IN THE MATTER OF THE ARBITRATION
BETWEEN

TEAMSTERS LOCAL 252	)	
	)	
	)	OPINION
and	)	AND
	)	AWARD
LEWIS COUNTY JUVENILE COURT	)	
	)	

Grievant: Geoffrey Nelson

Janet L. Gaunt
Arbitrator

December 6, 2011

APPEARANCES

For the Union:

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For the County:

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WITNESS LIST

1. Robin Hood, Juvenile Detention Officer
2. Ron Morton, Juvenile Detention Officer
3. Charles West, Detention Center Manager
4. Holli Jo Spanski, Juvenile Court Administrator
5. Geoffrey Nelson, Grievant

EXHIBIT LIST

County

1. Nelson Certification re: County Personnel Policy and Procedures Manual
2. Nelson Certification re: Juvenile Court Policy Manual (11/15/06)
3. Checklist of Employer Requirements for New Employees
4. Juvenile Court Uniform Standards of Conduct (revised 1/8/09)
5. Nelson Performance Evaluation (1/13/09)
6. West memo to Nelson (4/17/08)
7. Incident Report (8/14/08)
8. Incident Report (8/18/08)
9. Incident Report (8/28/08)
10. Vanessa Conwell Statement (8/26/08)
11. West notes of meetings with Nelson (2008)
12. Summary of Complaints against Nelson (8/19/08)
13. Spanski memo to Nelson (9/12/08)
14. Spanski response to Nelson grievance (10/9/08)
15. Judge Brossey denial of Nelson grievance (11/4/08)
16. West letter to Spanski re Nelson Investigation (6/15/09)
17. Spanski notice to Nelson of pre-disciplinary hearing (6/25/09)
18. Nelson statement re compliance with religion directive (undated)
19. Hood memos to West (1/16/11 and 1/20/11)
20. Morton Incident Report (1/20/11)
21. Spanski notice to Nelson of pre-disciplinary hearing (1/28/11)
22. Spanski notice to Nelson of allegations (2/3/11)
23. Spanski notice to Nelson re proposed discipline (2/9/11)
24. Notice of Termination (2/18/11)
25. Spanski Step One grievance response (3/14/11)
26. Judge Hunt Step Two grievance response (undated)
27. Collective Bargaining Agreement between Teamsters Local 252 and Lewis Count Juvenile Court (January 1, 2009-December 31, 2009)
28. West Summary of Complaint against Nelson (1/25/11)
29. Spanski Meeting Notes (2/17/11)
30. [Objection Sustained]

Union

1. Detention Work Schedule (January 2011)
2. West memo to Detention Officers (1/20/11)
3. West email to Nelson and Duckett (1/21/11)

PROCEEDINGS

Teamsters Local 252 ("Union" or "Local 252") initiated this arbitration on behalf of Mr. Geoff Nelson ("Grievant" or "Nelson") pursuant to the terms of a Collective Bargaining Agreement ("Agreement" or "CBA") with the Lewis County Juvenile Court ("County" or "Employer"). At issue is the Grievant's termination on February 18, 2011 for violation of various Standards of Conduct.

The Arbitrator was selected to serve as sole arbitrator by mutual consent, and a hearing was held in Chehalis, Washington on September 29, 2011. The Union was represented by David W. Ballew of Reid, Pedersen, McCarthy & Ballew, L.L.P. John E. Justice of Law, Lyman, Daniel, Kamerrer & Bogdanovich, P.S. The parties stipulated that the Arbitrator had jurisdiction to render a final and binding decision regarding the issues presented.

At the hearing, both sides had an opportunity to make opening statements, submit documentary evidence, examine and cross-examine witnesses (who testified under oath), and argue the issues in dispute. The hearing was tape recorded with prior notice the tape was solely for the Arbitrator's use and would not be retained. The hearing was closed on November 1, 2011 upon receipt of the parties' posthearing briefs. To accommodate the Arbitrator's travel schedule, the contractual time limit for issuing this decision was extended.

STIPULATED STATEMENT OF THE ISSUES

The parties stipulated that the Arbitrator should resolve the following issues:

1. Whether the discharge of Geoff Nelson was for just cause?
2. If not, what is the appropriate remedy?

RELEVANT FACTS

Teamsters Local 252 serves as the exclusive bargaining representative for Lewis County Superior Court and Juvenile Detention Center ("JDC") employees, who work in various job classifications. The Lewis County Juvenile Court is a division of the Superior Court. and the Juvenile Court Administrator is Holli Spanski. Charles "Chuck" West is the JDC Manager, and the Grievant's immediate supervisor. At the time in question, the Union and County were parties to a Collective Bargaining Agreement that commenced on January 1, 2009. Ex. C-27.[1]

The Detention Center is staffed 24 hours a day by crews of Juvenile Detention Officers ("JDOs"), who work 12-hour shifts, three days one week and four days the following week. Prior to January 1, 2011, each crew consisted of

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[1] Exhibits are referred to as either County ("Ex. C-__") or Union (Ex. U-__"). Witnesses are referred to by last name. References to exhibits or testimony are intended to be illustrative, not all-inclusive, of evidence in the record that supports a particular statement.

three officers, and officers were assigned to crews for up to 12 months. Crews reshuffle on the first of each year. Prior to January 2011, there were two (2) supervisors, who worked six (6) hours on each shift. As a result of budget cuts, one supervisory position was eliminated. The remaining supervisor works from 6 AM to 6 PM. When a supervisor is not present, the most senior JDO on duty serves as the lead, and is authorized to direct the work of their crew.

The Grievant's Work Record

Mr. Nelson began working for the County as a Juvenile Detention Officer in November, 2006. The Grievant had no prior experience in the corrections field, but graduated at the top of his class at the Juvenile Corrections Officer Academy. Mr. Nelson's first and only performance evaluation was conducted by Chuck West in January 2009 and covered the period of November 2006 to December 2008. In that evaluation, West described warnings that had been given to Mr. Nelson about inappropriate comments regarding the race, religion and/or sexual orientation of staff and detainees. Ex. C-5, pp. 4, 12. The Grievant had denied these allegations and no disciplinary action was taken. Instead, Mr. Nelson was reminded of the County's no tolerance policy and warned that future violations could result in termination. Ex. C-13.

West also noted that Nelson had been "directed to not engage in argumentative behavior in the workplace," and commented that since receiving that directive,

Mr. Nelson had complied. Finally, West rated the Grievant as below standards for the element of following Department Policies and Procedures because of a two (2) day suspension without pay that had been issued in September 2008 by Holli Spanski for engaging in open bible study on the work floor while on duty. This conduct had occurred after prior warnings from both West and Spanski that such conduct was not appropriate. Ex. C-13.

A concern about the Grievant interjecting religion into the workplace arose again in June 2009, when there was an allegation that Mr. Nelson had been quoting scripture to detainees. As resolution of this issue, Ms. Spanski accepted a written statement from the Grievant acknowledging he would follow her directive on religion and affirming that he would not preach to juveniles or staff.

> Also, under no circumstance will I try to persuade, impart, interpret or coerce anyone towards my religious beliefs or understanding of them. . . . . [If[religious topics . . . come up . . . I will inform the juveniles they need to talk to their probation councilor or religious leader. . . . .

Ex. C-18.

Events on January 15, 2011

Throughout 2010, Mr. Chevalo Duckett served as one of the two JDO supervisors. Duckett's supervisory position was eliminated by budget cuts, so he reverted back to a JDO position effective January 1, 2011. Throughout 2010, Mr. Nelson had been the most senior officer on his crew and thus had served as the lead. When crews were reshuffled at the outset of 2011, Duckett and Nelson were

assigned to the same crew and began working a night shift from 6:00 p.m. to 6:00 a.m.. The third member of their crew alternated between Robin Hood and Nichole Davis. Duckett, Nelson and Hood had never worked steadily on a crew together. Since Ms. Hood was the most senior of the three, she became the lead officer.

The Detention Center has three main work areas: an Intake area, the Day room where juveniles can be present until lockdown at 2200, and the Master Control Room ("MCR"), where an officer sits at a desk with three video monitors and a keyboard. During a shift, one officer is assigned to each of these areas. The officer in the Control Room is responsible for monitoring activity in the cells and Day Room where one JDO circulates among detainees until lockdown. Before each shift commences, officers gather in the MCR.

On the evening of January 15, 2011, Ms. Hood, Mr. Duckett and Mr. Nelson were all working the evening shift, with Hood as the shift lead. By the time Hood arrived in the MCR, Nelson was already present and watching an NFL Playoff game on a TV. The departing prior shift lead, Ron Morton, was still present when Hood directed the Grievant to turn the TV off until juveniles were locked down for the night. Ms. Hood contends he refused to do so. Nelson contended that TV watching had been permitted on his shifts in the past and argued with Hood about her directive. At some point, Mr. Duckett arrived and joined in the argument, asserting that he had allowed the TV to be on while he was a supervisor. Hood said she did not care what they had done previously; she

wanted the Grievant to turn the TV off. After Nelson ignored her request, Hood turned the TV off herself. As she was leaving the Control Room, Hood saw the Grievant's hand reach in the direction of the TV and heard the set come back on. Ms. Hood was upset but decided against further arguing. She contends the TV set remained on while the Grievant was working at the Control Room panel before lockdown. Hood and Duckett had a later conversation in the Day Room over whether she disliked him, but the rest of the shift was uneventful.

Events on January 16, 2011

The next evening, Hood asked Morton to remain in the Control Room at the outset of her shift as a witness while she reviewed work expectations with Nelson and Duckett. Hood then reiterated her directive that the TV be left off until lockdown. Nelson and Duckett continued to disagree and Nelson became especially upset after Hood also said she was offended by religious DVDs that Nelson and Duckett had been watching. According to Hood and Morton, the Grievant made a number of defiant statements such as :

- contending the only thing Hood could control was the timing of when the JDOs rotated through work stations;
- saying he had no concern about being written up because that had occurred before and nothing had happened;
- referring to being on paid leave during investigations as administrative "vacation," and indicating he could use another one; and
- asserting he had called Holli Spanski a liar to her face and she had not been able to do anything to him.

Hood said if Duckett and Nelson had an issue with her directive, they should take it up with Chuck West. Both officers indicated they would do so. Pursuant to Hood's directive, the TV did remain off until lockdown.

Part of Ms. Hood's concern about the religious DVDs was that Nelson and Duckett watched them at such a high volume that the audio could be heard outside the Control Room. When Duckett and Nelson offered to turn the volume down, Hood said would be fine, but she also questioned whether it was appropriate to be watching the DVDs on work time due to their religious content However, Hood did not insist that Nelson and Duckett stop watching the DVDs.

After the conversation ended, Hood began the shift in the MCR while Nelson began working in the Day Room. While in the Control Room, Hood prepared a summary of the recent shift events that she sent to Chuck West that evening. Ex. C-19. Later in the shift, after juveniles had been locked down, the Grievant came to speak with Hood in the Control Room and acknowledged things had gotten out of hand earlier. He and Hood talked through their respective concerns, and Hood asked Duckett to join the conversation because she felt it had been productive. By the end of the shift, Hood felt the crew could work together more cooperatively. By then, she had already sent the earlier memo to Mr. West.

The County's Investigation

West had been on leave and did not see Ms. Hood's memo until January 20, 2011. His initial reaction was to meet with the Grievant and ask what had occurred during the earlier shift. According to West, Mr. Nelson refused to acknowledge that he needed to comply with Hood's directives, and argued that she could not tell him to stop watching TV. The two men also discussed the religious DVDs, which West told Nelson to stop watching while he looked into the issue. When the Grievant kept insisting that West put this directive in writing, West became angry and ended the meeting.

West subsequently spoke with Mr. Duckett, who was apologetic, and acknowledged he had to follow Hood's directives even though Duckett had once been a supervisor West had another conversation with the Grievant in which West apologized for abruptly ending their earlier meeting, and Mr. Nelson continued to insist that West put his directive not to watch religious DVDs in writing. West reiterated that he needed to do some research before doing so.

Following his conversations with Duckett and Nelson, West asked Ms. Hood for a more detailed written description of the events on January 15 and 16. She submitted an expanded report the evening of January 20th. Ex. C-19, pp. 2–3. West also obtained an incident report from Officer Morton. Ex. C-20. Just before the night shift started on January 20th, West issued a memo to all JDOs which

stated, in relevant part: "Television is no longer allowed in the Control Room. Staff are allowed to watch television after 2200 hours if the Detainees are locked down." Ex. U-2. The next day, January 21, 2011, West also issued a written directive to Nelson and Duckett regarding DVD watching, which read as follows:

> Geoff and Chevalo - per our conversation last night. A co-worker had complained that they found the content in some DVDs to be offensive. They went on to state you two have been watching these DVDs in the control room. After some research today, it had been found that these *DVDs can be viewed in a private area such as the interior classroom but not in any common work areas where they could be seen or heard. It is expected that these DVDs be viewed with the volume low enough to prevent them from being heard outside of the interior classroom. Television viewing by staff is only allowed after 2200 hours so this classroom is a private area until 0600.* If you have any questions or concerns on this please call me or let me know and I will meet with you in person. If I do not hear back from you by January 24th, it will be considered that you both have a full understanding on the above expectations.
>
> I have contacted Robin Hood and explained this information to her.

Ex. U-3 (emphasis added by italics).

The Decision To Terminate

On January 25, 2011, Chuck West submitted a memo to Holli Spanski describing alleged events on January 15-16,2011, along with his subsequent conversations with the Grievant and Mr. Duckett. West stated he felt Mr. Nelson's behavior had violated a number of the County's Standards of Conduct. Ex. C-28. On January 28, 2011, Ms. Spanski gave Nelson notice that he was alleged to have violated various Codes of Conduct , and scheduled a pre-disciplinary meeting for

February 3, 2011. Mr. Nelson was advised of his right to union representation at that meeting. Ex. C-21.

On the day of the pre-disciplinary meeting, Mr. Nelson left voice mail messages for Spanski, indicating he was rescheduling the hearing until his representative could be present. The Grievant wanted to be represented by an attorney who had been delayed in court and would not be available at the scheduled time (6 pm). Spanski did not hear the messages until shortly before 6:00 pm, when she had a Union representative in her office. When Nelson did not appear, Spanski contacted him by phone, and advised that there was a Union representative present in her office. After some apparent confusion over who Nelson wanted to have represent him, Spanski explained that an attorney did not have standing to attend this kind of meeting, and the Grievant advised Spanski that he did not wish to attend without his attorney present. Instead of reporting to Spanski's office, the Grievant went to the MCR to begin his shift.

There is no requirement that an employee attend a prehearing conference. It is simply an opportunity to provide information if an employee wishes to do so. Based upon the information she had reviewed up to that point, Spanski concluded there was reason to believe various rules of conduct had been violated so she prepared a notice to that effect. Ms. Spanski then headed to the JDC Control Room where Nelson was speaking with Duckett when she arrived. Spanski asked

the Grievant to step outside so they could talk, but Nelson refused to do so, saying he preferred to have Duckett as a witness to the conversation. Ms. Spanski then handed Nelson a letter placing him on suspension pending termination proceedings. Ex. C-22.

Prior to making a final decision, Spanski scheduled another hearing on February 17, 2011, which Mr. Nelson did attend with a Union representative. During this meeting, the Grievant denied turning off the TV, but stated he did not feel it was insubordination to ignore Robin Hood's directive. The Grievant acknowledged saying he was not worried about being written up, but denied making statements about having called Spanski a liar or about wanting an administrative vacation. Mr. Nelson refused to review the written statements of Hood and Morton that were made available to him and his Union representative. Yet, he claimed both those JDOs were lying about his conduct. Nelson told Spanski she needed to investigate more before conducting hearings, which he characterized as a waste of time. Ex. C-29.

The next day, Spanski gave the Grievant notice of his termination effective February 18, 2011. Ms. Spanski concluded Nelson's behavior had violated Codes of Conduct #8 (Cooperation with Employees and Other Officials), 16 (Insubordination), 17 (Obeying All Directives) and 19 (Courteous and Respectful Behavior

Towards Positions of Authority). Spanski described the basis for discharge as follows:

> Insubordination, lack of respectful and courteous behavior towards positions of authority, and failure to cooperate cannot be tolerated by this Court. You willfully chose to disobey a direct order from the authorized Shift Lead, you were argumentative, discourteous, and insubordinate with Detention Manager West and you chose to refuse to follow my directives as well. The conduct you chose to engage in denigrates the efficiency and effectiveness of this Court.

Ex. C-24.

Filing of the Grievance

On February 23, 2011, the Union filed a grievance contending the County lacked the just cause for discipline that is required by Article 4.7 of the Collective Bargaining Agreement. That grievance was denied by Ms. Spanski at Step One of the contractual grievance procedure. At the Step Two appeal, Superior Court Judge Nelson Hunt found the Grievant's termination had been "thoroughly justified." Exs. C-25, C-26. The Union thereupon invoked arbitration, and the matter proceeded to hearing before this Arbitrator.

RELEVANT CONTRACT LANGUAGE

3. MANAGEMENT RIGHTS

3.1 Customary Functions

3.1.1 Except as expressly modified or restricted by a specific provision of this Agreement, all statutory and inherent managerial rights, prerogatives,

and functions are retained and vested exclusively in the Employer and its management, including but not limited to, the rights, in accordance with its sole and exclusive judgment and discretion:

* * * *

b) to reprimand, suspend, discharge or to otherwise discipline employees for just cause;

4. EMPLOYMENT POLICIES

* * * *

4.6 Investigations

4.6.1 Employees have an obligation to cooperate with any investigation conducted by the Employer. Failure to do so will be considered insubordination and will be grounds for discipline, up to and including termination.

4.6.2 Whenever an employee is being interviewed by the Employer in circumstances that may lead to disciplinary action against the employee, the employee will be advised prior to the start of the interview of the subject of the interview and the right to have Union representation at the interview.

4.6.3 Employees are entitled, at their option, to have Union representation during any investigatory interview conducted by Employer that the employee reasonably believes may result in discipline of the employee. During any such investigatory interview, a participating Union representative will be given the opportunity to ask questions, offer additional information and counsel the employee, but may not obstruct the Employer's investigation.

* * * *

4.7 Just Cause for Discipline

4.7.1 All disciplinary suspension, or termination action taken against an employee shall only be for just cause, ...

4.7.2 Just cause shall be defined as defined in the case Enterprise Wire Co. and Enterprise Independent Union, March 28, 1966 46 LA 359.

4.8 Administrative Leave & Progressive Discipline

4.8.1 . . . . the Employer recognizes part of a "just cause" standard requires the use of "progressive discipline, when appropriate, relative to allegations made against an employee.

* * * *

5. GRIEVANCE PROCEDURE

* * * *

5.3 Arbitration

* * * *

5.3. In connection with any arbitration proceeding held pursuant to this Agreement, it is understood as follows:

a) The arbitrator shall have no power to render a decision that will add to, subtract from or alter, change, or modify the terms of this Agreement, and his or her power shall be limited to interpretation or application of the express terms of this Agreement. All other matters shall be excluded from arbitration.

b) The arbitrator shall rle only on the basis of information presented in the hearing and shall refuse to receive any information after the hearing except in the present of both parties and upon mutual agreement.

c) The decision of the arbitrator shall be final, conclusive and binding upon the Employer, the Union, and the employees involved provided the decision does not involve action by the arbitrator which is beyond its jurisdiction.

* * * *

RELEVANT COUNTY POLICIES

21 STANDARDS OF CONDUCT

01-05.110-8 COOPERATION WITH EMPOLOYEES AND OTHER OFFICIALS

Employees are required to seek affirmatively ways to cooperate and work with other employees, other public officials, and employees of any organization with whom the employees or this Office needs to have a good working relationship in order to deliver lawful, effective, efficient, and safe service.

01.05.110-16 INSUBORDINATION

Employees shall wilfully observe and obey the lawful verbal and written rules, duties, policies, procedures and practices of the Lewis County Juvenile Court. They shall also subordinate their personal preferences and work priorities to the lawful verbal and written rules, duties, policies, procedures and practices of this Office, as well as to the lawful orders and directives of supervisors and superior command personnel of this Office. Employees shall wilfully perform all lawful duties and tasks assigned by supervisory and/or superior ranked personnel. Direct tacit or constructive refusal to do so is insubordination.

01.05.110.17 KNOWING, OBSERVING, AND OBEYING ALL DIRECTIVES, RULES, POLICIES, PROCEDURES, PRACTICXES AND TRADITIONS.

Employees shall display an affirmative, consistent effort to observce and comply with the directives, rules, policies, procedures, practices and traditions established for the effectivem, efficient, and safe operations of this Office. . . . .

01.05.110-19 COURTEOUS AND RESPECTFUL BEHAVIOR TOWARD POSITIONS OF AUTHORITY.

Employees shall be subordinate and display courtesy and respect in words, deeds, gestures, and actions towards personnel holding higher level of official authority.

CONTENTIONS OF THE PARTIES

The parties' respective arguments, although presented in much more detail to the Arbitrator, can be summarized as follows:

Union

1. The County has the burden of proving both actual wrongdoing, and a penalty appropriate to the offense. Neither of these burdens was met. County claims of alleged wrongdoing were based upon a flawed investigation which failed to put events in context and created mistaken impressions. The actual facts contradict the County's assumption that the Grievant was refusing to follow orders or perform his work duties over the course of two shifts.

2. The County erroneously claimed there was a long-standing practice of not having the television on before lock-down. In reality, Mr. Duckett had allowed that practice throughout his time as supervisor. An argument did occur between Robin Hood and both Chevalo Duckett and the Grievant at the start of their shift on January 15th, but what occurred that night did not amount to insubordination. Instead, by the end of the shift the following night, Ms. Hood felt the crew members had resolved their differences. After Ms. Hood turned the TV off, Mr. Nelson insists he did not turn the TV back on. Ron Morton's claim that the Grievant did so should not be credited.

3. Chuck West did not make contemporaneous notes of his meeting with the Grievant, and Mr. Nelson did not have a witness because in violation of CBA Article 4.6.2, West failed to advise the Grievant that he could have a Union representative at their meeting. West drafted a memo nearly a week later which describes Nelson as saying he would do what he wanted. That was West's conjecture, not a statement of fact. In reality, after Robin Hunt and Chuck West asked him not to watch religious videos, Mr. Nelson did not do so despite feeling this was an improper directive. Asking West to put that directive in writing was entirely appropriate and does not serve as a basis for discipline.

4. The disparity in treatment between Duckett and Nelson cannot be justified. In their interaction with Robin Hood, the only distinction is the allegation that Nelson turned the TV on after Robin turned it off. The Grievant denies doing so, and Ron Morton's assertion to the contrary should not be credited. The County has tried to justify the Grievant's much harsher discipline by claiming he was

defiant in meetings with Chuck West and Holli Spanski. That too mischaracterizes what occurred. West treated Duckett more like a confident than as a subordinate, and was admittedly more emotional in the meeting he conducted with the Grievant. Alleged defiance with Ms. Spanski was simply not established. Neither was the alleged disparity in the prior work records of Duckett and Nelson. Contrary to the County's assertion, Mr. Nelson had not been disciplined four times. There were only allegations that were not sustained. Unproven allegations against Mr. Duckett were not considered discipline, even when the County made payments to the complainants.

5. The County's investigation into the events of January 15 and 16 was flawed. Because she simply reviewed written statements without talking to the witnesses herself, Ms. Spanski was unaware that some events described in Ms. Hood's January 16th email occurred in a different sequence. Neither did Spanski know that after further discussion with the Grievant on January 16th, Hood considered their dispute to be resolved. Because of misunderstood facts, the County learned some relevant information for the first time at the arbitration. The actual facts paint a very different picture than the County's assumption that Mr. Nelson refused to follow orders or perform his work duties over the course of two shifts.

6. As Judge Hunt noted in his Step II denial, whether the Grievant turned the TV on again is a trivial issue. The primary reason for his discharge was the perception that Mr. Nelson felt he did not have to comply with the directions of supervisors. In reality, Nelson did comply with Hood's directions, and it is not reasonable to characterize their brief discussion before the Saturday night shift as insubordination. The Grievant complied with West's instruction to temporarily refrain from watching religious DVDs; he only asked that this directive be put in writing. There was likewise no defiance of authority with Holli Spanski. During her testimony at the arbitration, Ms. Spanski acknowledged that the Grievant's failure to attend a meeting in her office on February 3, 2011 was the result of miscommunication, not defiance. She also acknowledged it would not be right to discipline the Grievant for his refusal to talk outside the Control Room, since he wanted to have a witness present, but that individual could not leave the Control Room unattended. For all of the foregoing reasons, even if some fault is found with the Grievant's behavior during the shifts in question, discharge was an inappropriate penalty.

Company

1. The Grievant was not terminated for watching TV in the Control Room. That was an instigating event, but what led to Mr. Nelson's discharge was his insubordinate and defiant attitude towards his shift lead (Robin Hood), his direct supervisor (Chuck West), and even towards Juvenile Court Administrator Holli Spanski. The Grievant had a history of arguing with co-workers and of insubordinate behavior. Despite prior counseling and discipline, Mr. Nelson continued to convey the belief to others in authority that they could not tell him what to do. When the Grievant gave Ms. Spanski no reason to believe this attitude would change, she reasonably concluded resort to termination was justified. For a case of this sort, the County's burden of proof should be a preponderance of the evidence. That burden was amply met.

2. To determine whether just cause for discipline or discharge exists, the labor contract expressly adopts seven questions, set forth in the Enterprise Wire case. The Grievant's termination satisfied all the applicable considerations. Mr. Nelson had notice of the 21 Codes of Conduct and had been counseled as well as disciplined in the past for their violation. The Codes of Conduct specifically inform employees that termination can result from insubordination. Performance expectations set forth in the Codes are reasonably related to safe operation of a juvenile detention facility and to performance an employer might properly expect of an employee.

3. Before implementing discipline, the County conducted a fair and objective investigation in a good faith effort to determine whether the Grievant did violate a rule or order of management. All witnesses to relevant events were questioned or submitted written statements, and the Grievant had multiple opportunities to submit evidence on his behalf. There is no evidence that any relevant information was ignored. Statements and testimony by Robin Hood, Ron Morton, Chuck West and Holli Spanski provides overwhelming evidence that the Grievant was defiant about following directives from others in the chain of command.

4. While both Mr. Nelson and Mr. Duckett took issue with the directives that they turn off the TV and stop watching religious videos, a reasonable basis existed for terminating the Grievant while just counseling Mr. Duckett. It was Mr. Nelson not Duckett, who repeatedly refused to turn off the TV and turned it back on after Ms. Hood had turned the TV off. Mr. Duckett subsequently acknowledged he was wrong to challenge Ms. Hood's authority, and said this would not happen again. In contrast, Mr. Nelson continued to express the view that he could do what he wanted. Before the events on January 15 and 16th, Mr. Duckett had no sustained

incidents of misconduct. In comparison, Mr. Nelson had a history of prior discipline, including a suspension for engaging in prohibited religious activity on company time.

5. Mr. Nelson's proven offenses of insubordination, failure to comply with directives, and failure to display courteous and respectful behavior were serious and had a detrimental effect on co-worker morale, organizational effectiveness, and facility safety. Resort to termination was reasonable in light of the amount of prior counseling Mr. Nelson had received during a relatively short tenure of just over four years, and in view of his defiant and disrespectful attitude. For all of the foregoing reasons, the Arbitrator should find the County had just cause for Mr. Nelson's discharge, and the grievance should be denied.

OPINION

In Article 3.1.1(b) of the labor contract, the parties have agreed that "just cause" is required for the discharge of employees represented by the Union. In Article 4.7.2 of the CBA, the parties have additionally specified that just cause is to be defined as described in a 1966 decision issued by Arbitrator Carroll Daugherty. Enterprise Wire Co., 46 LA 359 (1966). In the form of questions, Arbitrator Daugherty listed the following seven considerations ("factors") for determining whether just cause for discipline existed:

1) NOTICE: Did the Employer give the employee forewarning or foreknowledge of the possible consequence of conduct at issue?

2) REASONABLE RULE OR ORDER: Was the Employer's rule or managerial order reasonably related to (a) the orderly, efficient, and safe operation of the Employer's business, and (b) the performance that the Employer might propoerly expect of the employee?

3. INVESTIGATION: Did the Employer, before administering the discipline to an employee, make a effort to discover whether the employee did in fact violate or disobey a rule or order of management?

4. FAIR INVESTIGATION: Was the Employer's investigation conducted fairly and objectively?

5. PROOF: At the investigation, did the "judge" obtain substantial evidence or proof that the employee was guilty as charged?

6. EQUAL TREATMENT: Has the Employer applied its rules, orders, and penalties even-handedly and without discrimination to all employees?

7. PENALTY: Was the discipline administered by the Employer reasonably related to (a) the seriousness of the employee's proven offense, and (b) the record of the employee in his service with the Employer?

46 LA at 362. Having considered each of those factors, I conclude that Mr. Nelson's proven conduct did provide just cause for termination.

I. PRIOR NOTICE OF APPLICABLE RULES WAS PROVIDED.

Mr. Nelson is alleged to have violated certain rules included in the County's 21 Uniform Rules of Conduct ("URC" or "Code). The Grievant has acknowledged that he received these rules and understood them. In the course of prior counseling and disciplinary action, Mr. Nelson had been specifically warned that future violation of Rules 16 (Insubordination) and 17 (Failure to Follow Directives) could result in termination. He was thus well aware of the potential consequences for failing to adhere to the Code of Conduct in the future.

II. THE RULES AND ORDERS MR. NELSON WAS EXPECTED TO FOLLOW ARE REASONABLE.

The Uniform Rules of Conduct explain the business necessity for each rule in detail. To maintain a safe environment for detainees and correctional employees, the need to work with others in a cooperative manner and follow directives from supervisors in the chain of command is self evident. As the URC explains, acts of insubordination are considered specially serious because insubordination involves the deliberate defiance of a legitimate management directive. Its egregious nature arises from the fact that this misconduct undermines the authority of supervisors, and violates a fundamental principle of the employer-employee relationship. *See, e.g.*, Just Cause: The Seven Tests, 34 (2d. Ed. 1992). The rules and orders that Mr. Nelson was expected to follow were reasonable, and the Union does not contend otherwise.

III. AN INVESTIGATION WAS CONDUCTED BEFORE THE ADMINISTRATION OF DISCIPLINE.

There can likewise be no doubt that the County conducted an investigation before Mr. Nelson was subjected to discipline. When Ms. Hood's description of events on January 15-16, 2011 came to his attention, Mr. West first spoke with the Grievant and Mr. Duckett. After encountering what he regarded as defiance from the Grievant, West obtained written statements from Hood and Ron Morton,

which he forwarded on to Holli Spanski along with a description of West's own interaction with the Grievant. When it appeared the Grievant's described behavior may have violated various provisions of the URC, Spanski gave Mr. Nelson notice of the potential violations and more than one opportunity to present his version of the events and respond to the allegations. Before discipline was imposed, the Grievant had an opportunity to suggest additional evidence that management should obtain. There is no evidence that the County refused to consider any relevant evidence that was available.

IV. THE COUNTY"S INVESTIGATION WAS FAIR AND OBJECTIVE.

I have considered various criticisms leveled by the Union at the nature of the County's investigation. For example, the Union contends that Mr. West failed to comply with Article 4.6.2 of the CBA when conducting an investigatory meeting with Mr. Nelson on January 20, 2011. That contract provision specifies that an employee is to be advised of his/her right to Union representation prior to an interview that "may lead to disciplinary action against the employee." Ex. C-27. The Union's contention was not raised until the arbitration, but Mr. West acknowledges he did not advise the Grievant of a right to Union representation before their conversation. It is also undisputed that Mr. Nelson never requested the assistance of a Union representative. In fact, later during the County's

investigation, when a Union representative was standing by in Ms. Spanski's office to attend an investigatory meeting that Spanski had scheduled, the Grievant rejected that representation.

Mr. West testified in persuasive fashion that when he called the Grievant to his office on January 20, 2011, he was not contemplating any disciplinary action. West simply wanted to discuss Hood's authority and get the Grievant's commitment that Nelson would follow Hood's directives in the future. The right to union representation does not apply to every conversation a supervisor conducts with an employee. When a supervisor just discusses work orders or seeks to simply counsel an employee, the circumstances that trigger application of Article 4.6.2 do not arise.

The Union's other criticisms of the investigation were likewise unpersuasive. Whether an investigation is fair and reasonable must be judged in light of the facts of each case. An investigation need not include everything that could conceivably be done. That would be an impossible burden for any employer to meet; especially given the benefit of hindsight. Neither must the "judge" personally interview every witness from whom a written statement is obtained. The interviewing of witnesses can reasonably be delegated to others in the chain of command.

To satisfy this element of just cause, an investigation must be reasonably complete and conducted in good faith. I find those criteria were met. Whether the County drew mistaken assumptions, and whether assertions by Mr. West should be disbelieved because he did not take contemporaneous notes of his meeting with the Grievant, go to the weight of the evidence obtained by the County. They are not considerations that cause me to question the fairness and objectivity of the investigation.

V. MS. SPANSKI HAD SUBSTANTIAL PROOF THAT THE GRIEVANT VIOLATED APPLICABLE RULES OF CONDUCT.

It is by now axiomatic that the burden of proving "just cause" rests with the County. The quantum of proof may vary depending on the nature of the misconduct alleged, but in a case of this sort the appropriate burden is a preponderance of the evidence. The asserted basis for the Grievant's termination was violation of various URC provisions, specifically: Rules of Conduct 8 (Cooperation with Employees and Other Officials), 16 (Insubordination), 17 (Obeying All Directives) and 19 (Respectful Behavior). Rule 8 directs employees to seek ways to cooperate and work with other employees. Rule 16 expressly states that insubordination can result from verbal refusal to comply with a directive or through one's attitude towards performance. Listed examples of violations include:

- Deliberate defiance of management's legitimate exercise of its rights;
- Refusal to accept (directly or constructively) management's lawful directives or decisions;
- Refusing to comply positively (directly or constructively) with the lawful rules, policies, procedures, practicews and directives of management; and
- Refusing to subordinate personal preferences to a supervisor's lawful directive or work instructions.

Ex. C-4, p.34. Rules 17 and 19 have been quoted earlier in this decision and their expectations are self evident.

Whether the County had substantial proof that the Grievant violated the cited rules requires a credibility determination in this case. There are no hard and fast rules for making credibility judgments, and they are rarely easy. Arbitrators, like judges or juries, can only listen to the evidence, study the witnesses, and then apply their best judgment. The purpose of this arbitration is to allow the Grievant to have someone make the credibility judgment without any bias that might result from being employed by the County. Certain factors are commonly considered. These include (1) the demeanor of a witness; (2) a witness's memory, perception and interest in the outcome; (3) consistency or inconsistency of the witness's testimony; (4) the plausibility or implausibility of testimony; (5) contradiction or corroboration by other witnesses, particularly those with no bias or motive; (6) contradiction by or consistency with other known facts,. *See, e.g.,* Hill & Sinicropi, Evidence in Arbitration, 101-109 (1980); Jones,

"Problems of Proof in Arbitration", Proceedings of the 19th Annual Meeting of the National Academy of Arbitrators, 207-208 (BNA, 1967).

According to Robin Hood, Mr. Nelson ignored a directive to turn off the Control Room TV, argued with her about prior practice and whether she could tell him not to watch before lockdown, and defiantly turned the TV back on after she had turned it off. During the course of a conversation the next night, the Grievant is also alleged to have made derogatory remarks in front of other employees about County supervisors and their ability to enforce the rules.

At the arbitration, Mr. Nelson described a very different chain of events. The Grievant admits that after Hood said she wanted the TV off, he took no action, but according to the Grievant, he never told Hood that he would not turn off the TV, and the first directive he received from Hood to turn off the TV was on January 16th at which point he complied Mr. Nelson denies that he turned the TV back on, and contends he did not argue with Ms. Hood. Nelson contends there was no discussion before Hood left the Control Room on January 15th. The Grievant admits there was some "cross talk" the next day, but contends any arguing was over watching the religious videos. He acknowledges saying something to the effect that he had been written up by the best but denies saying he had called Ms. Spanski a liar to her face.

Mr. Nelson was not a very persuasive witness, in part because of inconsistent testimony he offered about prior Bible study directives. Nelson initially testified that in 2007 he was told not to bring religious material into the workplace. After being shown a 2008 document which stated he was to confine his Bible study to breaks or lunch, the Grievant changed his testimony and belatedly recalled a meeting where Ms. Spanski had said he could have his Bible and religious material in the facility as long as he kept it to himself. This latter concession is inconsistent with an EEOC complaint that the Grievant recently filed. Spanski testified without rebuttal that in the EEOC complaint, Mr. Nelson alleged Spanski told him he could not have a Bible "in the building."

There was also no corroboration for Mr. Nelson's denial of the behavior described by Ms. Hood. Hood's description was corroborated by Ron Morton, who witnessed some of the conversations on January 15 and 16, 2011. In an incident report he provided during the County's investigation, and at the hearing, Morton said he heard Nelson refuse to turn off the TV, observed Nelson turn the TV back on after Hood had turned it off, and heard the Grievant make derogatory statements about management. At the arbitration, Morton asserted the incident report was accurate and stood by a description therein where Morton confirmed he heard Nelson make the following statements:

> Officer Nelson stated that he wasn't scared of Holli (referring to Holli J. Spanski L.C.J.J.C. head administrator) and that he had been in

> her office plenty of times stating, "I've stood in her office and called her a liar to her face and she hasn't been able to do anything to me. If you want to write me up go right ahead. I've been written up by the best write uppers hear [sic] and ain't none of them been able to touch me."

Ex. C-20. At the arbitration, Morton testified that the Grievant's tone of voice (as well as Duckett's) was raised, agitated and angry.

Hood and Morton's description of the Grievant's defiant attitude was lent further corroboration by Mr. Nelson's behavior in subsequent conversations with Chuck West and Holli Spanski. According to West, the Grievant admitted turning the TV back on and continued to argue about the need to follow Hood's directives. West contends Nelson would not acknowledge Hood's authority and kept insisting he could do what he wanted. Nelson also made statements to West asserting he was not afraid of discipline because he was "protected."

West described the Grievant as showing no remorse, and appearing to want conflict. "In seven years I never had anyone argue with me that way." Arbitrator's tape. Some of the statements West attributed to the Grievant were not described in notes West later made of their meeting. I have considered whether this undermines the reliability of West's recollection, but conclude that it does not. At the arbitration, West was quite certain about what Nelson said, and I found West to be a credible witness.

Ms. Spanski testified that during her pre-termination meeting with Mr. Nelson, the Grievant continued to show no recognition that his behavior with Hood had been inappropriate, and dismissed the Hood/Morton allegations as "lies" while refusing to read their statements. The allegations about statements disparaging management he told her had been blown out of proportion but did not flatly deny making them. Mr. Nelson had a Union representative at this meeting, and that individual was not called to dispute Spanski's description of the Grievant's behavior. I found Ms. Spanski quite credible when describing what she understandably regarded as a defiant, disrespectful attitude. Even the Grievant admits telling Spanski he felt their meeting was a waste of time.

Ms. Spanski felt Mr. Nelson had previously been insubordinate when he refused to leave the Control Room to talk with her. What occurred on that occasion did not amount to insubordination because it appears Mr. Nelson just wanted to have a witness at their conversation. Spanski agrees he had the right to request one, and Mr. Duckett was available but could not leave the Control Room. That is why Nelson did not want to talk with Spanski outside the Control Room. Spanski never advised the Grievant that she felt this was insubordinate so I have disregarded this incident.[2]

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[2] I likewise find no fault in the Grievant's request that Chuck West provide a written directive about not watching religious DVD's. Although West understandably refused to do so until he had a chance to look into the issue further, there was nothing improper about Mr. Nelson's request.

Even though he was not insubordinate with Ms. Spanski, I find the record convincing that he did act in a disrespectful and defiant manner during their subsequent meeting on February 17th. The record as a whole is therefore quite persuasive that Mr. Nelson violated a legitimate directive and was insubordinate with lead JDO Robin Hood, and was uncooperative and disrespectful in subsequent conversations with Chuck West and Holli Spanski. This behavior was reasonably regarded by the County as violating Rules of Conduct 8, 16, 17 and 19.

VI. MR. NELSON DID NOT RECEIVE DISPARATE TREATMENT.

It is undisputed that Mr. Duckett also argued vociferously with Robin Hood about turning off the TV and watching religious videos. Duckett received no formal discipline; he was only counseled by Mr. West. The Union contends Mr. Nelson's termination therefore amounted to disparate treatment. However, the "just cause" standard does not require the exact same treatment in every case. What *is* required is a reasonable basis for an employer's differing response, *i.e.*, different degrees of fault; mitigating or aggravating circumstances such as differences in prior work records. *See, e.g.*, Port Transit Authority, 84 LA 215, 218-219 (Creo, 1985).

> There is no discrimination, or no departure from the consistent or uniform treatment of employees, merely because of variations in

> discipline reasonably appropriate to the variations in circumstances. Two employees may refuse a work assignment. For one it is his first offense, there being no prior warning or misconduct standing against his record. The other has been warned and disciplined for the very same offense on numerous occasions. It cannot be seriously contended that discrimination results if identical penalties are not meted out.

Alan Wood Steel Co., 21 LA 843, 849 (Short, 1954).

As a former supervisor, Mr. Duckett can certainly be faulted for not supporting Ms. Hood's directive, and arguing with her about whether watching TV before lockdown had been allowed. However, Duckett was not the person who defiantly turned the TV back on after Hood had turned it off, and Duckett did not make derogatory statements about Spanski to Hood like the Grievant did. Mr. Duckett's response when counseled by Charles West was also quite different from Mr. Nelson's behavior. Nelson acted defiantly, offering no apology or assurance that he would comply with Hood's directive in the future. Duckett did just the opposite, acknowledging he had an obligation to follow Hood's directives when she was serving as the lead, and assuring West that the conduct at issue would not happen again.

There was also a significant difference in the prior disciplinary records of Duckett and Nelson. Mr. Duckett had no prior sustained findings of misconduct, and had received no prior discipline. I agree with the Union that Ms. Spanski overstated the record when asserting the Grievant had four prior instances of

discipline, but he had been previously warned to stop engaging in arguments in the workplace, and had a prior sustained finding of insubordinate conduct for which he had received a two day suspension without pay. In light of the differences just noted, the County had a reasonable basis for imposing more severe discipline in the Grievant's case. The Grievant was not the victim of disparate treatment. He was the victim of his own course of conduct.

VII. RESORT TO TERMINATION WAS NOT TOO SEVERE.

A final consideration is whether resort to termination was too severe. As a general rule of thumb, the longer an employee has satisfactorily performed before problems develop, the longer an employer is expected to work with the employee before resorting to termination. There is no hard and fast time frame, however. A rule of reason is applied to each case. Mr. Nelson was a relatively short term employee, who seemed unable to accept constructive counseling. Since the Grievant had already been disciplined once for insubordination, a recurrence of this behavior is justifiably regarded as especially serious.

Employers are generally expected to impose lesser progressive discipline when an employee recognizes the legitimacy of an employer's concern and cooperates in remedial efforts. When an employee adopts a hostile and uncooperative attitude, an employer is justified in resorting to termination much sooner.

National Can Corp., 68 LA 351, 352 (Turkus, 1977)(summary discharge found appropriate for "openly defiant and egregiously insubordinate" conduct). It would have been simple for the Grievant to explain that having been shift lead for the prior year, he was used to giving directions, but acknowledge that this authority had shifted to Ms. Hood. That was not his course of conduct.

The County had never issued any written directive about watching TV in the Control Room before lockdown, but Hood, Morton and West all testified that in their experience, the accepted practice had been to wait until after detainees were in their rooms for the night. There is an obvious operational and safety justification for this practice since the Control Room officer is responsible for watching video monitors of areas in which detainees or other officers are present. Mr. Duckett and Mr. Nelson may have chosen to adopt a more lenient practice about TV watching when they were in charge, but that does not mean Ms. Hood exceeded her authority as the lead when deciding she wanted her night shift officers to follow a different practice.

When an employee adopts a hostile and uncooperative attitude, as I am convinced Mr. Nelson did, then resort to termination becomes an appropriate penalty. A prior two day suspension had not sufficed to prevent a recurrence of insubordination. Because of his defiant arguing with Hood, West and herself, Ms. Spanski had legitimate reason to believe that further progressive discipline would

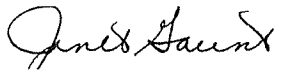
not effect a permanent change in Mr. Nelson's attitude or behavior. Because of the manner in which Mr. Nelson responded to supervisors who were raising a legitimate concern, and the fact that he engaged in a second act of insubordination, I find just cause for resort to termination did exist. The grievance is therefore denied.

AWARD

After careful consideration of all oral and written arguments and evidence, and for the reasons set forth in the foregoing Opinion, it is awarded that:

1. The discharge of Geoff Nelson was for just cause.
2. The grievance is therefore denied.

Dated this 6th day of December, 2011 by



Janet L. Gaunt