

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

In the Matter of the Arbitration Between: *
*
FRANKLIN COUNTY SHERIFF'S *
OFFICE *
*
-and- *
*
IBCO/NAGE, LOCAL 1-045 *
*

ARB-13-2860

Arbitrator:

Timothy Hatfield, Esq.

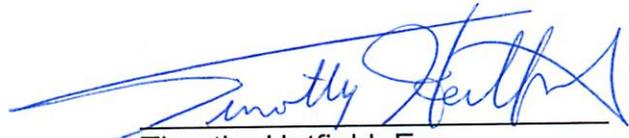
Appearances:

Kevin J. Sullivan, Esq. - Representing Franklin County Sheriff's Office
Michael P. Clancy, Esq. - Representing IBCO/NAGE, Local 1-045

The parties received a full opportunity to present testimony, exhibits and arguments, and to examine and cross-examine witnesses at a hearing. I have considered the issues, and, having studied and weighed the evidence presented, conclude as follows:

AWARD

The Franklin County Sheriff's Office had just cause to terminate the grievant on April 26, 2013 and the grievance is denied.



Timothy Hatfield, Esq.
Arbitrator
March, 12, 2015

INTRODUCTION

On May 28, 2013, IBCO/NAGE (Union) filed a unilateral petition for Arbitration.¹ Under the provisions of M.G.L. Chapter 23, Section 9P, the Department of Labor Relations (Department) appointed Timothy Hatfield, Esq. to act as a single neutral arbitrator with the full power of the Department. The undersigned Arbitrator conducted a hearing at the Department's Springfield office on January 30, 2014 and March 18, 2014.

The parties filed briefs on May 7, 2014.

THE ISSUE

Whether there was just cause to terminate the grievant on April 26, 2013 under the circumstances? If not what shall be the remedy?

RELEVANT CONTRACT LANGUAGE

The parties' Collective Bargaining Agreement (Agreement) contains the following pertinent provisions:

Article 9 – Discipline and Discharge (In Part)

The Employer has the right to discipline and discharge employees for just cause. ...

Article 15 – Management Rights (In Part)

The Management of the Office of the Sheriff and the direction of the working force, including the right to plan, direct and control operation; to schedule and assign work to employees; to determine the means, methods, processes, materials and schedules, pertaining to the overall operation of the facility; to establish standards and to maintain the efficiency of employees; to establish and require employees to oversee departmental rules and regulations; to hire promote, transfer, upgrade,

¹ The instant arbitration is before the DLR under an agreement by the parties.

classify, re-classify, lay off, or relieve employees from duties and to maintain order and to suspend, demote, discipline and discharge employees for just cause, and the recognized and reserved rights of the Sheriff.

EMPLOYEE HANDBOOK

The Franklin County Sheriff's Office (FCSO) Employee Handbook contains the following pertinent provisions:

General Order 220 – Employee Conduct (In Part)

.07 Security Interests

7. Employees must file a written report whenever ordered to do so by a supervisor. Employees shall report in writing any maintenance problem, security breach, safety hazard or unusual or significant event which has been identified by, or reported to, the employee. ...
10. Each employee shall be conscious of the control of contraband and shall make every effort to prevent any inmate from receiving, possessing or having access to unauthorized items. ...

.10 Other Offenses

1. Failure to obey lawful verbal or written orders of a Superior Officer.
2. Insubordination or disrespect.
3. Failure to submit required reports in a timely fashion or to cooperate in an internal investigation. ...

FACTS

The FCSO and the Union are parties to a successor collective bargaining agreement that was in effect at all relevant times to this arbitration.

The grievant, Beth Nissenbaum (Nissenbaum), was hired on July 7, 2009 for the part-time, grant-funded position of substance abuse counselor. After fourteen months of part-time employment, Nissenbaum became a full-time counselor/case worker. In this position, Nissenbaum interacted with the inmates assigned to her caseload, which included advocating and coordinating their

activities, such as work assignments, treatment plans, discharge planning and placement. Additionally, Nissenbaum provided a means for inmates to communicate with attorneys, family members and other support resources.

All FCSO employees, including Nissenbaum, received a minimum of forty hours of training per year in proper procedures and employee protocol. These sessions included training about mandatory safety procedures and reporting requirements. The FCSO distributed Employee Handbooks to all employees, which contained the policies of the FCSO, including General Order 220. Section 7 of General Order 220 required all employees to file written reports whenever a superior ordered them to do so. Also, when employees learned of a security breach, they were required file reports. Employees were to be conscious of and prevent inmates from possessing unauthorized items. Section 10 of General Order 220 put employees on notice that it is an offense to be insubordinate, not to file reports in a timely manner, or not to cooperate in an internal investigation.

On January 22, 2013, the FCSO issued Nissenbaum a verbal reprimand for inserting her personal opinions about inmates into treatment notes. On February 11, 2013, Nissenbaum received a written reprimand for chronic attendance issues because she had exhausted her paid leave, and for her failure to perform the duties of a case worker because she failed to assist with a prisoner count. On March 21, 2013, the FCSO issued Nissenbaum a verbal reprimand for failure to timely report safety concerns about an inmate to security staff after being directed to do so. On March 29, 2013, the FCSO again verbally reprimanded Nissenbaum for her failure to timely report safety concerns.

On March 23, 2013, Nissenbaum informed Captain Jonathan LaBelle (Captain LaBelle) that an inmate reported to her that a knife had been smuggled into Pod C. Captain LaBelle immediately conducted a tool inventory of the kitchen and the print shop, which showed that no tools were missing. On March 28, 2013, Nissenbaum wrote a report of an incident that she had with inmate D.F. D.F. was pacing the hallway outside her office before he entered her office and confronted her. He complained about her continued documentation of his activities, stating that "this is getting old." Nissenbaum asked him to leave her office due to his threatening behavior. Nissenbaum requested that security not allow him in her office again.

On Friday, April 19, 2013, Nissenbaum had a conversation with inmate L.C. who advised her that D.F. had hidden a weapon, specifically a metal shank, in Pod C and that she should be careful around him. Despite possessing knowledge of a metal shank hidden within the general population of the jail, Nissenbaum went home for the weekend and failed to notify anybody of the presence of the weapon.²

On Monday April 22, 2013, Nissenbaum did not immediately notify anyone of the information she possessed concerning the shank in Pod C. Nissenbaum met with her supervisor, Assistant Superintendent Candace Angier (Assistant Superintendent Angier) about D.F. and failed to notify her of the potential danger.

² Nissenbaum testified at the hearing that she had verbally informed a new correction officer, whose name she could not remember, of the threat on her way out of the facility on the same day she received the information. Due to the lack of specific information concerning the correction officer whom she allegedly informed about the threat, and her failure to inform anyone on Monday that she had in fact reported the information on Friday, I decline to credit this testimony.

At 2 PM, during a conversation with Lt. Lee Tirrell (Lt. Tirrell), Nissenbaum informed him of the potential weapon in Pod C. Lt. Tirrell immediately told Nissenbaum to file a written report and list the informant's name in order that the FCSO could conduct an investigation. Lt. Tirrell immediately notified Assistant Superintendent Angier and Assistant Superintendent Lori Streeter (Assistant Superintendent Streeter) about the information Nissenbaum had reported. In a meeting with Lt. Tirrell and Assistant Superintendent Angier, Nissenbaum was again ordered to write a report and list the name of her informant. Nissenbaum wrote the report but failed to include the name of the informant. Finally, in a meeting with Assistant Superintendent Streeter, Nissenbaum revealed the name of the informant. Upon reviewing the information, Superintendent David Lanoie (Superintendent Lanoie) placed Nissenbaum on administrative leave pending an investigation. On April 22, 2013 and April 24, 2013, the FCSO conducted a search of Pod C and recovered a four and one-half inch metal shank.

Following an investigation into the events of April 22, 2013, as well as a review of Nissenbaum's disciplinary record, Superintendent Lanoie terminated Nissenbaum. The Union filed a grievance on Nissenbaum's behalf that was denied at all levels by the Employer and has resulted in the instant Arbitration.

POSITIONS OF THE PARTIES

THE EMPLOYER

Nissenbaum, both through her written reports and her testimony at the hearing, admitted to several breaches of FCSO policy. She failed to file proper reports, as mandated by General Order 220, and was insubordinate by not

following direct orders, which caused security breaches and search delays that ultimately endangered the well-being of inmates and staff. The FCSO previously gave Nissenbaum extensive training on its policy and procedures. Assistant Superintendent Streeter testified that Nissenbaum received in excess of forty hours of training per year on standard FCSO procedures. Many of these sessions dealt specifically with security procedures within the Jail, and the need to file appropriate, timely reports to ensure the safety of both inmates and employees. Nissenbaum never denied that she received this training or that she had knowledge of the FCSO's policies. Furthermore, Nissenbaum was clearly comfortable with the procedure for filing reports, as she had filed many reports during her employment with the FCSO. However, the evidence is clear that Nissenbaum often neglected to submit timely reports when it came to safety concerns and procedures.

While the April 22, 2013 breach of procedure was significant, the evidence showed that it was not Nissenbaum's only failure to follow safety protocol. Previously, Nissenbaum's work habits and failure to follow procedure had led to security breaches and caused her supervisors to be concerned that she was creating unnecessary security risks. Prior to the April 22, 2013 weapon incident, Nissenbaum's transgressions ranged from chronic attendance issues and the failure to perform duties of a case worker by assisting in prisoner counts to reprimands for a failure to timely report security concerns.

The most egregious conduct and breach of security protocol occurred on Friday, April 19, 2013, when Nissenbaum made the conscious decision to

disregard all of her training and previous warnings from supervisors and simply leave the facility for the weekend without reporting a potentially dangerous situation. Despite multiple reprimands and direct verbal discussions of security protocol with her superiors in the month prior to this event, Nissenbaum decided no report was necessary because "it was the weekend, and she knew her safety was not in jeopardy."

Although Nissenbaum was aware that on Saturday and Sunday, FCSO staff and other inmates would have substantial direct contact with D.F., Nissenbaum made no attempt to contact any FCSO personnel and advise them of the weapon hidden in Pod C. Nissenbaum was aware of the proper protocol but consciously chose not to report her knowledge of the weapon. In fact, during a follow up meeting regarding the weapon issue, she told her superiors that she had worried all weekend about not reporting the shank. However, this concern was not sufficient to compel her to comply with General Order 220 and alert anyone of the weapon in Pod C.

Nissenbaum's only real explanation as to why she failed to report the weapon were some vague references to the FCSO's failure to investigate a previous report she filed about a weapon in Pod C. Although Nissenbaum believed that no action was taken, the FCSO conducted an immediate inspection of the kitchen and the print shop on the same day of her verbal report, which showed that no tools were missing. The FCSO gave enormous attention to all reports of security breaches in order to ensure the safety of inmates and staff.

Another area of concern was Nissenbaum's lack of action upon returning to work on Monday April 26, 2013. Despite her acknowledgement of the security protocol and her alleged concern over the presence of a weapon in Pod C, Nissenbaum failed to report her knowledge of the shank to anyone until late afternoon on Monday. Although Nissenbaum attended a meeting with her direct supervisor Assistant Superintendent Angier about D.F., she again made the conscious decision to withhold this information.

Finally, at 2 PM, Nissenbaum informed Lt. Tirrell about her conversation with the informant and the probable existence of a weapon within Pod C. Lt. Tirrell instructed Nissenbaum to write a report and identify the informant so that an investigation could be conducted. Lt. Tirrell immediately notified Assistant Superintendents Streeter and Angier about the existence of the weapon. Within the hour, Assistant Superintendent Angier had her second meeting of the day with Nissenbaum and instructed her to file the appropriate report and name the informant. Nissenbaum finally wrote the report but disobeyed the instruction to include the name of her informant. Nissenbaum only revealed the identity of the informant after Assistant Superintendent Streeter confronted her.

The Union made the argument at the hearing that the inmate who ultimately had hidden the weapon in Pod C was difficult to work with and made Nissenbaum uncomfortable. In fact, FCSO staff were aware of this issue and had taken precautions to insure Nissenbaum's safety. The staff were providing extra security to her and were closely monitoring the actions of D.F. In a correctional facility, an employee cannot pick and choose their clientele.

Ironically, due to a grievance filled by D.F. against Nissenbaum, a meeting to discuss D.F.'s care occurred on the same day that the issue of the weapon came to light. The FCSO determined that proper security and protocols were in place and that Nissenbaum could continue as D.F.'s case worker.

The FCSO placed Nissenbaum on administrative leave pending an investigation. Superintendent Lanoie conducted the investigation, which included not only this latest incident, but all other disciplinary actions against Nissenbaum that had occurred during the previous twelve months.

Conclusion

The FCSO had just cause for Nissenbaum's termination on April 26, 2013, and the grievance must be denied.

THE UNION

On March 26, 2013, Nissenbaum reported that an inmate had informed her that a knife had been smuggled out of the kitchen into Pod C and that she should be careful. The security staff's response was to accuse the inmate of spreading false information for the purpose of getting D.F. in trouble. After counting the knives in the kitchen and tools in the print shop, Captain LaBelle was satisfied that no risk existed. There is no documentary evidence that the FCSO undertook any additional search efforts, including a shakedown of Pod C, or an inspection of the kitchen equipment to search for missing metal/hard plastic pieces. For the next six weeks, the threat of a weapon in Pod C existed. During that same period, Nissenbaum continued to document her concerns relative to D.F.'s state of mind and talk of violent thoughts. D.F. became aware that

Nissenbaum continued to file reports about him. He became bolder, confronted Nissenbaum, and threatened to file a grievance against her. D.F. made a number of comments that concerned Nissenbaum, including wanting to “snap” on someone, as well as having violent thoughts and the need for medication and psychological treatment to curb racing, violent thoughts.

On April 17th, two days before L.C. informed Nissenbaum that she was in danger, D.F. filed an internal grievance against her. Nissenbaum did not feel supported by the security staff or her direct supervisors. She believed that they perceived her as crying “wolf” too many times. The supervisory staff had already commented that in certain instances, she was too supportive of the inmates. When she realized that she would continue to be assigned to Pod C where D.F. would have access to her she informed the FCSO about the weapon in Pod C. Rather than supporting Nissenbaum, the Employer turned against her and terminated her.

Conclusion

The discipline in this case is not warranted and does not support just cause under the facts and circumstances. The leap from a written reprimand to a termination of employment, especially when there is so much fault on the part of others, is simply too great. The risk for employees and staff in Pod C over the weekend of April 20-21, 2013 was no greater than it had been since March 26, 2013. The remedy is to return Nissenbaum to her position as a case manager and make her whole in all aspects.

OPINION

The issue before me is: whether there was just cause to terminate the grievant on April 26, 2013 under the circumstances? If not what shall be the remedy?

For all the reasons stated below, there was just cause to terminate the grievant on April 26, 2013. The grievance is denied.

The record before me, as it relates to April 19, 2013, is clear and undisputed. An informant told Nissenbaum that a weapon was hidden in Pod C and that she should be careful around D.F. Nissenbaum did not report this information to anyone and went home for the weekend. Nissenbaum put the well-being and safety of the inmates of Pod C and all the FCSO staff that entered Pod C over the weekend in grave danger when she decided to keep this information to herself. Nissenbaum compounded her mistake on Monday, April 22, 2013 when she attended a meeting about D.F. with Assistant Superintendent Angier, and still consciously decided to keep the information about the weapon to herself. Nissenbaum finally decided to report the information about the potential weapon to Lt. Tirrell only after she learned that D.F. was going to remain on her caseload.

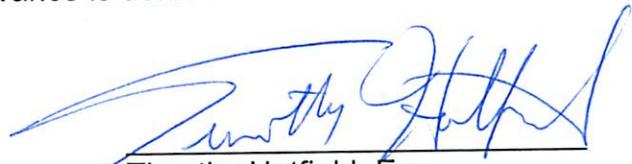
Nissenbaum's mistakes did not end there, however. In a follow up meeting with Lt. Tirrell and Assistant Superintendent Angier, Nissenbaum was ordered to write a report about the incident and divulge the name of the informant. Nissenbaum, in a continued exercise of poor judgment, wrote the report but refused to reveal the name of her informant. It was not until a final

meeting with Assistant Superintendent Streeter that Nissenbaum finally revealed the informant's name.

The series of poor decisions that Nissenbaum made from Friday afternoon through Monday afternoon contradict all of the security training that she had received as an employee of the FCSO. The naïve belief that only her safety was in question and that she could leave for the weekend without reporting the information she received combined with her erroneous decision to protect the identity of the informant correctly call into question Nissenbaum's judgment. The FCSO must be satisfied that its employees will make the proper decisions in the best interests of everyone's safety and security. Based on the decisions that Nissenbaum made in this matter, the FCSO justifiably no longer has confidence in Nissenbaum's judgment.

AWARD

The Franklin County Sheriff's Office had just cause to terminate the grievant on April 26, 2013 and the grievance is denied.



Timothy Hatfield, Esq.
Arbitrator
March 12, 2015