Lee Hornberger

Department of Corrections, 2023 BL 477393, 2023 BNA LA 407

VOLUNTARY LABOR ARBITRATION TRIBUNAL

FEDERAL MEDIATION AND CONCILIATION SERVICE

In the Matter of:

Teamsters Local Union No. 117,

Union,

and

Department of Corrections,

Employer.

FMCS Case No. 231228-02188

Arbitrator Lee Hornberger

DECISION AND AWARD

BNA Headnotes

LABOR ARBITRATION

SUMMARY

[1] Work Assignment – Safety – Leave – Temporary Transfer ▶100.08 ▶100.552575 ▶100.5203 ▶100.5206

Arbitrator Lee Hornberger ruled that the Department of Corrections didn't violate the CBA when it temporarily removed the grievant from her assignment pending a just cause investigation involving clerical errors she made, but did violate the CBA by temporarily transferring her to a more hazardous unit. Because she mistakenly processed paperwork that could've inadvertently resulted in the erroneous premature release of inmates which constitutes a public safety risk, her removal adhered to Article 8.3's language that an employee wouldn't be removed unless there was a legitimate "safety/security concern." However, Arbitrator Hornberger also determined that because her transfer to a unit involving high-risk inmates culminated in her taking approximately 277 hours of leave due to stress and anxiety, the department thereby violated Article 19.11's provision that temporary reassignments should "have the least adverse affect on the employee."

APPEARANCES

For the Union:

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For the Employer:

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INTRODUCTION

This arbitration arises pursuant to a Collective Bargaining Agreement (CBA) between Teamsters Local Union No. 117 (Union) and the Department of Corrections (Employer). The Union contends that the Employer violated the CBA when it reassigned Grievant pending the outcome of a just cause investigation. The Employer maintains that it did not violate the CBA when it reassigned Grievant.
Pursuant to the procedures of the Federal Mediation and Conciliation Service, I was selected by the parties to conduct a hearing and render a final and binding arbitration award. The hearing was held on October 17 and 18, 2023, in Aberdeen, Washington, via Zoom. At the hearing, the parties were afforded the opportunity for examination and cross-examination of witnesses and for introduction of relevant exhibits. The hearing was transcribed. The transcript was received on October 24, 2023. The dispute was deemed submitted on December 1, 2023, the date the post-hearing submissions were received.
The parties stipulated that the grievance and arbitration were timely and properly before me, and that I could determine the issues to be resolved in the instant arbitration after receiving the evidence and arguments presented.
The advocates did an excellent job of presenting their respective cases.

ISSUE

The Union framed the issues as:
Did the Employer violate Art. 8.3 and Art. 19.11 of the CBA when it reassigned Grievant pending the outcome of a just cause investigation?
If so, what is the remedy?
The Employer framed the issue as:
Did the Employer act within its authority of Art. 8.3 of the CBA by temporarily reassigning Coleman while it conducted a just cause investigation?
The parties agreed that I could frame the issues. Tr. 7.
I frame the issues as:

Did the Employer violate CBA Art. 8.3 and Art. 19.11 when it reassigned Grievant pending the outcome of a just cause investigation?
If so, what is the remedy?

RELEVANT CONTRACTUAL LANGUAGE

ARTICLE 8

DISCIPLINE

... In addition to ensuring that the rights of employees are protected, the Parties recognize that the investigation process must protect the interests of the public, the incarcerated individuals, and the Department. ... CBA, p. 25.

8.3 Work Assignment

An employee accused of misconduct will not be removed from their existing work assignment unless there is a safety/security concern, including security issues due to any allegation that involves a conflict between staff. CBA, p. 25.

ARTICLE 19

BID SYSTEM

19.1(E). Operational Need ...
8. Employee investigations where it is necessary to temporarily reassign an employee pending investigation of a charge of misconduct and pending any resolution**[*2]** of a finding of misconduct against the employee. CBA, p. 73.

19.11 Temporary Reassignment

... Assignments made for operational need will be designed to have the least adverse affect on the employee ... ." CBA, p. 76.

FACTUAL OUTLINE

Background

Grievant has been employed with the Employer since 1999. At the time of the Grievance, she worked as a CO in the Hearings Unit.
The Hearings Unit conducts disciplinary hearings against incarcerated individuals regarding infractions written by staff. The Hearings Officer finds incarcerated individuals either guilty or not guilty of the infraction. If an incarcerated individual is found guilty, the Hearings Officer can sanction them with a loss of good conduct time (GCT). GCT allows an incarcerated individual time off their sentence.
Mr. Van Ogle, explained GCT as follows:

> Generally speaking, the incarcerated receive additional time off of their sentence. Generally, it's a third off, but for some crimes, it could only be a fifth off, and they get that time up front. So subsequently, if they get in trouble and violate one of our administrative code rules

> inside the prison and they're infracted for such and found guilty, then the hearings officer would take good conduct time away from them as a sanction, which prolongs their incarceration. Tr. 27.

Incarcerated individuals can appeal the Hearings Officer decision to the Associate Superintendent (AS), who will either uphold or dismiss the guilty finding. If the AS dismisses the guilty finding, the deducted GCT would be restored and noted in writing on the hearing documentation, which is called a restoration packet.

The restoration packet is then sent back to the Hearings Unit, which is responsible for documenting the AS's decision in the Offender Management Network Information (OMNI) system. The Hearings Unit Office Assistant is responsible for performing clerical duties such as inputting the decision into OMNI and making adjustments to the incarcerated individual's GCT.

Besides the Hearings Officer and Office Assistant, the Hearings Unit is staffed with a CO. In this case Grievant was the CO. The primary function of the CO is to maintain security of the facility. Hearings Unit CO duties include scheduling hearings, callout, serving hearing notifications, and escorting.

Just Cause Investigation and November 3, 2021, to March 2, 2022, Temporary Reassignment

Grievant in her capacity as a CO documented the AS's decision into OMNI and made adjustments to GCT. Grievant processed two restoration packets and initiated the restoration of GCT that was allegedly not approved by the AS.

Grievant and her supervisor had a supervisory conference on November 1, 2021, during which they discussed the restoration packets. A supervisory conference is a meeting between a supervisor and subordinate staff in which they discuss what the staff is doing, areas for improvement, communicate expectations, or discuss other issues. Supervisory**[*3]** conferences are not regarded as disciplinary actions. An employee's actions or misconduct discussed at a supervisory conference could form the basis of an investigation. The Employer initiates a just cause investigation to determine whether misconduct occurred. Investigations are not disciplinary actions, but the conclusions following an investigation could form the basis for discipline. On November 3, 2021, the Employer notified Grievant that it was investigating the allegations that Grievant improperly restored GCT.

Concurrent with the just cause investigation, the Employer temporarily reassigned Grievant to F Unit. F Unit is a specialized unit that houses incarcerated individuals on maximum security because of disciplinary issues; high-risk incarcerated individuals that cannot maintain behavior in general population units; or incarcerated individuals that receive infractions for fighting, assaults or other serious misbehavior pending hearing. Grievant disagrees with the temporary reassignment to F Unit. Grievant worked in the F Unit for a few years early in her career and spent time in F Unit as the CO in the Hearings Unit. As the Hearings Unit CO, Grievant would go inside F Unit several times a week to the incarcerated individual's cell front and serve the notice of hearing to the individual, which schedules the hearing and notifies the accused of the hearing date and time. At the hearing, Grievant and another CO would go to the cell front, restrain the incarcerated individual with wrist and ankle restraints and escort the incarcerated individual to a conference room in F Unit to attend their disciplinary hearing.

Grievant explained the working conditions in F Unit as follows:

> There's a lot of mental abuse working F Unit. The inmates are a lot more vocal when it comes to dealing with staff members. Some just don't get along with anybody, and all they can do is scream and yell and cuss and call you names. Tr. 99.

Grievant testified that, in her opinion, the working conditions in F Unit have gotten worse over the years since she worked a post in that unit. She testified that:

> There's a lot more stress now than there was back then. It doesn't seem to be any accountability for how the offenders interact with staff. They are extremely vocal. You're called names on a daily basis. Tr. 100-101.

Upon completion of the investigation report, the Superintendent determined that there was no misconduct by Grievant. The Employer moved Grievant back into her position in the Hearings Unit on March 2, 2022. The Superintendent set the expectation that Grievant not complete administrative paperwork because such clerical duties are performed by the Office Assistant. The removal of the administrative duties was neither a correctional action nor disciplinary action because the job duties were not part of her CO duties.

November 2021 to March 2022 Leave

Grievant had anxiety about working in F Unit**[*4]** and took leave from November 8, 2021, to March 31, 2022. The investigation into the allegations of misconduct and temporary reassignment lasted from November 3, 2021, to March 2, 2022.

During Grievant's leave, she remained in pay status by using a combination of vacation, sick, personal holiday, and shared leave. Each month employees earn vacation leave in accordance with their years of service. Each month employees accrue a maximum of eight hours of sick leave. Employees also accrue a personal holiday, which is one day of vacation leave that must be utilized within a calendar year and cannot be rolled over into the following year. Shared leave is leave donated by other employees, in which the recipient employee may use the donated leave to assist with some hardship. An employee receiving shared leave donations will continue to get paid at their base salary.

The leave Grievant took from November 8-21, 2021, was prescheduled vacation leave that had been approved in February 2021. The Employer also approved Grievant's request for continuous FML from November 21, 2021, to February 28, 2022. FML is a protected leave that allows an employee to take leave due to a serious health condition. During the time period Grievant was out on protected FML, she utilized sick leave, vacation leave, personal holiday, shared leave, and vacation in lieu of sick leave. From March 1 to 31, 2022, Grievant was out on unprotected leave, but continued to receive her base salary as a result of using shared leave.

CONTENTIONS OF THE PARTIES

a. For the Union

The Union contends that the Employer violated the CBA when it reassigned Grievant pending the outcome of the investigation because (1) there was no safety and security concern to justify the reassignment and (2) the Employer did not consider the adverse impact the reassignment had on Grievant. The CBA contains provisions addressing when the Employer may reassign an employee pending

an administrative investigation. Art. 8.3 provides, "An employee accused of misconduct will not be removed from their existing work assignment unless there is a safety/security concern, including security issues due to any allegation that involves a conflict between staff." CBA, p. 25. Art. 19.11 provides, in relevant part, that temporary reassignments "made for operational need will be designed to have the least adverse affect on the employee ... ." CBA, p. 76. The CBA contains an exclusive list of circumstances that can be considered an "operational need." CBA, pp. 72-73. Art. 19.1(E). That list includes "[e]mployee investigations where it is necessary to temporarily reassign an employee pending investigation of a charge of misconduct and pending any resolution of a finding of misconduct against the employee." CBA, p. 73.
The Union requests that I sustain the grievances and order an appropriate make whole remedy including interest.

b. For the Employer

The Employer contends that the Employer investigated allegations of misconduct**[*5]** against Grievant that were ultimately unfounded. The Employer took no disciplinary action against Grievant. During the pendency of the November 2021 to March 2022 just cause investigation, the Employer temporarily reassigned Grievant to a different unit. Grievant kept the same CO position, salary, and scheduled days off. The Employer properly followed the work assignment process as set forth in CBA Art. 8.3. From November 2021 to April 2022, the same time period in which Grievant was on temporary reassignment, she was out on leave, much of which was protected FML. Grievant used a combination of continuous vacation, sick, personal holiday, and shared leave. Grievant grieves her temporary reassignment and seeks restoration of the leave she took while the Employer investigated the allegations of misconduct.
The Employer complied with CBA Art. 8.3 and properly temporarily reassigned Grievant during the pendency of a just cause investigation. Grievant fails to meet the burden of proving by a preponderance of the evidence that the Employer violated the CBA. The Employer acted properly and within the scope of the CBA by temporarily reassigning her to F Unit while the just cause investigation was ongoing. The Employer requests that I deny the Grievance.

DISCUSSION AND DECISION

The instant case involves a contract interpretation in which I am called upon to determine the meaning of some portion of the CBA between the parties. I may refer to sources other than the CBA for enlightenment as to the meaning of various provisions of the CBA. My essential role, however, is to interpret the language of the CBA with a view to determining what the parties intended when they bargained for the disputed provisions of the CBA. Indeed, the validity of the award is dependent upon my drawing the essence of the award from the plain language of the CBA. It is not for me to fashion my own brand of workplace justice nor to add to or delete language from the CBA.
In determining the meaning of the instant CBA, then, I draw the essence of the meaning of the CBA from the terms of the CBA of the parties. Central to the resolution of any contract application dispute is a determination of the parties' intent as to specific contract provisions. In undertaking this analysis, I will first examine the language used by the parties. If the language is ambiguous, I will assess comments made when the bargain was reached, assuming there is evidence on the subject. In addition, I will examine previous practice by the parties related to the subject. When direct evidence is not available, circumstantial evidence may be determinative.

Burden of proof

The burden lies with the Union to identify a CBA provision which prohibited the Employer from acting as it did. Abrams, *Inside Arbitration*, pp. 246-247 and 301-303.

General overview

"Ordinarily, all words used in an agreement should be given effect. The fact that a word is used indicates**[*6]** that the parties intended it to have some meaning ... ." Elkouri & Elkouri, *How Arbitration Works* (8th Ed.)p. 9-36.

All of the witnesses testified honestly and to the best of their recollections.

If CBA wording is clear and definite, clear language should be enforced. In cases where the language is clear and unambiguous, arbitrators are generally unlikely to consider extrinsic forms of evidence such as the intent of the parties, bargaining notes or history, or practices. Words should be given their ordinary and popularly accepted meaning in the absence of anything indicating that they were used in a different sense or that the parties intended some special or technical meaning.

It has been indicated that:

> Although [I] may use [my] expertise in interpreting and applying the contractual provisions, [I] cannot substitute [my] own sense of equity and justice but the award must be grounded in the terms of the agreement. To do otherwise would, in effect, be to change or alter the agreement through indirection. This [I] cannot, and should not do in the interest of *all* parties and the collective bargaining process. In other words, it is the [my] duty ... to interpret the contract as precisely as [I] can, and not to rewrite it. *Johnston-Tombigbee Mfg. Co.*, 113 LA 1015, 1020 (Howell, 2000). Emphasis in original.

Did Art. 8.3 Prohibit Employer from removing Grievant from her assignment?

Art. 8.3 provides, "[a]n employee accused of misconduct will not be removed from their existing work assignment unless there is a **safety/security concern**, including security issues due to any allegation that involves a conflict between staff." CBA, p. 25. Emphasis added.

The Employer argues that CBA Art. 8 addresses the Employer's authority to initiate just cause investigations "concerning the actions and/or omissions of ... employees... . In addition to ensuring that the rights of employees are protected, the Parties recognize that the investigation process must protect the interests of the public, the incarcerated individuals, and the Department." CBA, p. 25. "An employee accused of misconduct will not be removed from their existing work assignment unless there is a safety/security concern, including security issues. . . ." *Id.* The Employer has the authority to determine what alleged misconduct constitutes a safety or security concern that may necessitate removal of the employee from their existing work assignment.

The Employer investigated the allegation that Grievant "made multiple inaccurate and unauthorized Incarcerated Individual (I/I) entries into [OMNI] approving the restoration of '[GCT]' per [AS] and without AS ... approval and/or signature." Rx. 3, at 1. Mr. Van Ogle directed a just cause investigation into the allegations and determined that Grievant be temporarily reassigned given safety and security concerns of keeping her in the Hearings Unit.

Mr. Van Ogle determined that the restoration of GCT without authorization from the AS constituted a safety and security concern to the Employer because Grievant was altering the sentence lengths of incarcerated**[*7]** individuals, who, as a result, could be released early. There is a public safety risk if an incarcerated individual is released early because they could continue to commit crimes in the community and harm a member of the public. The Employer could also be liable for harm caused as a result of the erroneous early release of an incarcerated individual. Given the safety and security risk of keeping Grievant in the Hearings Unit, the Employer temporarily reassigned Grievant out of the Hearings Unit effective November 3, 2021. The Employer did not want to risk Grievant possibly continuing to restore GCT until the Employer could verify the veracity of the allegations. The Employer likewise did not remove job duties from her CO position in the Hearings Unit because she was the only CO in the unit. Grievant's temporary reassignment to F Unit was a non-disciplinary action.

The Union argues that the Employer could not have removed Grievant from her work assignment "unless there is a safety/security concern." CBA, p. 25. There was no safety and security concern. The entire issue regarding the missed signatures stemmed from a clerical issue originating in the AS's office and not from the Grievant's conduct. The investigation involved only seven restoration packets that were missing signatures from the AS. Two of those packets were addressed by Grievant's direct supervisor. Grievant identified five additional packets that were also missing signatures. While those five packets were missing signatures, the AS had signed the cover sheet. Grievant searched "three years' worth of packets" to discover the five that were missing signatures. The Employer was not able to identify any other packets missing signatures during the investigation. The investigation determined that there was no safety issue related to Grievant's processing of restoration packets. At worst, the investigation showed that Grievant had failed to catch and correct a mistake that originated in the AS's office. It did not show that Grievant was entering restoration time that should not have been entered. Even if the Employer had valid safety and security concerns about Grievant continuing to enter the restoration packets, the Employer was still not justified in reassigning Grievant. The restoration packets were a very small part of her job. That work is not mentioned in her position description. The restoration packet work was not an essential function of her position. That work was reassigned away from Grievant at the conclusion of the investigation. The Employer determined that that work was more properly assigned to an Office Assistant rather than a CO. Rather than reassign Grievant, the Employer could have reallocated the restoration packet work at the beginning of the investigation rather than at the end of it.

I conclude that the reassignment[*8] did not violate Art. 8.3. The Employer reasonably believed that Grievant "made multiple inaccurate and unauthorized Incarcerated Individual (I/I) entries into [OMNI] approving the restoration of '[GCT]' per [AS] and without AS ... approval and/or signature" and that this might result in premature release of incarcerated individuals. Under Art. 8, the investigation process "**must protect the interests of the public** ... ." Emphasis added. The Employer reasonably believed there was an Art. 8.3 "safety/security concern." CBA, p. 25.
It has been indicated that "An arbitrator is mindful of the context of the employee's work. ... Concern about safety is essential in the workplace for every employee and for the employer." Abrams, p. 220. Elkouri & Elkouri, pp. 15-28 to 15-29.

Did Art. 19.11 prohibit the Employer from reassigning Grievant to F Unit?

Art. 19.11 provides, in relevant part, that temporary reassignments "made for operational need will be designed to have the **least adverse affect on the employee** ... ." CBA, p. 76. Emphasis added.

The Employer argues that it acted within its Art. 19.11 authority to temporarily reassign Grievant to F Unit based upon the operational need given the pending investigation of the alleged misconduct. Grievant maintained Saturday and Sunday as her regular days off while temporarily assigned to F Unit. Her working hours changed from 7:00 a.m. to 3:30 p.m. to 6:10 a.m. to 2:10 p.m. The Employer reassigned Grievant to the F Unit because the schedule had the least adverse effect on her. The temporary reassignment to the Hearings Unit was a non-disciplinary action because Grievant maintained the same salary and position assignment as a CO.

The Union argues that the Employer violated Art. 19.11 by reassigning Grievant to F Unit. Art. 19.11 provides that temporary reassignments for operational need "will be designed to have the least adverse affect on the employee ... ." CBA, p. 76. F Unit is arguably the most difficult working environment at the Center. COs who work in F Unit are subjected to high levels of "stress" and "mental abuse" from the incarcerated individuals who are housed there. F Unit is a "specialized unit" and is subject to special rules. Those rules both give more discretion to management about selecting staff to work in those areas and limit certain staff from being allowed to work in those units. CBA, p. 75; Ux. 1 Policy 400.410. Employer Policy does not allow staff to work in specialty units if they have any "pending disciplinary action involving reduction in pay, suspension, or demotion." Ux. 1. Policy 400.410.

I conclude that the reassignment to F Unit violated Art. 19.11. Art. 19.11 specifies that reassignment must be designed "to have the **least adverse affect on the employee** ... ." Emphasis added. Grievant was severely adversely impacted by the reassignment. The reassignment to F Unit caused her stress and anxiety to the point she sought medical attention and took leave. The Employer was on notice**[*9]** about the impact of the reassignment because Grievant was taking sick leave. Union Representative Miskell contacted the Employer to request that Grievant be reassigned to someplace other than F Unit.

Union Representative Michael Miskell testified that:

> [Grievant] very clearly pointed that out to me when she got her reassignment letter that she was very, very stressed, and it was impacting her when she got that reassignment letter to F Unit. Tr. 125.
>
> > Q. As the union representative, did you ever ask that Ms. Coleman be assigned to a different unit or ask for her removal from the F Unit?
> >
> > A. Absolutely.
> >
> > Q. You did. So when did you submit that request?
> >
> > A. We called — I called Captain Eric Mainio first, and then I called the superintendent, Ron Haynes at the time. Tr. 131.
> >
> > Q. So can you explain why, then, the reassignment was not — did not have the least adverse effect to [Grievant]?

> A. Because it's in the F Unit. She had worked in there, and she had been in hearings for a long time. And to go from hearings to an intensive management or segregation unit is a very big move. Again, it's a specialty unit for a reason. People choose to be in there. There's other guidelines for folks on who gets to work in there. It's a big move. It's not insignificant. Tr. 132.

Relief.

I have the authority to grant an appropriate remedy. Elkouri & Elkouri, pp. 18-1 to 18-14. Abrams, pp. 169 to 184. The proper remedy is a make-whole remedy, which requires that Grievant have restored to her any contractual leave that, but for the reassignment to F Unit, she would not have taken.
The Grievance requested a remedy of "returning all leave used ... as a result of this investigation." Rx. 5. The total amount of leave that Grievant took during the time of her reassignment was: 228.9 hours of vacation leave and 120 hours of sick leave. Those totals do not include any shared leave that was donated from other employees or holiday leave, which would have been taken regardless of the reassignment. Grievant would have taken her prescheduled vacation leave from November 8 to 19, 2021, whether or not she was reassigned. 72 hours of vacation leave were prescheduled. The remainder of the vacation time is attributable to the reassignment because the CBA allows employees to take vacation leave in lieu of sick leave. CBA, p. 89. Art. 23.3. As a direct result of the reassignment, and for which there should be restoration, Grievant used 156.9 hours of vacation time and 120 hours of sick leave. In regard to the total number of hours to be restored, if there is an error, the parties can file a sixty day remedial jurisdiction motion.

The Union asks for interest. Based on the totality of the circumstances, including no citation to CBA authorization for interest, I am not granting interest. Elkouri & Elkouri, pp. 18-31 to 18-34. Abrams, p. 178.

Some of the leave was designated as statutorily protected leave by the Employer. Grievant's sick leave and vacation leave benefits derive from the CBA. CBA, pp 80-84 and 87-92.**[*10]** Art. 21 and 23. It is within my authority to direct the Employer to restore to Grievant a contractual benefit that Grievant lost because of the Employer's violation of the CBA.

CONCLUSION

The crucial points in this case include;

1. Union has the burden of proof,

2. Art. 8.3 did not prohibit the Employer from removing Grievant from her assignment;

3. Employer reassigning Grievant to F Unit violated Art. 19.11;

4. assignment to F Unit caused anxiety and caused Grievant to go on leave;

5. Grievant used 156.9 hours of vacation time and 120 hours of sick leave;

6. clear and unambiguous language that is interpreted consistent with the parties' intent as reflected by clear and explicit terms,

7. ordinary meaning given to words unless they are clearly used otherwise,

8. CBA language that is consistent with and supported by the negotiating history,

9. totality of the circumstances, and

10. wording of the CBA.

This decision neither addresses nor decides issues not raised by the parties.

AWARD

Having heard or read and carefully reviewed the evidence and argumentative materials in this case and in light of the above discussion, I grant the Grievance.
Art. 8.3 did not prohibit the Employer from removing Grievant from her assignment.
The Employer reassigning Grievant to F Unit violated Art. 19.11.
The 156.9 hours of vacation time and 120 hours of sick leave that Grievant used during her reassignment shall be restored to her.
I retain remedial jurisdiction over this matter for sixty days from the date of this Award for the sole purpose of resolving any questions that may arise over application or interpretation of a remedy. *Code of Professional Responsibility for Arbitrators of Labor-Management Disputes*, Part 6, Section E. Elkouri & Elkouri, pp. 7-49 to 7-54.

Dated: December 8, 2023

LEE HORNBERGER
Arbitrator
Traverse City, Michigan