

**IN THE MATTER OF THE ARBITRATION BETWEEN:**

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**STATE OF MINNESOTA**

**And**

**AMERICAN FEDERATION OF STATE, COUNTY AND  
MUNICIPAL EMPLOYEES, Council 5  
(James Hill Grievance)**

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**DECISION AND AWARD OF THE ARBITRATOR**

**BMS Case No.: 10PA1594**

**ARBITRATOR:**

**Richard A. Beens  
1314 Westwood Hills Rd.  
St. Louis Park, MN 55426**

**December 10, 2009**

**APPEARANCES:**

**FOR THE EMPLOYER:**

**Ms. Joy Hargons, Esq.  
Minnesota Management and Budget  
658 Cedar Street  
St. Paul, MN 55155**

**FOR THE UNION:**

**Mr. Tim Henderson  
AFSCME Council 5  
300 Hardman Ave. S.  
South St. Paul, MN 55075**

## **JURISDICTION**

This arbitration arises pursuant to a collective bargaining agreement (“CBA”) between the State of Minnesota (“Employer”) and AFSCME Council 5 (“Union”).<sup>1</sup> James Hill (“Grievant”) was employed as a corrections officer by the State of Minnesota Department of Corrections (“DOC”) and a member of AFSCME Council 5.

The undersigned neutral arbitrator was selected by the parties to conduct a hearing and render a binding arbitration award. A hearing was held on December 2, 2010, at the Oak Park Heights Correctional Facility in Stillwater, Minnesota. The parties stipulated that the matter was properly before the arbitrator. Both were afforded the opportunity for the examination and cross-examination of witnesses and for the introduction of exhibits. Following oral closing arguments, the record was closed and the dispute deemed submitted.

## **ISSUE**

The parties stipulated that the issue before the arbitrator be:

*Did the Employer have just cause to terminate James Hill? If not, what would the appropriate remedy be?*

## **SYNOPSIS**

During the night of August 18-19, 2009, Grievant, who was off duty and obviously intoxicated, made certain statements to his girlfriend resulting in his arrest, conviction, and sentencing for gross misdemeanor Terroristic Threats. He had been

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<sup>1</sup> Joint Exhibit 1.

employed for 20 years as a correctional officer at the Minnesota Correctional Facility located at Oak Park Heights. Following sentencing, the employer terminated Grievant for violation of DOC policies. He now grieves his termination on the basis that the employer lacked just cause.<sup>2</sup>

### **BACKGROUND FACTS**

The State of Minnesota Department of Corrections maintains ten correctional facilities, one of which is the Oak Park Heights (“OPH”) prison in Stillwater, Minnesota. As a Level 5 facility, it houses the most dangerous male offenders committed to the department’s care. Grievant has worked as a corrections officer at OPH for 20 years. He had attained the rank of sergeant and for the last five years was assigned to master control, a central post which, through computer electronics and monitoring, controls all of the 26 security “bubbles” in the OPH prison.<sup>3</sup> Grievant had never been late for work or disciplined during his 20 year tenure at DOC.

In the late evening of August 18, 2009, Cottage Grove police officers were twice called to Grievant’s home by his live-in girlfriend. She informed them that Grievant had been drinking, first alone and then with a neighbor, for the entire evening. Grievant had shown the neighbor his gun collection containing 16 weapons, including a handgun. The girlfriend has first called police in response to Grievant handling the gun while obviously intoxicated. By the time police first arrived, she had taken the pistol away from Grievant and hidden it. No assault or threats had occurred at this point. Police got the couple to

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<sup>2</sup> Union Exhibit 1.

<sup>3</sup> Employer Exhibit 3.

agree to separate for the remainder of the evening. Grievant had gone to bed as the police departed from their first visit. A short time later, Grievant, still obviously intoxicated, got up and began searching for his pistol. He told the girlfriend and her daughter that he was, “...going to find the pistol and blow their heads off.” She again called police who, upon learning of his actions, set up a perimeter before entering the home a second time. They found the girlfriend and her daughter in the garage. Still in the home, Grievant was advised to come out. He did so and was promptly arrested for Terroristic Threats and 5<sup>th</sup> Degree Domestic Assault.<sup>4</sup> On August 20, 2009, Grievant was charged with one count of Terroristic Threats<sup>5</sup> in Washington County District Court.<sup>6</sup>

The Employer learned of Grievant’s arrest during the early morning hours of August 19, 2009, through Mike Green, an OPH supervisor who also worked part-time at the Washington County jail. Later that same day the Employer placed Grievant on paid investigatory leave.<sup>7</sup>

On August 25, 2009, six days after his arrest, Grievant voluntarily entered Hazelden where he completed a 28 day chemical dependency treatment program.<sup>8</sup> Shortly after his discharge from Hazelden on September 22, 2009, the Employer brought Grievant back to work briefly for a short assignment that did not involve contact with OPH prisoners or staff.<sup>9</sup> Thereafter, Grievant remained on paid investigative leave until

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<sup>4</sup> Employer Exhibit 5, p. 8.

<sup>5</sup> Minnesota Statutes, Section 609.713.3(a)(1).

<sup>6</sup> Employer Exhibit 5, pp. 10-13.

<sup>7</sup> Employer Exhibit 4, p. 3.

<sup>8</sup> Union Exhibit 7, p. 1.

<sup>9</sup> Employer Exhibit 4, p. 4.

he was terminated on April 14, 2010.<sup>10</sup>

The criminal proceedings against Grievant stretched out over several months.<sup>11</sup> He ultimately pled guilty to the felony terrorist threats charge on January 4, 2010. Following Grievant's plea, he was interviewed by OPH Special Investigator Jeff Dansky on January 5, 2010.<sup>12</sup> No further action was taken by his Employer until after Grievant was sentenced on March 10, 2010. Following a pre-sentence investigation, the District Court Judge did a downward departure from the Minnesota Sentencing Guidelines presumptive sentence. Consequently, Grievant's conviction is deemed to be a Gross Misdemeanor pursuant to Minnesota Statutes, Section 609.13.<sup>13</sup> District Court Judge Schuerr set out his reasons at length for departing downward during the sentencing:<sup>14</sup>

*THE COURT: I have carefully reviewed this matter and reviewed the facts and circumstances regarding the nature of this offense. As Mr. Hutchinson kind of alluded to, I'm getting old, having been around for along (sic) time, and I have seen a large number of terrorist threat charges in my years. And each of these incidents of terrorist threats have to be analyzed based on the facts of each case.*

*It's probably not unlikely to say that if police officers were present in many homes, bars, and other locations in society that they could charge hundreds of these cases on a weekly basis under the definitions and the elements of the offense of terrorist threats. So it is not simply one of seeing if the elements of an offense have been met as a result of using the right language by an individual at a certain time. I think it's more important to review all of the details involved in a situation.*

*It appears to me that in this situation Mr. Hill clearly had an addiction with alcohol. When someone consumes over a dozen beers on a nightly basis, four to five times a week, and tries to stop and only lasts a couple of days, I think it's clear that he meets the level of addiction. And it's clear that in this case that addiction led to the inappropriate and illegal behavior. But also intoxication, although not a defense, certainly does go to the issue of intent and the issue of transitory anger.*

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<sup>10</sup> Employer Exhibit 7, pp. 1-2.

<sup>11</sup> Employer Exhibit 5, pp. 23-25.

<sup>12</sup> Employer Exhibit 5, p. 20.

<sup>13</sup> Employer Exhibit 5, p.24.

<sup>14</sup> Union Exhibit 8, pp. 20-22.

*Now, in the State of Minnesota transitory anger is not a defense to terrorist threats. However, it is certainly relevant and appropriate for this Court to take into consideration in analyzing whether there are substantial and compelling mitigating circumstances.*

*It's also clear to say that at no time during this incident did Mr. Hill ever possess a firearm and make threats. The threats which were clear were made at a time when Mr. Hill never had possession of a weapon. There is no indication that Mr. Hill ever did anything to go get other weapons which he had, and so the threat was not connected to the gun as discussed.*

*It also appears to me that it is appropriate for me in the consideration of this matter and in the consideration of mitigating factors, victim input. Many times I have been asked by the County Attorney's Office to place great weight on a victim's statement when that victim comes in and asking for punishment. And I consider those statements and that input.*

*I think it is just as appropriate for me to consider the victim input in this case when the victim is asking for leniency under the circumstances based on her experience, her knowledge and her relationship with Mr. Hill.*

*Based on all of these considerations, in addition the fact that there were other guns in the house which were in a safe and never involved, I don't believe raises the level of seriousness in this case, or else we would be able to aggravate sentences based on how many guns are in a home whenever there's been a threat or an assault occurs.*

*So as a result of all these -- my review of the specifics of this case, and based on my determinations of these facts, I find that they are less egregious than many, many of the terrorist threats that I've seen. Many of the terrorist threats that I've seen have involved a threat while in possession of a dangerous weapon. And the plea was not to an assault in the second degree, but to a terrorist threats. And so under these circumstance and based on reduce ability for intent, transitory anger, I find that there are substantial and compelling mitigating reasons to depart from the presumed guidelines sentence.*

*Therefore, I'm going to proceed to a sentence of a gross misdemeanor today...<sup>15</sup>*

Grievant's sentence as a Gross Misdemeanor provided for 30-day service with the Sentence to Serve Program in lieu of jail time, payment of \$585 court costs and two years of supervised probation. The judge conditioned the sentence and probation on the following:<sup>16</sup>

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<sup>15</sup> It should be noted that the transcript of Grievant's sentencing was not received by either the Employer or the Union until December 2, 2010, the day of the arbitration hearing.

<sup>16</sup> Employer Exhibit 5, p. 23.

1. *Conditions, other, complete Continuing Care Program at Hazelton (sic) and follow rec's of program and probation 03/10/2010, ...*
2. *Remain law abiding...*
3. *No assault...*
4. *Supply DNA sample...*
5. *No alcohol/controlled substance use...*
6. *Attend AA (Alcoholics Anonymous), 3 times a week for 1 year...*
7. *Psychological evaluation/treatment, complete individual Psychotherapy...*
8. ***No use or possession of firearms or dangerous weapons, except at work at Dept of Corrections...*** (emphasis added)

The Employer interviewed Grievant again on April 8, 2010.<sup>17</sup> The terms and conditions of his sentence and probation were discussed. Grievant acknowledged that he could not have weapons in his possession or at his home during the two-year period of his probation. As in his earlier interview, Grievant was cooperative and forthcoming.

On April 14, 2010, the Employer terminated Grievant.<sup>18</sup> The discharge letter cited his violation of DOC Policy 103.220 Personal Conduct of Employees. At the arbitration hearing, additional reasons were added. 18 USC 922 (g)(9) prohibits, “...*any person...convicted in any court of a misdemeanor crime of domestic violence ... to possess in or affecting commerce, any firearm or ammunition...*” One of the duties of correctional officers assigned to Master Control is to respond while armed to alarms from the OPH perimeter fence.<sup>19</sup> Finally, the employer asserts that, “*It is untenable to allow an individual who is under criminal supervision to be in a position of authority over other individuals who are also under criminal supervision.*”<sup>20</sup>

The Union grieved Hill's discharge on April 15, 2010.<sup>21</sup> They assert the

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<sup>17</sup> Employer Exhibit 5, pp. 21-22.

<sup>18</sup> Employer Exhibit 7.

<sup>19</sup> Employer Exhibit 3, p. 10.

<sup>20</sup> Employer Exhibit 7, p. 4.

<sup>21</sup> Union Exhibit 1.

punishment imposed was too harsh and request that Grievant be returned to a Correction Officer III position with the condition that he cannot work in any position involving the use or handling of firearms.

## APPLICABLE CONTRACT AND POLICY PROVISIONS

### Collective Bargaining Agreement<sup>22</sup>

#### **Article 16 - DISCIPLINE AND DISCHARGE**

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

**Section 5. Discharge** *The Appointing Authority shall not discharge any permanent employee without just cause.*

## DEPARTMENT OF CORRECTIONS POLICIES<sup>23</sup>

### Policy: 103.0141

**Title: Employees Who Are the Subject of Criminal Investigation(s), Arrest(s) and/or Conviction(s)**

**POLICY:** *Employees convicted of a misdemeanor, gross misdemeanor or felony may be subject to discipline up to and including discharge based upon criteria outlined below...*

- F. The appointing authority will determine if employee discipline, up to and including discharge, should be administered using the following criteria:*
- 1. The relationship of the crime(s) to the employee's position;*
  - 2. The nature and seriousness of the crime(s) for which the employee is convicted;*
  - 3. All circumstances relative to the crime(s), including mitigating circumstances surrounding the commission of the crime(s);*
  - 4. Whether the employee's conduct violates Policy 103.220, "Personal Conduct of Employees" ...*

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<sup>22</sup> Joint Exhibit 1.

<sup>23</sup> Employer Exhibit 1. Only those policies or portions thereof applicable to this arbitration have been reproduced.

5. *The reflection on the Department of Corrections.*

**Policy: 103.220**

**Title: Personal Conduct of Employees**

**POLICY:** *All department employees, when on and off duty, will conduct themselves in a manner that will not bring discredit or criticism to the department. Common sense, good judgment consistency and the department's mission will be the guiding principles for the expected employee standard of conduct.*

*D. Employees will comply with all laws of the United States and of any state and local jurisdiction.*

### **OPINION**

It is well established in labor arbitration that, where an employer's right to discharge or suspend an employee is limited by the requirement that any such action be for just cause, the employer has the burden of proof. Although there is a broad range of opinion regarding the nature of that burden, the majority of arbitrators apply a "preponderance of the evidence" standard. That standard will be applied here.

In determining the question of whether the employer acted with "just cause," the arbitrator is called upon to interpret the phrase as a term of art which is unique to collective bargaining agreements. While the arbitrator may refer to sources other than the contract for guidance as to the meaning of just cause, his essential role is to interpret the contract in determining whether a given action was proper.

A "just cause" consists of a number of substantive and procedural elements. Primary among its substantive elements is the existence of sufficient proof that the employee engaged in the conduct for which he was disciplined or discharge. Other elements include a requirement that an employee know or could be reasonably expected

to know ahead of time that engaging in a particular type of behavior will likely result in discipline or discharge. Last, there must be a reasonable relationship between the employee's misconduct and the punishment imposed.

There is little dispute that the Employer had just cause to discipline Grievant. He clearly violated DOC Policies 103.0141 and 103.220 when convicted of a gross misdemeanor. Although the Union points out that the conduct occurred while Grievant was off duty, they simply allege that discharge was an overly harsh penalty.<sup>24</sup> They concede the Employer's right to discipline Grievant by implication.

Off-duty misconduct away from the employer's premises only warrants disciplinary action only if there is a material, adverse nexus between the conduct and the employer's business.<sup>25</sup> It would be difficult to imagine a clearer nexus than a crime committed by a corrections officer. His day-to-day job of supervising other convicted criminals could be affected. As pointed out by the Employer, his credibility might become suspect and, in any event, it does little to enhance the reputation of DOC. In the corrections context, DOC policies 103.0141 and 103.220 are reasonable exercises of managerial discretion. Further, Grievant makes no claim that he was unaware of DOC policies and that he did not know the conduct could lead to disciplinary action. I find the Employer had just cause to discipline Grievant.

However, the extent to which a Grievant with a spotless 20-year work record should be punished presents a closer and far more difficult question. While an arbitrator has the power to determine whether an employee's conduct warrants discipline, his

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<sup>24</sup> Union Exhibit 1.

<sup>25</sup> *Elkouri & Elkouri*, How Arbitration Works, 2010 Supplement, Chapter 15.3.A.i

discretion to substitute his own judgment regarding the appropriate penalty for management's is not unlimited. Rather, if an arbitrator is persuaded that the discipline imposed was within the bounds of reasonableness, he should not impose a lesser penalty. This is true even if the arbitrator would likely have imposed a different penalty in the first instance. On the other hand, if an arbitrator is persuaded the punishment imposed by management is beyond the bounds of reasonableness, he must conclude the employer exceeded its managerial prerogatives and impose a lesser penalty. In reviewing the discipline imposed on an employee, the arbitrator must consider and weigh all the relevant factors including employee's length of service, his work record, and the seriousness of the misconduct.

The Employer advanced three principal reasons for discharging rather than imposing a less onerous discipline on Grievant: his conduct reflects badly on the DOC; his conviction disqualifies him from using firearms; and, his criminal probation status makes it problematic for him to supervise the convicts housed in OPH. Each of these reasons is rooted in the considerations stated in DOC Policy 103.0141, F.<sup>26</sup> The facts supporting each reason have an ultimate bearing on the propriety of discharging Grievant. I do not doubt the Employer's good faith in arriving at the discharge decision -- a decision that the Warden in particular clearly anguished over. The impact of Grievant's conduct on the operation of the OPH facility was, and should be, the primary consideration. This is an extremely close case --one over which reasonable people can honestly differ. Let us examine each of the three reasons cited in more detail.

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<sup>26</sup> Employer Exhibit 1, p. 2.

While several DOC supervisors repeated the “reflects badly” mantra at the hearing, I am not convinced that attitude extends to the public at large. Grievant is one of over 4000 DOC employees. Grievant’s misconduct was undoubtedly serious, but the extent to which it realistically reflects on the DOC is highly subjective. Although his conviction is public information and may be known by any number of people, its overall impact on the public perception of DOC is speculative at best and likely minuscule. Granted, the very name of the crime, Terroristic Threats, conjures up foreboding images. However, like books, the relative seriousness of crimes cannot and should not be judged only by their titles. There is a continuum of culpability within any given criminal designation, be it homicide, terrorist threats, or drunk driving. Simply focusing on the nametag is convenient, but unfairly ignores the underlying facts and circumstances. Again, I do not find fault with the DOC policy and have found there was just cause to discipline Grievant. Nevertheless, the assertion that his conviction may reflect badly on DOC is, at least under the facts of this case, a slender thread upon which to hang discharge.

Grievant’s disqualification from possessing or using firearms was advanced as another reason for his discharge. The state sentencing judge specifically found, “*No use or possession of firearms or dangerous weapons, except at work at Dept. of Corrections.*”<sup>27</sup> In doing so the judge was either unaware of or chose to ignore 18 United States Code 922 (g) (9) which provides, “*..it shall be unlawful for any person...convicted in court of a misdemeanor crime of domestic violence... to possess in or affecting*

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<sup>27</sup> Employer Exhibit 5.

*commerce, any firearm or ammunition...*” The Union countered by pointing out Grievant’s conviction was for Terroristic Threats, not Domestic Assault. The United States Supreme Court has addressed this issue. In *U.S. v. Hayes*, 129 S. Ct. 1079 The court held that if the underlying facts of the crime show a “threatened use of a deadly weapon” against a spouse or a cohabiter, the federal statute is triggered. In other words, the Supreme Court looks at the underlying facts, not the title of the crime. Consequently, there is no question Grievant cannot use or possess firearms at the present. What effect does this have on his job at OPH?

Sgt. Mike Keapproth, President of the Union local, testified that only 12 to 15 of the 90 OPH correction officers who work on the First Watch are required to be firearms qualified. While Grievant’s position in Master Control did require it, the majority of other positions do not. The Employer countered by indicating that placement of Grievant in one of the latter jobs, might require inconvenient (to the Employer) “bumping” pursuant to the collective bargaining agreement. Second, Grievant’s criminal probation will end on March 10, 2012, less than 15 months from today.<sup>28</sup> At that time, Grievant’s full civil rights, including the right to bear arms, can be completely restored. *Minnesota Statutes, Section 609.165.*

Last, the Employer contends Grievant’s discharge was justified because his Terroristic Threats conviction affects his ability to supervise OPH prisoners, some of them incarcerated for the offense. The argument would be stronger if the Employer did not already have correction officers working while on criminal probation for DUI

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<sup>28</sup> Employer Exhibit 5, p. 23.

offenses, one of them a gross misdemeanor DUI. The Employer counters by asserting Terroristic Threats is a more serious crime than DUI. Not necessarily. Once again, that assertion focuses on nametags and ignores any analysis of the facts and circumstances surrounding the respective crimes. For instance, conviction of gross misdemeanor DUI usually means the driver has had a previous DUI or drove with more than twice the legal limit of blood alcohol. *Minnesota Statutes, Sections 169A.25 and 169A.26*. Operating a motor vehicle on public highways under these circumstances is arguably a far greater threat to the general public safety than the facts present in Grievant's case. Nevertheless, would Grievant's return to work impact DOC's ability to maintain order at the OPH facility? Probably no more so than the presence of DUI offenders on the staff already does. The evidence indicates a corrections officer was the subject of some prisoner taunting due to his DUI, but nothing more serious.

Finally, what mitigating factors were presented in Grievant's defense? He is a 20-year employee with an otherwise spotless record. His performance reviews for the last five years all indicate he either "Fully Meets Standards" or "Exceed Standards."<sup>29</sup> In four of his last five reviews his supervisor added memorandums lauding Grievant's ability to get along with fellow officers and inmates, his knowledge of the job and his professionalism.<sup>30</sup>

With respect to his conviction, the threats he uttered were clearly the product of a previously undiagnosed alcohol addiction. The sentencing judge detailed his reasons for

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<sup>29</sup> Union Exhibit 5.

<sup>30</sup> Union Exhibit 5, pp. 3, 8, 11, and 13.

showing leniency.<sup>31</sup> There is no evidence of similar conduct either before or after August 18-19, 2009. To date, he has fulfilled all the conditions of his probation, including completion of Hazelden's Continuing Care Program and thrice weekly attendance at Alcoholic Anonymous meetings.<sup>32</sup> He also successfully completed psychological counseling with respect to domestic abuse issues.<sup>33</sup> Last, Grievant has maintained sobriety continuously since the night of his arrest.

As previously stated, this is an extremely difficult and close case. Grievant was convicted of a serious crime and clearly deserved the criminal sanctions imposed. He also clearly deserves workplace discipline. Operating a level 5 prison is obviously a complex job calling for high degree of skill and professionalism. Even if only in the abstract, his conviction complicates that work. Nevertheless, upon considering the unique facts of this case and balancing all the equities, I find discharge to be unduly harsh. However, given the seriousness of his offense, I find that awarding back pay would be unduly punitive to the Employer. Consequently, I will order reinstatement without back pay.

### **AWARD**

Based upon the entire record, the grievance is SUSTAINED IN PART. Within 10 business days of the receipt of this Award, the DOC shall reinstate the Grievant to his former employment without any back pay or fringe benefits from the period of his discharge to the date of reinstatement. As required by Federal law, grievant shall be

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<sup>31</sup> Union Exhibit 8, pp. 20-22.

<sup>32</sup> Union Exhibit 7.

<sup>33</sup> Union Exhibit 7, p. 3.

reinstated to a position that does not require the use or possession of firearms until his civil rights are fully restored.

Dated: 12/10/2010

/s/ Richard A. Beens

Richard A. Beens, Arbitrator