

IN RE ARBITRATION BETWEEN:

HUMAN SERVICES SUPERVISORS ASSOCIATION, HSSA

and

DAKOTA COUNTY

DECISION AND AWARD OF ARBITRATOR

BMS 13-PA-0248

JEFFREY W. JACOBS

ARBITRATOR

May 28, 2013

IN RE ARBITRATION BETWEEN:

HSSA,

and

Dakota County

DECISION AND AWARD OF ARBITRATOR

BMS Case # 13-PA-0248

H S grievance

APPEARANCES:

FOR THE UNION:

Ron Rollins, Attorney for the Association
Joel Button, Attorney for the Association
H S, Grievant
Rick Morrissey, President of HSSA

FOR THE COUNTY:

Pam Galanter, Attorney for the County
Nancy Hohbach, Employee Relations Director
Tim Cleveland, Deputy Dir. Comm. Corrections
Sgt. Dan Bianconi, Dakota County Sheriff's Dep't.
Barbara Illsley, Community Corrections Director

PRELIMINARY STATEMENT

The hearing in the matter was held on April 5, 2013 at the Dakota County Administration Offices in Hastings, Minnesota. The parties submitted Briefs that were received by the arbitrator on May 6, 2013 at which point the record was closed.

CONTRACTUAL JURISDICTION

The parties are signatories to a collective bargaining agreement covering the period from January 1, 2012 through December 31, 2012. Article V provides for submission of disputes to binding arbitration. The arbitrator was selected from a list provided by the Minnesota Bureau of Mediation Services. The parties stipulated that there were no procedural arbitrability issues and that the matter was properly before the arbitrator.

ISSUES PRESENTED

Did the County have just cause to discipline or discharge the grievant? If not what shall the remedy be?

COUNTY'S POSITION:

The County's position was that there was just cause to terminate the grievant under the facts of this matter. In support of this position the County made the following contentions:

1. The County noted that the grievant is a probation officer with years of experience and training in how to determine if one of her clients is using drugs or alcohol and that her history shows that she is quite capable of this yet she claims that she did not know that her husband not only was operating a substantial grow and sell operation for illegal marijuana on her property but also that he kept a very large bag of it on a dresser in her bed room. The County asserted throughout the proceeding that the grievant's claims are simply not credible and that she either knew or certainly should have known of the presence of this quantity of illegal drugs in her own home or that she was so blind to it that she cannot be trusted any longer.

2. The County also asserted that the grievant had known her current husband for several years prior to the marriage and knew of his drug use. The County pointed not only to the grievant's testimony but also that of the husband, whose statement as transcribed by Sgt. Bianconi as part of the investigation of the criminal matter. The County relied on Sgt. Bianconi's testimony and the grievant's own testimony of the proposition that the grievant as well as her husband's prior drug usage and even confronted him about it several times. The County again asserted that her claim that she was unaware of his usage during the material time frames in this matter is not believable since she acknowledged his use. Further, as the County noted more below, even though the grievant claimed that she would have acted to remove her husband from the home if she discovered his drug use, she sat literally next to him during a taped television interview with a local TV station while he acknowledged somewhat triumphantly that he smokes marijuana and "was not ashamed to say it," yet she did nothing about it even then.

3. The County further countered the claim by the Association that the grievant's husband's statement cannot be used and asserted that his statement, taken by a law enforcement officer in the regular course of his investigation, falls under a well-established hearsay exception for business records. It should thus be given full evidentiary weight and not discounted based on a hearsay theory.

4. The County noted that there were ample warning signs. The grievant's minor son found marijuana and reported that to the grievant yet she claimed that she "assumed" it belonged to a friend who had visited the home. The son also found drug paraphernalia and complained that he smelled marijuana odor in the home but the grievant claimed that it was tanned beaver hides and told the son not to worry.

5. The County asserted that this should have been a clear warning that something untoward was going on – at the very least that the grievant's husband was associating with people who used drugs. The grievant as a trained probation officer and who was aware of the prior drug use should have known that this was a clear warning sign of the risk of use yet she did nothing about it. The County argued that she was at the very least, complicitous in her husband's use and enabled it even if she did not truly know of the extent of it.

6. The event that led to the grievant's eventual termination occurred on October 22, 2010 when the son discovered a large plastic bag full of marijuana in the grievant's bedroom on a dresser mere feet from her bed. He photographed this and sent the photo to his father who then reported that to law enforcement. The County asserted that the pictures taken at the home showed that the bag was quite large and contained heat-sealed bags of marijuana apparently ready to be shipped. The County asserted that there was simply no credible way the grievant could not have known this bag was there or what was in it.

7. The County introduced testimony from the investigating officer who interviewed the son and the husband. The County asserted that his testimony showed that the husband had a significant grow operation and that he was clearly selling marijuana from his home. Sgt. Bianconi obtained a warrant to search the home and found large quantities of marijuana in the home and further found tools used for drying and cutting and bagging marijuana for sale.

8. Sgt. Bianconi is an experienced law enforcement officer who is familiar with these types of operations and of the tools and processes used to grow and sell it. He testified that the bag in the bedroom contained over 198 grams of marijuana, nearly 5 times the felony level for possession of marijuana. He further identified the grievant as a licensed probation officer, who is trained in ways to avoid detection of drug use.

9. The County also asserted that even though this occurred off duty there was a clear nexus after the media picked up on this story. The County noted that the story “went viral” and that local media ran the story and that even the national and international news media picked up the story. All of these identified the grievant as a Dakota County probation officer.

10. The County argued that these news stories seriously hurt the County and its reputation. The County asserted to that many of the great’s co-workers were disappointed and badly shaken by these stories and that some have even expressed unwillingness to work with the grievant. There as thus a clear nexus between her conduct in her home and her job.

11. The County noted that the nexus can be shown in a variety of ways: i.e. (1) conduct involving harm or threats to supervisors, co-workers, customers, or others with an actual or potential business relationship with the employer; (2) conduct that could seriously damage an employer's public image; (3) conduct that reasonably makes it difficult or impossible for supervisors, co-workers, customers, or others with an actual or potential business relationship with the employer to deal with the employee; or (4) public attacks by the employee on the employer, supervisors, or the employer's product. Citing, Elkouri & Elkouri, *How Arbitration Works*, section 15-11 (7th Ed. 2012).

12. The County argued that this conduct very seriously damaged the employer’s reputation. It also made it difficult for co-workers with a business relationship – like prosecutors, law enforcement personnel and judges/court personnel, to say nothing of other probation officers, to work with the grievant after this.

13. The County also asserted that the grievant's actions in allowing this grow operation and the use of marijuana to go on literally under her nose seriously undermines the grievant's credibility and her standing within the employer and the community in which the grievant operates. The County asserted that the grievant's coworkers no longer trust her and were unwilling to even testify on her behalf at the hearing of this matter.

14. The County also asserted that the grievant's actions constituted a serious breach of her ethical duty to the County and to her clients. The County pointed to the American Probation and Parole Association (APPA) Code of Ethics, and noted that the grievant signed, but has clearly breached, an oath promising to obey the law and to model the very behavior a probation officer would expect from an offender. That Code provides in relevant part as follows:

I recognize my office as a symbol of public faith and I accept it as a public trust to be held as long as I am true to the ethics of the American Probation and Parole Association.

I will constantly strive to achieve these objectives and ideals, dedicating myself to my chosen profession.

15. The County also asserted that the grievant failed in her obligation to report the activity that she clearly must have known about. Her training and experience should have alerted her to her husband's activities yet she either negligently or deliberately turned a blind eye; even the extent of claiming to ignore a 198 gram bag of marijuana that sat on her dresser for several days.

16. The County also asserted that her claims that she was unaware of the activities going on in the camper trailer found to contain large amounts of marijuana as well as the tools for drying and grinding it were equally incredible. She claimed that she rarely goes in it yet she testified as to its condition. The County asserted that she obviously does know the condition of the trailer. Further, her husband openly declared on TV that he smokes marijuana and it strains credibility that she could not smell it on him. The County noted that like cigarette smoke, marijuana leaves a distinctive odor that should have been obvious and detectable yet she chose to ignore all these clear signs.

17. Moreover, the trailer was on her property and as Ms. Illsley testified, she is held responsible for what occurs on her property. Thus whether she “knew” or not, she is held liable and thus responsible for these activities and cannot be trusted to perform the duties of a Dakota County as a probation officer.

18. Finally, the County argued that the grievant was not discharged for use of these drugs nor does it matter that there were or were not criminal charges filed. She was discharged for her conduct and of the reasons stated in the discharge notice, See Joint Exhibit 2. Conduct such as this has been upheld as the basis for termination by many arbitrators across the country who have ruled that a person in the position of trust such as the grievant’s, must be held to the same standard as a law enforcement officer. The County also noted that the grievant was not discharged exclusively for the media coverage, although it was clearly a factor and that the media coverage was not inaccurate and reported what the grievant's husband said accurately. This is thus a very different sort of case from one where the media “got it wrong” or where the media was incorrect in its reporting of the facts. Here the media coverage showed accurately what happened – and that was enough to warrant dismissal.

The County seeks an award of the arbitrator denying the grievance in its entirety.

ASSOCIATION'S POSITION

The Association’s position was that there was no cause for the termination here. In support of this position the Association made the following contentions:

1. The Association acknowledged that the bag of marijuana was found in the grievant’s bedroom on October 22, 2010 and that her son photographed it, sent it to the boy’s father who then reported it to police.

2. The Association also acknowledged that the grievant’s husband was charged with 5th degree possession of a controlled substance with intent to sell. The Association asserted that the grievant was also charged criminally as well but that those charges were later dropped.

3. The Association also acknowledged that there were media reports about this but noted that the story ran locally for only a short time; ending in November 2010 and that no new reports or airings of the story have appeared since. The Association asserted that given the time frame that has elapsed here, the grievant can still perform her duties as a probation officer effectively and competently.

4. The Association also pointed to the standards for determining whether here is just cause for discharge for off duty misconduct and cited similar arbitral authority as the county did. Of the four standards typically used only “conduct that could seriously damage an employer's public image and conduct that reasonably makes it difficult or impossible for supervisors, co-workers, customers, or others with an actual or potential business relationship with the employer to deal with the employee” even arguably apply here. There were no threats or public attacks of any kind.

5. The Association cited several other cases of off duty conduct that were quite offensive yet were not found to be sufficient to warrant discharge. In one case an employee flew a Nazi flag outside his house. In another, the arbitrator ruled that mere bad publicity was insufficient to sustain a discharge even where that publicity was quite adverse. In yet another, an employee

6. The Association noted that there was insufficient evidence that the coworkers would refuse to work with the grievant nor was there sufficient evidence that others in the criminal justice system would share that view – i.e. judges, law enforcement personnel, other probation offices or court personnel. The Association asserted that the county has the burden of proof on these issues – not the other way around – and that the Association does not need to prove that coworkers would work with her but rather the County had the burden to show that they would not.

7. The Association also objected to the use of any statements gathered by Sgt. Bianconi on hearsay grounds. The Association noted that these statements form the very basis of the County’s case against the grievant and that those giving them should have been made available to be cross examined yet they were not.

8. The Association cited arbitral precedent for the proposition that hearsay evidence should not be given much if any weight and that a discharge based entirely on hearsay evidence must be overturned. The County bore the burden of proof and hearsay evidence by the officer should not be enough to warrant discharge.

9. Further, the Association argued that the media reports alone are insufficient to warrant discharge and that despite the large amount of media coverage there was no evidence that the reputation of the County had been damaged to the extent claimed by the county.

10. Moreover, the grievant claimed most ardently that the bag of marijuana found in her bedroom was in a Menard's bag, closed so that anyone casually passing it would not have known what was in it unless they opened it and looked. In addition, she claimed ha she did not know that her husband placed the bag there or what was intended of rit.

11. She also claimed that she rarely if ever went into the camper trailer where the grow operation was apparently going on since it was so old and somewhat dirty and had no idea what was going on in there. The Association noted that there was no proof that she did know what went on in the camper and that the county is again assuming things not shown by any of the evidence.

12. The Association claimed that the sole bases of the discharge was that the large amount of marijuana fond on her property and the media attention. The Association noted that in neither of those cases was the grievant responsible for what happened. She was unaware of the marijuana and the media attention was completely out of the control. Further there was no proof that the media attention did any damage to the reputation of the department.

13. The Association also noted that at no point did the grievant ever use marijuana and never has – in fact none was even alleged by the County. Neither dos she condone it and testified that she has asked her husband to refrain from any use at all and if she had known of it she would have done something to get her husband the help he needed.

14. The Association asserted that the claimed ethics violations should be disregarded since they were not listed in the discharge letter and were raised at the hearing for the first time by County witnesses. Further, the Association noted that there is no specific policy the grievant violated and asserted that the failure to report her own husband, even if she was aware of the marijuana, is absurd.

15. Further, the Association asserted that the so-called ethics issues were not tied to the County policy in any way and that there was thus no policy violation by the grievant. Neither did the grievant have any positive or affirmative duty to report her husband. He was not an “offender” within the meaning of the policy and there was no duty to report him. The Association also noted that the training given informed her that she had no duty to report activities she did not see or hear directly.

16. The Association noted that the grievant had set clear rules against drug use in her home and had every reason to expect that her husband would follow them. The grievant and the Association asserted most vehemently that she never knew about the use or of the operation. She thus had no reason to report him. She believed him when the marijuana and the drug pipe was found and thought that a friend had brought them.

17. The Association noted that no drug tools or paraphernalia were found in the house. The bag of marijuana was the only drug item found on the home and this was in a sealed Menard’s bag that was opaque. The grievant asserted that she never looked in the bag and assumed it was something from Menard’s.

18. The essence of the Association’s case is that the grievant was comely faultless in this and that she was unaware of her husband’s activities. Had she known of them she would have put a stop to it immediately. In addition, the media attention was out of her control and was not shown to have caused any damage whatsoever to the probation office. There was thus no nexus and insufficient reason to sustain a discharge.

Accordingly, the Association seeks an award sustaining the grievance, reinstating the grievant to her former position and to make the grievant whole for all lost time and accrued contractual benefits.

DISCUSSION

The grievant is a Probation Supervisor in the Dakota County Community Corrections Department. She worked in the Court Unit, which is responsible for chemical and mental health assessments, risk assessments, compiling criminal history reports and other offender risk assessment. She completed pre-sentence investigations, and prepared reports to the court. The Court Unit is responsible for intake, risk assessment, investigations and restitution.

In order to perform her duties, the Grievant interacted with judges, law enforcement officers, prosecutors, defense attorneys and offenders. The Grievant served on the Criminal Justice Council that meets monthly and includes representatives from the Sheriff's Office, Court Administration and judges, in addition to Community Corrections.

The evidence showed that she is a competent officer who has been trained and is attuned to the potential of violations of probation by the clients, including the possibility of drug use.¹ The evidence showed that a great many clients served by the Dakota County probation office were convicted of drug related offenses and that there is a heightened level of scrutiny with the law enforcement culture in the county to watch for signs of repeat offenses or inappropriate drug or alcohol use.

The evidence showed that the grievant had been through a divorce and that there was some acrimony as a result of that between her and her ex-husband. She met her current husband some time ago and knew he had had difficulty with drugs and alcohol even before they began dating.¹

¹ There was some dispute at the hearing regarding the admissibility and weight to be given to the recorded statement of the grievant's current husband in which he acknowledged drug use going back several years. On this record it was unnecessary to consider that statement in any great detail given the grievant's own testimony as well as the recorded television interview in which both the grievant and her husband appeared together on a couch in the grievant's home and during which the husband quite freely and somewhat proudly announced that he smokes marijuana. The Association argued that the County's case cannot be established without hearsay evidence yet as need herein, there was a mountain of direct evidence from direct witnesses, not the least of which was the grievant herself as well as the clear photographic evidence taken during the investigation, that established the County's case here. The hearsay evidence objected to were the statements of the son and of the husband. Even without the son's statement the case would come out the same way. His testimony was not necessary here given the other evidence. Moreover, the husband's statement to St. Bianconi was unnecessary given the photos and his own statement made on television while his wife sat next to him.

There was little question on this record that her current husband had had these difficulties and that he and the grievant had discussed it as a potential issue in their relationship. The grievant has two minor children in her home and after the pair were married her current husband moved into the grievant's home.

Whether it was caused by the lingering tension between the grievant and her ex-husband or not the grievant's minor son became concerned that his stepfather was still using marijuana. The evidence showed that he reported that to his mother, the grievant, but little was done to either investigate it or stop it. There was one incident prior to the events of October 24, 2011 where drug residue was found in the home but the grievant claimed she dismissed it as something brought by some friends and accepted her husband's denials of continued use.

Further, in the late summer of 2011, the grievant's minor son found a glass bong pipe used for smoking marijuana in the grievant's home. He reported this as well and the Grievant talked with her husband and reportedly told him if he was using, he would need to leave. The husband did not deny the bong was his.

On yet another occasion, the son told the grievant he thought the stepfather's clothes smelled of marijuana. The grievant dismissed this as well and told the son that some tanned beaver hides in the basement were likely the cause of this odor. The grievant talked with her husband again and told him if he was using he needed to leave but apparently believed his denials despite mounting evidence that he was in fact using and doing so right in her home. It is also significant that this evidence came from the grievant as well as from the statements taken from the son and the husband during the criminal investigation in this matter.

It was puzzling how she ignored this clear warning even though the job of a probation officer would have been to at least further question such evidence.² It was also puzzling that the son thought his step father's clothes smelled of marijuana yet the grievant, who sleeps with him, did not and that she claimed at tanned beaver hides could be mistaken for marijuana smoke residue. During all of this, the grievant claims that she had been telling her husband that if he were using he would be asked to leave yet despite all of this evidence that at least pointed to use and should have alerted a competent probation officer to the very real potential of use, the grievant did little else. Frankly this was difficult to believe that she did not know under these circumstances. It is against that factual backdrop that the events of October 24, 2011 unfolded.

On that day the minor son found a large white plastic Menard's bag on the grievant's dresser in her bedroom. The photos of the room and the bag were review along with the dozens of other photographs of the grievant's home and property. The dresser is perhaps 2 or 3 feet from the foot of her bed and while it was an opaque white bag that had the word "Menard's" on it the bag was not sealed shut. It was easily accessible and open at the top.

The son took a cell phone picture of the bag and its contents and sent it to his father who immediately recognized it as marijuana and reported that to law enforcement. The sheriff's office launched an investigation of this and obtained a search warrant for the grievant's home.

Sgt. Bianconi testified credibly as to what he found when he arrived. There was some 198.1 grams of marijuana in the bag on the grievant's dresser. This translates to approximately half a pound and was about the size of a large purse or medium sized pillow from the photos. The felony-level threshold for possession of marijuana is 42.5 grams and it is clear that nearly 5 times that was found in her bedroom and overall approximately 8 pounds of it was found on the property

² It should also be noted that this evidence came from the grievant herself and not exclusively from the statements taken by Sgt. Bianconi during his investigation.

He also testified about the contents of a travel/camper trailer found on the grievant's property. Inside that camper he found clear evidence of a grow operation, sealed bags suitable for shipment, drying equipment, grinding equipment and other paraphernalia he testified were part of an operation to grow and sell marijuana. He testified about his credentials and experience as a drug enforcement officer and this testimony was both persuasive and compelling that this was an operation designed now simply to grow a small amount of marijuana but was one designed to grow it for sale as well. There was some 8 pounds of marijuana found on the grievant's property.

During the search the husband arrived at home and additional evidence of marijuana use was found in his vehicle. Sgt. Bianconi interviewed both the son and the husband. There was again considerable dispute about the admissibility and probative value of these statements since neither was called to testify. Again, the evidence this record was compelling enough based on the photographic evidence and the direct testimony of Sgt. Bianconi and the grievant herself that these statements by themselves did not swing the case one way or the other. They were reviewed and found to be consistent with the other evidence in the case and were used on this record to simply corroborate that other evidence in the matter.

Based on the evidence found in the home, the grievant and her husband were both charged with drug-related crimes. The grievant was charged with fifth degree aiding and abetting and possession. Those charges were later dropped and the husband is on probation. On this record however the result of the criminal prosecution was not controlling. There mere fact of a decision not to prosecute does not control the determination of whether there is just cause for discipline in the arbitral setting.

The media picked up on this story, largely due to the somewhat sensationalized detail that the grievants own son was the person who first reported this. Clearly, for whatever it is worth it was that angle that caught the attention of the media.

The story ran in local news outlets both print and broadcast and was even picked up by the national and international news outlets. Most of these identified the grievant as a probation officer in Dakota County. As noted above, at one point, in a remarkably puzzling and concerning decision, the grievant consented to an interview with a local television reporter who televised the interview in her home about the allegations. The husband stated unequivocally in that interview that he used marijuana and that “I smoke marijuana and I am not ashamed to say it.” The grievant sat next to him during this interview and demonstrated neither shock nor disappointment in this statement. This was in stark contrast to her earlier statements that she would have asked him to leave had she known.³

The media coverage went on in something of a frenzy from November 14 to 16, 2011. There was no evidence that the story ran again – at least not broadcast or in the print media after that but it is clearly all over the internet and there is no way to know how many times that story, many of which identify the grievant by name and as a Dakota County Probation Officer was accessed or viewed across the country or even the globe.

As discussed below, the damage was done. The media stories badly hurt the reputation of the Dakota County probation Office, damaged the grievant’s relationship with those with whom she works, including law enforcement and judicial personnel and undercut the trust relationship any officer in her capacity must have. Ms. Illsley testified credibly that she could no longer trust the grievant or her judgment and that this story would certainly make it difficult if not impossible for her to work effectively in her role as a probation officer in the future.

³ The husband told Sgt. Bianconi that he uses marijuana in the house and the grievant knew it. It was this statement that drew the most vociferous objection by the Association. As noted herein, this statement alone was not determinative of the case but added some support to the other evidence that also indicated that the grievant must have known this was going on. Further, as noted earlier, Sgt. Bianconi was quite credible in his testimony and here was no evidence that this statement alleged made by the husband was incorrect, misquoted or fabricated in any way. It is also completely consistent with the other evidence in the case. There was also evidence that the grievant told Mr. Cleveland that her husband smoked marijuana. This statement would not be considered true hearsay but rather an admission by a party under formal rules of evidence. It should also be stated, as it was at the hearing, that arbitrations are not subject to the formal rules of evidence that might apply in Court and that some hearsay statements are admissible and give the appropriate weight they deserve just as any other piece of evidence. Here these statements were admitted and as noted herein, were used mostly for the purpose of corroborating other direct pieces of evidence in the case. As with all such matters, the evidence as a whole is the determinative factor.

The Association argued quite vehemently that the grievant did not know this was going on and would have taken steps to get him the help he needed and stopped the behavior. The grievant asserted that she believed her husband when she would confront him, if indeed she ever truly did, that he was not using marijuana. The evidence simply did not support this denial.

One of the most difficult things an arbitrator is called upon to do in to determine credibility of witnesses. Sadly, on this record, the grievant's story simply is not credible. There is virtually no credible way that she could not have known what was in that bag and no credible way she could have had no idea what was going on under her nose in her own house and on her own property. The husband made no effort to hide this operation either - the camper trailer was parked near the house. This was especially true in this instance where the grievant is a trained and, by all accounts, competent probation officer. Certainly if one of her probation clients had exhibited this sort of behavior or these kinds of things had been reported to her in her professional capacity (or to one of her supervisees) the evidence showed that would have been duty bound to investigate it immediately and not dismiss it as belonging to someone else or to tanned beaver hides. While there was no evidence that she was complications in the selling operation directly there was some evidence here that she was appropriately charged with constructive knowledge, as Ms. Illsley put it, of the things going on in her home, especially on this record with all these warning signs popping up in front of her. There is in the law the notion that someone either "knew or should have known." That concept was never more applicable than here.

The Association argued that there was insufficient nexus between her job duties and her off duty conduct. The argument is that here was an insufficient showing of the requisite degree of nexus between those to warrant discipline at all much less dismissal. On this record that argument rang hollow.

There was a very clear connection between her off duty conduct and her job in this instance. As the County correctly asserted, the grievant is in a similar position to any law enforcement officer and that if a law enforcement officer engaged in this type of conduct even off duty would certainly be subject to discipline or discharge.

Elkouri notes that such a nexus can be shown in several ways, two of which are relevant here and can involve either conduct that could seriously damage an employer's public image or conduct that reasonably makes it difficult or impossible for supervisors, co-workers, customers, or others with an actual or potential business relationship with the employer to deal with the employee. See, Elkouri & Elkouri, *How Arbitration Works*, section 15-11 (7th Ed. 2012).

There was no question that there was serious damage to the employer's public image and the working relationship it and the grievant needs to work with law enforcement personnel. There was also evidence that her co-workers within the office expressed an unwillingness to work with her and were very disappointed in both her conduct and the fact that she sat on the couch in her home with a TV reporter while her husband acknowledged extensive illegal drug use while in the grievant's home.

The Association further argued that the media coverage does not create the requisite nexus between her off duty conduct and that mere media coverage cannot be used as a reason to terminate someone just because of adverse publicity. Several things can be said about this assertion. First, had the media coverage been incorrect the Association's point would be well taken.

Publicity in itself is not the determinative factor. The press sometimes gets it wrong. One could certainly imagine a scenario where the media story is simply incorrect, as it sometimes is, or that the facts are misstated, taken out of context or simply fabricated or based on "reliable sources" who fabricate it. In that case an employee wrongly chastised in the press for an alleged offense would have a far stronger case for reinstatement even in the face of withering media attention.

Here however the essential facts were correct. She did have 8½ pounds of marijuana in her home. There was a so-called "grow" operation going on in the house. In addition, it was clear that despite the claim that she was unaware of this the facts and evidence showed otherwise. It was clear that she knew of this and ignored it or ignored obvious signs of what was going on. In any event her entreaties that she was unaware of this rang hollow.

Second, the interview with the local TV reporter was a substantial piece of evidence in this matter and showed the husband willingly admitting to significant marijuana use all while the grievant sat next to him and showed neither surprise nor disgust with that statement. As noted above, while there was considerable dispute about the admissibility and probative value of certain statements taken in the course of the police investigation, the statements made and the conduct exhibited to the media was hard to refute.

Third, the cases cited by the Association where grievant's have been reinstated for off duty conduct are distinguishable. In Dep't of Corrections, 114 LA 1533 (1997) an employee was terminated for displaying a Nazi flag on his property. The arbitrator ruled that mere adverse publicity is not enough to warrant termination and that there must be actual harm shown. Here the conduct was far more than the unpleasant expression of free speech while off duty. It involved clearly illegal activity going on in the grievant's own bedroom, among other places on her property and the very clear nexus between the media attention identifying her and her employer. See also, MN Dep't of Corrections, 130 LA 235 (Daly 2011) where the arbitrator ruled that mere publicity is not enough. See also City of Minneapolis v Moe, 425 N.W.2d 367, 370 (Minn. Ct. App. 1990). Here there was more than "mere publicity." The publicity, even though the initial stories lasted only a few days was quite damaging to the County and to the grievant's reputation within her own office as well as with the offices with which she does business.

The Association also argued that there was no actual policy violation by the grievant and asserted that the County could not point to any specific policy or rule she violated. The Association asserted that vague rules such as “ I will uphold the law with dignity” cannot be used to terminate someone since it gave virtually no notice to the grievant as to what sort of conduct would result in discipline, much less her termination.

This assertion is a testament to the ability to make an argument with a straight face. On this record it cannot seriously be argued that there was no policy violated. Even though there was no evidence that the grievant used drugs of an kind, the fact that she likely did know this was going on and either turned a blind eye to it, despite her protestations to the contrary, or worse, somehow enabled her husband’s conduct by ignoring it, she certainly cross a line that every probation officer could identify.

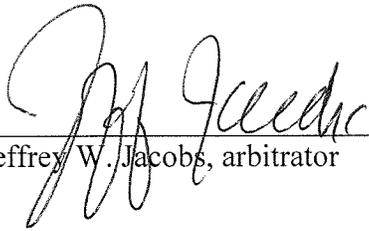
When taken as a whole, the evidence supported the claim that the grievant’s discipline was appropriate. The remaining question is whether discharge is appropriate on this record. The County provided persuasive evidence of the damage done both to its official reputation within the law enforcement and judicial community as the result of the grievant’s actions here. It also showed that the grievant’s co-workers, both inside and outside of the office have so lost faith in her that they would be unwilling or unable to work with her in the future. While it is unfortunate the media stories ran so often and became so public, some of this was due to the grievant’s own actions in granting an interview in her own home while her husband proudly announced his use of marijuana. It was also based largely on the clear fact that she must have known or certainly should have known what was going on under her own roof and on her own property. On his record, there was both a clear showing of serious misconduct and a clear showing of a nexus to the work activity. There was also an adequate showing that given the totality of circumstances here, termination was warranted. Accordingly the grievance must be denied and the discharge upheld.

AWARD

The grievance is DENIED.

Dated: May 28, 2013

HSSA and Dakota County Siebenaler award



Jeffrey W. Jacobs, arbitrator