

**IN THE MATTER OF
VETERANS PREFERENCE ACT HEARING BETWEEN**

)	
JAMES LANERD,)	
)	
Veteran,)	
)	
and)	DECISION AND ORDER
)	
STATE OF MINNESOTA,)	
DEPARTMENT OF CORRECTIONS)	
)	BMS Case No. 12-VP-0358
Employer.)	
)	

Hearing Officer: Stephen F. Befort
Hearing date: January 10, 2012
Date Post-Hearing Briefs received: January 20, 2012
Date of decision: February 10, 2012

APPEARANCES

For the Veteran: James Lanerd, pro se
For the Employer: Krista Fink

INTRODUCTION

James Lanerd was terminated on March 10, 2011 from his position as a Correctional Officer with the Minnesota Department of Corrections (Employer). Mr. Lanerd requested a hearing challenging his termination under the Veterans Preference Act, Minn. Stat. § 197.46, and

selected to have his case heard before a single hearing officer. A Veterans Preference Act hearing was held on January 10, 2012 at which each party was given a full opportunity to present their case through the testimony of witnesses and the introduction of exhibits.

LEGAL STANDARD

The Veterans Preference Act provides that a covered veteran may be discharged from public employment only for incompetence or misconduct. Minn. Stat. Sec. 197.46. The Minnesota Supreme Court has interpreted these grounds as equivalent to a “just cause” standard for discharge. AFSCME Council 96 v. Arrowhead Regional Corrections Board, 356 N.W.2d 295, 297-98 (Minn. 1984). In Ekstedt v. Village of New Hope, 292 Minn. 152, 193 N.W.2d 821 (1972), the Court explained that:

. . . the cause [for discharge] must be one which specifically relates to and affects the administration of the office, and must be restricted to something of a substantial nature directly affecting the rights and interests of the public. The cause must be one touching the qualifications of the officer or his performance of its duties, showing that he is not a fit or proper person to hold the office.

193 N.W.2d at 828. The burden of establishing the statutory grounds for discharge lies with the public employer. Johnson v. Village of Cohasset, 263 Minn. 425, 116 N.W. 2d 692, 698 (1962).

The Minnesota Supreme Court also has clarified the responsibilities of the hearing officer in applying this standard. In Matter of Schrader, 394 N.W.2d 796 (Minn. 1986), the Court stated that:

“[in] conducting a veterans preference hearing the task of the hearing board is twofold: first, to determine whether the employer has acted reasonably; second, to determine whether extenuating circumstances exist justifying a modification in the disciplinary sanction”.

394 N.W.2d at 801- 02.

ISSUES

1. Did the Employer act reasonably in deciding to terminate James Lanerd from his position as a correctional officer with the Minnesota Department of Corrections?
2. Even if the Employer did act reasonably, do extenuating circumstances warrant a modification of the termination penalty?

FACTUAL BACKGROUND

James Lanerd is an honorably discharged veteran of this nation's armed forces. He was hired by the Employer in 1996, and he has served as a Corrections Officer 2 for the past fourteen years. The Employer terminated his employment on March 10, 2011.

At the time of his discharge, Mr. Lanerd was employed at the Rush City Correctional Institution (Rush City) which is a level 4 close custody correctional facility with a population of approximately 1,000 inmates. As a Corrections Officer 2, Mr. Lanerd was responsible for maintaining the safety and security of the institution. Corrections officers also are expected to follow applicable policies and rules for the safe and orderly operation of the facility.

During the course of his employment, Mr. Lanerd received generally positive performance evaluations, although two of the evaluations expressed concerns about excessive use of leave. He also received some coaching and minor discipline relating to attendance issues, plus suspensions of one and three days.

The incident leading to the Employer's discharge decision took place on February 26, 2011. On that day, Isanti Police Department officers responded to a loud noise complaint in the city of Isanti. The officers found Mr. Lanerd, Christopher Dixon, and two underage females at the site drinking alcohol. The officers observed that Mr. Lanerd had white powder around his

nostrils, and Mr. Lanerd admitted that he had snorted a crushed version of the prescription drug Vicodin. The officers arrested Mr. Lanerd on charges of 3rd degree possession of a controlled substance and booked him into jail. On the following day, Mr. Lanerd contacted the Rush City facility with information concerning his arrest. He was released from jail on March 1. Mr. Lanerd eventually resolved the charge by accepting a stay of adjudication coupled with five years of probation.

Mr. Lanerd was scheduled to work next on March 2 on a shift commencing at 6:00 a.m. He did not report at the scheduled time and did not call in his tardiness. Instead, he reported to Human Resources when that office opened at 8:00 am.

Meanwhile, Rush City Human Resources asked Captain Walter Sass and Special Investigator Terry Ergen to investigate the February 26 incident. During the investigation, the investigators discovered that Mr. Lanerd was on probation for another incident. They ascertained that Mr. Lanerd had been charged with two misdemeanor counts and one petty misdemeanor count after he allowed an unlicensed driver to use his uninsured vehicle on December 25, 2009. The driver subsequently caused an accident resulting in a fatality. Mr. Lanerd ultimately pled guilty to a misdemeanor and was sentenced on March 10, 2010 to one year of probation. It is undisputed that Mr. Lanerd did not inform Rush City about the arrest, conviction, or his probationary status.

The investigators interviewed Mr. Lanerd as part of their investigation. During the interview, Mr. Lanerd indicated that he had a prescription for another pain killer, Darvacet, due to his ongoing knee problems. Mr. Lanerd claimed that Mr. Dixon told him that the crushed tablet they were ingesting was the same as his prescription, but that information turned out to be inaccurate. In terms of the tardy report on March 2, Mr. Lanerd indicated that he assumed that

he would not be permitted to work his normal shift and that he would have to review his status with Human Resources, so he timed his arrival on that day to coincide with the time at which the Human Resources office opened. Finally, Mr. Lanerd indicated that he did not inform Rush City of his earlier 2010 conviction and probationary status because he thought the policy requiring disclosure was new and applied only to new charges.

The investigation report concluded that Mr. Lanerd had engaged in three acts of misconduct: 1) his arrest for third degree possession of a controlled substance, 2) failing to report an earlier conviction and his probationary status, and 3) being a no call/no show on March 2, 2011. The Employer issued a termination letter to Mr. Lanerd, signed by Rush City Warden Bruce Reiser, on March 10, 2011. At the arbitration hearing, Warden Reiser testified to his belief that Mr. Lanerd's policy violations made him unfit to perform the safety sensitive duties of a correctional officer.

Mr. Lanerd offered several pieces of information during his testimony at the arbitration hearing. First, Mr. Lanerd testified that he has an addiction to prescription drugs due to his ongoing knee problems and that this contributed to his use of Vicodin on February 26, 2011. Second, he offered an additional explanation for not reporting his prior conviction and probationary status, testifying that he understood the Employer's policy only to require the reporting of drug and firearm-related petty misdemeanors (and higher grade offenses) while he believed that he had pled guilty only to a traffic-related petty misdemeanor. Finally, Mr. Lanerd alleged that some other correctional officers have not been terminated despite having been convicted of a crime.

Warden Reiser, in his testimony at the arbitration hearing, acknowledged that this latter allegation by Mr. Lanerd was accurate, but stated that Mr. Lanerd's behavior was more

egregious than that of any of the retained employees. The Employer also submitted evidence establishing that Mr. Lanerd was charged in August 2011, several months after his termination, with furnishing alcohol to a minor. This charge eventually was dismissed.

DISCUSSION AND OPINION

A. Did the Employer act reasonably in terminating Mr. Lanerd from his position as a Correctional Officer 2?

As noted above, the Employer bears the initial burden of establishing that it acted reasonably by discharging the veteran for just cause. This inquiry typically involves two distinct steps. The first step concerns whether the Employer has submitted sufficient proof that the employee actually engaged in the alleged misconduct or other behavior warranting discipline. If that proof is established, the remaining question is whether the level of discipline imposed is appropriate in light of all of the relevant circumstances. *See Elkouri & Elkouri, HOW ARBITRATION WORKS* 948 (6th ed. 2003).

1. The Alleged Misconduct

The Employer's termination decision was premised upon the three conclusions of the investigatory report. Each of these issues is discussed below.

a. The February 26 Arrest

The Employer's first allegation is that Mr. Lanerd committed misconduct by snorting a controlled substance on February 26, 2011. He was charged with a third degree possession violation for this conduct, and he subsequently accepted a stay of adjudication coupled with five years of probation. This allegation is not really in dispute since Mr. Lanerd has acknowledged that he did snort crushed Vicodin tablets on that date. By way of partial explanation, Mr. Lanerd testified that he thought that the tablets were the same medication as those for which he had a

prescription. However, this assumption was erroneous. In addition, Mr. Lanerd ingested the Vicodin by means of inhaling the ground powder nasally rather than by swallowing the tablet in its more delayed release form. As such, the Employer has adequately established that Mr. Lanerd engaged in this first allegation of misconduct.

b. Failure to Report a Prior Conviction and Probation

The second allegation is that Mr. Lanerd failed to report that he was convicted of a crime for lending his uninsured vehicle to an uninsured driver who was involved in an accident. During the investigation into the February 26, 2011 incident, the investigators learned that Mr. Lanerd had pled guilty to a misdemeanor offense for this earlier incident and that he was sentenced to one year of probation on March 10, 2010.

Department Policy 103.0141 states that:

An employee must immediately notify the appointing authority/designee if the employee is the subject of an order for protection, criminal investigation, petty misdemeanor (when the charge is related to drugs, drug paraphernalia, or guns), misdemeanor, gross misdemeanor or felony investigation, charge, arrest, and/or conviction, or is incarcerated for any reason. . . . If an employee does not provide immediate notification to the appointing authority or designee, the employee is subject to discipline up to and including discharge, pursuant to collective bargaining agreements.

It is undisputed that Mr. Lanerd did not notify the facility of his arrest, conviction, or probationary status. Mr. Lanerd maintains that he did not provide notification because he believed that the new policy only applied to new offenses and because he believed that he had been convicted of a non-covered petty misdemeanor. Both of these perceptions, however, are erroneous. First, the newly revised policy merely continued an already existing directive requiring notification under similar circumstances. Second, Mr. Lanerd was charged with and pled guilty to a misdemeanor, both of which are clearly covered by the notification policy. Here

again, the Employer has sufficiently established that Mr. Lanerd engaged in the misconduct alleged.

c. No Call/No Show Violation

The Employer's third allegation is the Mr. Lanerd failed to call in his tardy arrival on March 2, 2011. The Employer's written policy obligates employees to report any absences or late arrivals within 15 minutes of an assigned shift. It is undisputed that Mr. Lanerd did not report his late arrival on the morning of March 2, 2011.

Mr. Lanerd testified to his belief that he would not be permitted to work at the beginning of his scheduled 6:00 am shift due to the February 26 arrest, and that he timed his arrival to coincide with the opening of the Human Resources office at 8:00 am. While it would have been preferable for Mr. Lanerd to have confirmed his assumption by calling in at 6:00 am, his assumption was not unreasonable under the circumstances. Accordingly, this allegation is not sustained as a basis for discipline.

2. The Appropriate Penalty

The Employer's termination decision, accordingly, is premised on two instances of off-duty misconduct and for a failure to report the facts concerning one of those instances of misconduct. In general, an employee's off-duty time is her own and non-work related conduct is not an appropriate basis for discipline. An exception exists, however, when off-duty conduct has a nexus with an employee's job. Thus, it is well recognized that off-duty misconduct may be grounds for discharge or discipline where the misconduct has a substantial impact on the employer's business operation or reputation. DISCIPLINE AND DISCHARGE IN ARBITRATION 392-93 (Brand & Biren, eds., 2nd ed. 2008).

The Employer maintains that a sufficient nexus exists in this instance and that termination is warranted for three reasons. First, the Employer points out that the Rush City facility works closely with local law enforcement officials in coordinating their respective law enforcement missions. By violating legal norms and having repeated negative interactions with local law enforcement officials, Mr. Lanerd's actions have damaged the working relationship between these entities.

Second, the Employer argues that Mr. Lanerd's actions have impaired the credibility and trust necessary for the performance of his duties. A correctional officer is expected to adhere closely to policy and rules in order to carry out the fundamental security functions of his position. The Employer maintains that this mission is compromised when a correctional officer fails to follow policy and engages in the same type of criminal behavior as those inmates he is expected to secure. As the Employer's representative expressed at the hearing, an officer cannot be trusted to enforce rules within the facility if he is breaking rules in the outside world.

Third, the Employer asserts that Mr. Lanerd's criminal behavior inevitably will be known by other staff and inmates. This negatively affects the morale of staff who are expected to follow facility rules and obey the law. In addition, inmates may discredit the authority of an officer who has engaged in such conduct and attempt to manipulate his adherence to facility rules.

I find that these assertions have merit and that they support the conclusion that discharge is an appropriate remedy in the context of this case.

B. Do extenuating circumstances warrant a modification of the termination penalty?

In spite of the Employer's proof of reasonableness, a hearing officer may modify a discharge decision if sufficiently compelling extenuating circumstances exist. In this case, Mr. Lanerd contends that a lesser penalty is appropriate due to two mitigating circumstances.

Mr. Lanerd first argues that his problems with the law have occurred, at least in part, because of his addiction to pain killer prescription drugs. He maintains that he began to abuse pain killer medication as a means of coping with his service-related knee disability. In essence, he contends that his sanction should be reduced to reflect the fact that his conduct has been influenced by disability-related factors.

While Mr. Lanerd's use of pain killers to lessen the impact of a physical impairment is understandable, his ongoing abuse of such medications does not excuse his actions. Under the Americans with Disabilities Act, for example, an individual who currently uses unlawful drugs, which would include non-prescribed pain killers, is not entitled to protection against disability discrimination. In addition, the use of alcohol or drugs does not exempt an individual from the repercussions related to any resulting misconduct. BEFORT, EMPLOYMENT LAW AND PRACTICE § 12.9 (3rd. ed. 2011). Finally, it is noteworthy that Mr. Lanerd has not entered a treatment program to help him deal with his addiction.

Mr. Lanerd next argues that he should be treated with the same leniency as another corrections officer, James Hill, whose discharge after being convicted of terroristic threats and sentenced to two years of probation was reduced by an arbitrator to reinstatement without back pay. State of Minnesota and AFSCME Council 5, BMS Case No. 10-PA-1594 (Beens, arb. 2009). In that decision, the arbitrator relied on a number of mitigating factors including the employee's unblemished 20-year work record and his completion of alcohol treatment and domestic abuse counseling.

This comparison, however, is inapt. Mr. Lanerd does not have a spotless disciplinary record. He received suspensions of one and three days prior to his 2009 and 2011 arrests. Moreover, he has not taken steps to deal with his addiction. Unlike Mr. Hill who had a single

infraction and took decisive corrective action, Mr. Lanerd has a troubled past and has not taken any affirmative rehabilitation efforts.

Under these circumstances, the record does not present sufficient extenuating circumstances to warrant a reduction in the termination penalty.

ORDER

The decision of the Employer to terminate James Lanerd is sustained.

Dated: February 10, 2012

Stephen F. Befort
Hearing Officer