

VOLUNTARY LABOR ARBITRATION TRIBUNAL

In the Matter of the Arbitration between

MICHIGAN AFSCME COUNCIL 25 and LOCAL [REDACTED]

Union,

and

Gr. No. 09-7015

Log No. A21527-[REDACTED]-09

([REDACTED] - Termination)

[REDACTED] CENTER,

Employer

OPINION AND AWARD

APPEARANCES:

For the Union: Aina N. Watkins, Esq., Michigan AFSCME Council 25, 600 West Lafayette, Suite 500, Detroit MI 48226. Also present: [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED]

For the Employer: [REDACTED], [REDACTED], Esq., The [REDACTED] Firm, [REDACTED] South [REDACTED] Street, [REDACTED], [REDACTED] MI [REDACTED]. Also present: [REDACTED], [REDACTED]

BEFORE:

Theodore J. St. Antoine, Arbitrator, [REDACTED] School, [REDACTED] MI [REDACTED]

FACTS

[REDACTED] Center hired [REDACTED] as a Public Safety Officer on October 25, 2006. Public Safety Supervisor [REDACTED], who was a friend of [REDACTED] niece, recommended [REDACTED] for the position. Following her probationary period, [REDACTED] was assigned to the second shift, running from 4:00 p.m. until 12:00 midnight. Her

performance ratings under three different evaluators ranged from "Very Good" to "Outstanding" (J-13, p. 14; U-3; U-5; U-6). [REDACTED] was appointed a trainer for other employees. She also became a Union steward and a member of the Executive Board.

On May 11, 2009 [REDACTED] [REDACTED], Senior Public Safety Supervisor, conducted a meeting with the second shift. [REDACTED] attended. At one point Union President [REDACTED] expressed concerns that Hospital rules were not being properly enforced on the first shift, whose Supervisor was [REDACTED]. [REDACTED] then declared that "if I was 20 years younger, I would bust [REDACTED] [REDACTED] in the mouth." Everybody laughed, including [REDACTED] and all present seemed to treat this as a joke. There were no complaints at the time.

The critical events that led to [REDACTED] termination occurred during a very few minutes on Sunday, May 24, 2009 in [REDACTED]'s main lobby. I have paid close attention to the testimony of the witnesses and the exhibits presented by the Parties, and the best reconstruction of the situation I can manage is as follows.

Officer [REDACTED] arrived at [REDACTED] about 3:20 p.m. to get ready to go on duty for the second shift. As she was passing the information desk, she was stopped by Officer [REDACTED] [REDACTED] who was on break and standing nearby. [REDACTED] said she needed to talk with [REDACTED] and [REDACTED] agreed. The two walked over in front of the Chapel door but were still within hearing distance of patients and visitors in the lobby. [REDACTED] told [REDACTED] she had heard about the second shift's departmental meeting and asked why [REDACTED] was saying negative things about the first shift. According to [REDACTED] own statement (H-8):

Before she [REDACTED] could say anything more, I told her "that a dog that carries a bone, leaves a bone, so you could take that bone back to who ever told you this, and get your facts right."... PSS [REDACTED] who was standing behind the Information Desk said to PSO [REDACTED] "[REDACTED] you do not have to defend me and what I do on my shift.["] I told PSS [REDACTED], "[do not come up in my face with

that 'Road Kill' [hairdo] on top your head and say anything to me about hearsay, because I was not talking to you."

Although [REDACTED] denies this, I am satisfied that the conversation had got loud and [REDACTED] had punctuated her remarks with "m-f-" references. [REDACTED] [REDACTED] in charge of the Information Desk, had indicated to Public Safety Supervisor [REDACTED] who was off duty but present for an unrelated purpose, that there was a need for her to intervene.

Although [REDACTED] also denies this, I am further satisfied that she said to [REDACTED] words to the effect, "I'm gonna have to bring my mutha-fuckin gun [or pistol] up here and blow somebody's mutha-fuckin head off if people keep on lying on me" (H-5 – [REDACTED] report; H-2 – [REDACTED] see also H-1 – [REDACTED] J-3 – [REDACTED] & [REDACTED] record). [REDACTED] told [REDACTED] "You know I can report you for saying something like that." [REDACTED] replied: "I do not care. Do what you have to do. I have something to fall back on." [REDACTED] then walked away, saying as she went, "Everybody can kiss my big black ass."

[REDACTED] [REDACTED] a Public Safety Supervisor who was not involved in the incident, provided the following statement, which I find credible (J-13, Ex. 1):

On Sunday 5/24/09 I was in the lower Public Safety office waiting for the start of the 2nd shift when PSO [REDACTED] entered the office [about 3:30-3:35 p.m.]. I could tell she was upset over something. She proceeded to tell me of an incident that just took place in the East Tower Lobby between her, PSO [REDACTED] and PSS [REDACTED]

PSO [REDACTED] indicated that she was having a conversation with PSO [REDACTED] while standing in front of the Chapel. From what she said to me I could tell it was about what was said during the 2nd shift staff meeting. I don't remember all that she said but she did say things about having something to fall back on while others do not. She also said something about having a gun and going to get it. At that point she said that PSS [REDACTED] had said something about reporting the threat and PSO [REDACTED] said to go ahead and report it.

Union President ██████ who was in the PS office that afternoon, testified he did not hear any such admission by ██████. But there was no showing that ██████ arrived in time to hear what ██████ had to say, and I found no sound reason to doubt ██████ account.

Subsequently, in a legal proceeding I find of little relevance except for some of the Parties' statements and testimony during it, ██████ sought and obtained a personal protection order against stalking by ██████. This was later dissolved. U-2; U-10.

On June 1, 2009 Public Safety Supervisor ██████ supplied ██████ with a Notice of Investigation, as a result of a "safe work place/complaint of potential/actual violent act ..." (J-2). The Notice declared that "you [██████] were heard using profanity and making threats by an off duty Public Safety Supervisor" (*id.*). Initially ██████ planned on giving ██████ "a 15-day suspension concerning her actions" (U-4). On June 14, 2009, however, he and Department Head ██████ recorded for ██████ the disciplinary action of suspension pending permission to terminate for "violation of ██████ Employee work rule number 26 (Threatening, intimidating, coercing, or interfering anytime on Medical Center premises)" (J-3). On July 7, 2009 ██████ Vice President for Human Resources, entered a formal notice of termination, citing a violation of rules for "threatening violence with a firearm" and emphasizing ██████ "zero tolerance policy with regards to safety in the workplace" (J-4).

The Union filed a grievance on ██████ behalf on June 14, 2009 (J-9), and in turn alleged a violation of ██████ Non-Retaliation Policy (J-10). An arbitration was held before the undersigned on December 16, 2009 and January 27, 2010. All Parties were present, examined and cross-examined witnesses, and submitted other evidence. Both the

Union and the Employer filed thorough and helpful posthearing briefs and these have been duly considered.

ISSUE

Was there just cause for the suspension and termination of Grievant [REDACTED] as a Public Safety Officer at the [REDACTED] Center? If not, what shall the remedy be?

DISCUSSION

The positions of the Parties in this case are extremely simple and easy to understand. Employer [REDACTED] declares that its investigation “revealed that Grievant made a threat to bring a gun to work and ‘blow somebody’s head off,’” and her discharge should plainly be upheld for such conduct (H. Br., p. 8). The Union admits that [REDACTED] used profanity and a suspension was warranted, “[b]ut Mrs. [REDACTED] did not threaten to bring a firearm to work” (U. Br., p. 10). If I could fully accept the position of either Party, my task would be extremely simple and easy too. A serious threat of violence with a firearm is the gravest sort of misconduct and would justify a termination under almost any conceivable circumstances. The use of the profanity in which [REDACTED] indulged, by security personnel in a hospital lobby, would certainly support a suspension but it alone, in view of an excellent work record like Grievant’s, would ordinarily not call for discharge.

My problem is that I find this case much more complicated and difficult than either Party would like it to be. To begin with, I am satisfied that [REDACTED] uttered the words about the gun or pistol which I have quoted in setting forth the facts. There are too many witnesses to the statement or the admission to be disbelieved. Even if [REDACTED] and [REDACTED] are discounted as interested parties, the statement and deposition of PSS [REDACTED] who thinks well of Grievant, clinches that for me (J-13, pp. 6-7; *id.*, Ex. 1).

After carefully reviewing all the evidence before me, however, I am also convinced that this was not a genuinely serious threat and was not perceived as such at the time by the witnesses. It was instead the heated, spontaneous outburst of an angry, frustrated, overly touchy person who thought she was being ganged up on by first-shift personnel on the basis of hearsay about a comment she made in jest at a meeting of the second shift. For what it is worth, the “threat” was also *conditional* – “if people keep on lying on me...” (H-5; emphasis added). My characterization of Grievant’s utterance as not a genuinely serious threat is supported by the immediate or initial reactions of the witnesses and others. PSO [REDACTED] statement was that after Grievant’s gun reference, “PSS [REDACTED] told her you know I *can* report you for saying something like that” (H-1; emphasis added). [REDACTED] own account was that: “At that point I stated, ‘Please don’t say things like that because I will have to report it because that is a threat’” (H-2, p. 2; emphasis added). Those hardly sound like the responses of persons confronted with a potentially life-threatening situation.

Even more to the point is a memorandum [REDACTED] submitted to SPSS [REDACTED] “It is not my intention to get Ms. [REDACTED] fired, but I am requesting that she be referred to the EAP and receive help for her anger issue’s...” (H-3). Also, after a full investigation, PSS [REDACTED] stated: “I had planned to give Ms. [REDACTED] a 15-day suspension concerning her actions” (U-4). Finally, Grievant was allowed to continue on to her scheduled second shift on May 24, 2009, and she was not suspended until June 14, 2009. There were of course no intervening incidents of violence or threatened violence involving [REDACTED] and [REDACTED]. None of this bespeaks a situation in which the authorities or the immediate

participants believed that anyone at [REDACTED] was truly at risk because of Grievant's literally outrageous remarks.

As matters escalated, of course, attitudes hardened and [REDACTED] sought and obtained a personal protection order against [REDACTED]. But even here [REDACTED] credibility in asserting a fear of possible violence on [REDACTED] part is called sharply into question by [REDACTED] serious mistreatment, inadvertent or otherwise, of PSS [REDACTED] position in this whole affair. Compare U-2, Item 17-B, with U-4. According to [REDACTED], [REDACTED] had misused his statements about the second-shift meeting and [REDACTED] supposed threat to punch [REDACTED] in the mouth, and then [REDACTED] had wrongly assured [REDACTED] she had not used his name in seeking the personal protection order. [REDACTED] veracity in this matter has not been questioned. While I will not conclude there was any deliberate falsification on [REDACTED] part, her handling of the application for the PPO must raise doubts about the accuracy of her memory concerning such an emotional issue as her relationship with Grievant [REDACTED].

It is probably understandable that as this case proceeded up the ladder of the [REDACTED] administration, the stark words of Grievant's apparent threat, spread out in the black-and-white of the written reports, assumed more ominous significance and were regarded as violations of [REDACTED] Employee Conduct Rule 26 (J-8) and its Safe Workplace Policy (Zero Tolerance for Violence) (J-7). But all those strictures are subject to the "just cause" provision of the Parties' Agreement (J-1, p. 3) ("justifiable and legitimate reasons"). For the reasons I have set forth, I conclude that what actually happened here did not constitute the genuinely serious threat to [REDACTED] [REDACTED] or anyone else that would justify the discharge of an employee with a work record as unblemished and excellent as Grievant's.

At the same time, however, the loud and profane language, and especially the harsh and seemingly threatening words employed, by a Public Safety Officer toward a superior officer in a location open to staff, patients, and other visitors, would normally have supported a disciplinary suspension of at least 15-30 days' duration. For another arbitrator's reduction of a termination to a 30-day suspension in a somewhat similar case of an alleged threat to "get a gun and shoot some f- body," see *Pepsi-Cola General Bottlers*, 115 L A 699 (B.F. Speroff 2000). Yet, as I shall next explain, the remedy in this case cannot be a simple suspension followed by reinstatement.

Grievant [REDACTED] has denied making the threat to get a gun and shoot somebody. That was either a knowingly false statement or a serious lapse of memory about a major event. I do not dismiss the possibility that it was the latter. [REDACTED] was in a highly agitated if not distraught state on May 24, 2009. What she had to say to PSS [REDACTED] immediately after the confrontation with [REDACTED] and [REDACTED] was apparently hard to decipher: "She [REDACTED] also said *something* about having a gun and going to get it" (J-13, Ex. 1; emphasis added). The notion that [REDACTED] has since blotted out the memory of the critical words of her outburst is not farfetched, since it would be difficult for any intelligent person to believe she could get away with lying about an occurrence that two witnesses had observed and a third, disinterested person had heard her admit had happened. For my purposes I am going to give Grievant the benefit of the doubt and assume the latter.

The important point, however, is that in either event – lying or failure of memory about a significant event – Grievant's continuing *qualifications* to serve in a position with major public safety responsibilities became seriously suspect on and after May 24, 2009. This is a factor I must take into consideration in fashioning a remedy. In this respect I am

deeply concerned about ensuring as far as possible that Grievant is fully capable of handling the duties of her sensitive position, even in stressful and confrontational situations. I shall start by declaring that there was no just cause for a disciplinary termination and that Grievant [REDACTED] shall be reinstated as soon as feasible, but without back pay. Moreover, the reinstatement shall be conditional. The conditions are threefold: (1) Grievant must attend and complete a recognized course in anger management, through an Employee Assistance Program or otherwise; (2) a psychiatrist or a psychologist mutually agreeable to the Employer and the Union (the expenses to be equally shared by Employer and Union) shall certify in effect that Grievant is capable of safely and civilly handling the duties of her position and that there is no reasonable likelihood she constitutes a risk to the physical or mental well-being of any person with whom she may come in contact; and (3) if Employer [REDACTED] so wishes, it may require Grievant to execute a standard Last Chance Agreement of a maximum duration of three (3) years from the date of her reinstatement.

AWARD

1. The grievance is sustained in part and denied in part. There was not just cause for the disciplinary suspension and termination of Grievant [REDACTED] effective respectively on June 14 and July 7, 2009. She shall be reinstated as soon as feasible (in accordance with paragraph 2 below) to her former position or its equivalent, with seniority and all other benefits intact, but without back pay.

2. The reinstatement of Grievant [REDACTED] shall be subject to the *prior* fulfillment of the three conditions set forth in the Discussion above. Employer [REDACTED] the Union, and

Grievant [REDACTED] shall all cooperate in every reasonable way to ensure the most expeditious and effective performance of these conditions.

3. The Arbitrator retains jurisdiction for the sole purpose of clarifying this Award in the event of any dispute over its interpretation or implementation.*

Theodore J. St. Antoine

THEODORE J. ST. ANTOINE
Arbitrator

[REDACTED] Michigan

March 25, 2010

* The Union's Grievance also claimed a violation of [REDACTED] Non-Retaliation Policy (J-9). Neither Party denominated this a separate issue in its brief. In any event I found no substantial evidence to support such a claim.