

**In the Matter of Arbitration Between
AFSCME Council #5 [Tom Anderson]**

OPINION AND AWARD

And

BMS Case No. 09-PA-0628

**Minnesota Department of Corrections-
Red Wing Facility and Minnesota
Management and Budget, State of
Minnesota**

ARBITRATOR

Joseph L. Daly

APPEARANCES

On behalf of AFSCME, Council 5
Cynthia M. Nelson, Business Representative
AFSCME, Council 5
St. Paul, Minnesota

On behalf of Red Wing Facility and
Minnesota Management and Budget, State of Minnesota
Joy Hargons, Labor Relations Representative Principal
St. Paul, Minnesota

JURISDICTION

In accordance with the Agreement between the Unit 208 and the State of Minnesota, July 1, 2007 – June 30, 2009; and under the jurisdiction of the State of Minnesota Bureau of Mediation Services, the above grievance arbitration was submitted to Joseph L. Daly on December 29, 2009, at the Minnesota State Correctional Facility, Red Wing, Minnesota. Post hearing briefs were waived. The decision was rendered by the arbitrator on January 19, 2010. Parties agree the issue is: Did the employer have just cause to issue a 3-day suspension to Thomas Anderson? If not, what would the appropriate remedy be? [Stipulation of issue signed December 18, 2009]

THE RELEVANT CONTRACTUAL PROVISIONS INCLUDE:

ARTICLE 16. DISCIPLINE AND DISCHARGE

Section 1. Purpose. Disciplinary action may be imposed upon an employee only for just cause.

Section 3. Disciplinary Procedure. Disciplinary action or measures shall include only the following:

1. oral reprimand;
2. written reprimand;
3. suspension;
4. demotion; and
5. discharge.

RELEVANT POLICIES INCLUDE:

Minnesota Department of Corrections

Policy: 103.300 **Title:** Anti-Discrimination and Sexual Harassment
Issue Date: 11/19/07
Effective Date: 11/19/07

AUTHORITY: Minn. Stat. §§ 363A.01 et al (Minnesota Human Rights Act) and 43A.01

PURPOSE: To ensure the department's employment practices are free from illegal discrimination, including sexual harassment and discrimination based upon protected class characteristics, by providing a process through which complaints of illegal discrimination will be promptly, thoroughly, and respectfully handled and investigated.

Sexual Harassment – for purposes of this policy, is a form of discrimination that includes unwelcome sexual advances, requests for sexual favors, or verbal or physical conduct of a sexual nature when any of the following occurs:

- Submission to such conduct is made a term or condition of an individual's continued employment, promotion, or other condition of employment. This may occur by acts or words that are stated clearly, or acts or words that are implied.
- Submission to or rejection of such conduct is used as a basis for employment decisions affecting an employee or job applicant.
- Such conduct is intended to interfere or result in interference with an employee's work performance, or creates an intimidating, hostile, or offensive work environment.

Sexual Harassment Prohibited Conduct – examples of prohibited actions and statements include but are not limited to:

- Derogatory or vulgar comments of a sexual nature; sexually vulgar language; remarks about a person’s physical anatomy or characteristics; “dirty” jokes; sexual innuendo; sexually explicit language; lewd or vulgar tones; threats of physical harm; and distribution or display of written or graphic sexual materials.
- Touching oneself or another person in a sexually suggestive way; physical contact or positioning so as to invade personal privacy; or intentional touching of anatomy that is private such as breasts, genital areas, or buttocks. Also included are intentional movements made in an attempt to look at another person’s breasts, genital areas or buttocks. Also prohibited are physical acts such as hitting, pushing and making physical gestures of a sexual nature such as hip-grinding or grabbing motions.
- Display of nude or semi-nude sexually suggestive pictures, sexually oriented magazines or posters, sexually offensive cartoons, and other words or pictures of a sexually suggestive nature.

FINDINGS OF FACT

1. By letter dated September 16, 2008, Correctional Officer II Thomas Anderson, Minnesota Correctional Facility, Red Wing, Minnesota, was informed that he was being placed on a 3-day disciplinary suspension without pay. The letter stated:

Officer Tom Anderson
Minnesota Correctional Facility – Red Wing
1079 Hwy. 292, Red Wing, MN 55066

RE: Misconduct Investigation: Anti-discrimination and Sexual Harassment

Officer Anderson,

This letter is to advise that you are being placed on a disciplinary suspension for three (3) days without pay, effective September 22, 2008. This disciplinary action is being imposed as a result of your violation of the Anti-discrimination and Sexual Harassment policy #103.300.

On August 12, 2008, you met with Special Investigator Diane Deyo. You were provided a Tennessee Disclosure Notice which you reviewed and signed, and

offered the opportunity for union representation, which you accepted and signed a union representation acknowledgement form. During the interview you were informed of the reason for the interview and allegation against you.

The investigation showed your conduct violated Policy #103.300, in part, because it interfered with an employee's work performance, and created an intimidating, hostile, or offensive work environment. The misconduct stems from your comments and interaction with other officers on July 28, 2008, which was found not to be in the spirit of maintaining professional boundaries with co-workers. After the suspension on September 22, 23, and 24, 2008, you are expected to return to work on your next scheduled shift. During the time of your suspension, you are not to report to work, call the facility (other than to speak with your supervisor) or come on the facility grounds.

Please understand your failure to follow policy contributed to a breakdown in our ability to maintain a workplace free from offensive behavior. Your personal boundaries and interpersonal interactions with other staff have been previously brought to your attention and it was expected you would make the necessary adjustments to prevent future occurrences. You are expected to promote professional inter-staff relationships in a manner that does not violate expectations of policy or your position description. Additionally, you have previous discipline for unrelated misconduct, which has resulted in progressive corrective action in this instance.

In the future, you will be expected to comply with Department of Corrections and facility policies, instructions, and post orders, and to fulfill the responsibilities outlined in your position description. Failure to do so may result in additional disciplinary action up to and including termination of your employment.

You are entitled to a Pre-deprivation (Loudermill) hearing with the Superintendent to present an explanation of the evidence against you. If you desire such a meeting it will be held between September 16th and 19th, 2008, as arranged by my office. You are allowed to have a union representative at the

meeting, however, it is not required. Please advise Kathy Johnson if you desire such a meeting and she will assist you.

You are referred to the Bargaining Agreement between the State of Minnesota and AFSCME Council 6[sic 5] for your rights in this matter.

Sincerely,

Otis Zanders, Superintendent

[Employer exhibit 9A].

2. On Saturday, July 26, 2008, Correctional Officer Jessica Nelson-Morrow and her son were at the Red Wing, Minnesota Public Swimming Pool. Officer Thomas Anderson was also at the pool with his family. He approached Officer Nelson-Morrow to say hello. He conversed with her for a period of time.

3. On Monday, July 28, 2008, while Correctional Officer Jessica Nelson-Morrow was posted at the Metal Shop at the Correctional Facility, she received a phone call from Correctional Officer Thomas Anderson who was then posted at the Brown Cottage at the Facility. Correctional Officer Nelson-Morrow stated she thought Officer Anderson was calling about an offender who had been in the Metal Shop and sent to Brown Cottage. Instead, Officer Anderson talked to her about seeing her at the public pool on Saturday, July 26, 2008. Officer Nelson-Morrow stated that Officer Anderson commented about her tattoos and asked if she had a tattoo with "Shannon" (her husband's name) because he couldn't see it. Officer Nelson-Morrow testified Correctional Officer Anderson also commented about her tan and said that her tan looked good with her swimsuit. Officer Nelson-Morrow testified the conversation made her feel "uncomfortable."

Correctional Officer Heather Burt testified that on July 28, 2008, she was working with Correctional Officer Nelson-Morrow in the Metal Shop. She observed Correctional Officer Nelson-Morrow talking on the phone and observed that Correctional Officer Nelson-Morrow "appeared to be uncomfortable". She testified she heard Correctional Officer Nelson-Morrow respond on the phone saying "Yes, I have a few tattoos.

4. Correctional Officer Stephanie Huppert testified that on Monday, July 28, 2008, while she was working with Correctional Officer Thomas Anderson, Correctional Officer Anderson told her that he had seen Correctional Officer Nelson-Morrow wearing a “little white bikini” and that she was tan. He also talked to Correctional Officer Stephanie Huppert about Correctional Officer Nelson-Morrow’s “body”. Correctional Officer Stephanie Huppert testified she felt the conversation “made me uncomfortable”. She testified that later that day she mentioned the conversation to Correctional Officer Heather Burt. Correctional Officer Heather Burt then explained to Correctional Officer Stephanie Huppert what had occurred in the Metal Shop earlier in the day.

5. Correctional Officer Heather Burt contacted Lieutenant Anita Kendal to tell her about the various conversations. Lt. Kendal contacted Brent Wartner, Director Policy and Legal Services Division of the Minnesota Department of Corrections, who ordered an investigation. Diane Deyo, Special Investigator, was assigned to do the investigation.

After the investigation Superintendent Otis Zanders, Department of Corrections, Red Wing, determined that Correctional Officer Anderson had violated the Department of Corrections Anti-discrimination and Sexual Harassment Policy #130.300 and ordered a 3-day disciplinary suspension. [See September 16, 2008 letter, Finding of Fact #1 above].

6. Correctional Officer Thomas Anderson testified he was simply having a “friendly conversation” with a co-worker about the previous weekend when he made the phone call to Correctional Officer Nelson-Morrow. He further testified he was “not hoping anything would result.” He was having “normal conversation about the weekend.”

Correctional Officer Thomas Anderson testified that he understood after receiving the discipline that he had exercised “poor judgment.” He testified he had “no intent” other than to be “complimentary.”

7. The record shows that Correctional Officer Thomas Anderson has received training in “Sexual Harassment Prevention” on July 1, 1999, repeated on April 16, 2002 and “Harassment in the Workplace” training on June 22, 2005.

Correctional Officer Thomas Anderson’s disciplinary record involves: 1) a supervisory conference for personal boundary/touching issues on January 2006; 2) a 1-day suspension for no

response to an incident on March 2006; and 3) a 2-day suspension for leaving post on October 2007. The 2006 incident involved a female staff subjected to “unwanted touching of shoulders, backs and arms.” [Employer exhibit #4].

Correctional Officer Thomas Anderson testified he does “not want people to feel uncomfortable around me and I will do whatever is needed to do to change that.” It is “not my intent to make people feel uncomfortable.”

8. All of the female witnesses testified that Correctional Officer Thomas Anderson is “friendly” and “not threatening.” Correctional Officer Nelson-Morrow testified that on her own she would not have reported the telephone call of July 28, 2008. However, all the women who testified stated that at times Correctional Officer Anderson had made them feel “uncomfortable” by moving in too close to them. Each raised concerns about “boundary issues” and “proximity.” Now retired Correctional Officer Tom Crisp testified that he had supervised Correctional Officer Thomas Anderson and had had conversations with him about “boundary issues” and “uninvited touching of backs and shoulders”.

9. The Department of Corrections has a progressive discipline policy.

10. The basic contention of the State of Minnesota is that there is just cause for a 3-day suspension. The State contends Correctional Officer Anderson made “remarks about a person’s physical anatomy or characteristic regarding physical anatomy, a bikini and tattoos that could be both seen and not seen. Even though there may not have been intent, the effect was to make a number of women uncomfortable. The comments impacted the workplace, the investigation was full and complete and the previous 1 and 2-day suspensions allow for a 3-day suspension under these circumstances.”

The Union contends that Correctional Officer Thomas Anderson did not violate any of the Sexual Harassment policies. His conversations were not hostile or abusive or sexual. He did not physically threaten anyone. The Union further contends Correctional Officer Thomas Anderson did not violate anyone’s personal boundaries. Further, the Union contends that the investigation was flawed and that the investigator assigned by the Department of Corrections was biased. The Union further contends no one was threatened nor was there any sexual intent.

DECISION AND RATIONALE

While Correctional Officer Thomas Anderson may have had no intent to create an intimidating, hostile or offensive work environment, he made a number of women “uncomfortable.” Why? Because on Monday, July 28, 2008, he called Correctional Officer Nelson-Morrow and talked to her about her physical anatomy, her tattoos, her tan, and her bikini. Later the same day he made comments about Correctional Officer Nelson-Morrow’s “tan” and “body” to Correctional Officer Stephanie Huppert. He also mentioned to Correctional Officer Huppert that his wife worked at a place where she could get discount tickets for use of the swimming pool. Correctional Officer Huppert testified he made her “uncomfortable”. She stated she did think he was trying to be sexual, but she did wonder if he wanted to see her in a swimsuit.

The Red Wing Correctional Facility houses violent offenders. The Correctional Officers need to be dependent on each other. Brent Wartner, Director of Policy and Legal Services for the Minnesota Department of Corrections, testified “Employee morale is important. No way should any staff be uncomfortable by the actions of another. The totality of the circumstances must be taken into account.” Mr. Wartner testified that the effect of such comments “can have a debilitating effect on female correctional officers”.

A man phoning a woman who is not his wife or significant other to “compliment” her on her tan, her bikini and to ask her about her unseen tattoos would reasonably cause discomfort. He would be crossing reasonable boundaries. The ‘Sexual Harassment Prohibited Conduct’ includes “remarks about a person’s anatomy or characteristics.” Even assuming Correctional Officer Thomas Anderson had no underlying intent to sexually harass by calling a fellow worker on the phone and making remarks about her physical anatomy and characteristics, then commenting to another female co-worker about such things, he has nevertheless violated the sexual harassment policy. In this case simply by making such remarks to female correctional officers he has “create[d] an intimidating, hostile or offensive environment” [See Policy 103.300 above]. All of the female correctional officers who testified said they felt “uncomfortable” by his remarks.

Based on the progressive discipline policy a 3-day suspension is proper. The State of Minnesota Department of Corrections has just cause to suspend Correctional

Officer Thomas Anderson for 3 days based on the facts of this case. The suspension is upheld.

1/19/2010

Date

Joseph L. Daly

Arbitrator