis was extremely brief. While it cannot be disputed that the prior pursuits were not identical to grievant's pursuit, the prior incidents included aggravating factors including refusal to comply with a supervisor's order to discontinue the pursuit. They clearly were sufficiently serious to support the Guild's disparate treatment argument. The arbitrator's use of an "arbitrary, capricious or discriminatory" standard for discipline ignores the just cause standard included in the contract. If the Guild wanted to use such a low standard for discipline it could easily have convinced the City to adopt an arbitrary and capricious standard in the contract in lieu of just cause. John says I'm a sore loser.