

OFF- DUTY CONDUCT OF CORRECTIONS OFFICER DID NOT THREATEN CORE FUNCTION OF PRISON

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The Commonwealth Court recently reviewed a grievance arbitration award directing the reinstatement of a corrections officer who engaged in off-duty misconduct. Department of Corrections v. Pennsylvania State Corrections Officers Association, NO. 2132 CD 2006 (May 3, 2007.) The Court determined that the arbitration award modifying discharge to a five (5) day suspension drew its essence from the parties' collective bargaining agreement and that the prison's core functions were not affected.

The arbitrator found that a corrections officer's off-duty misconduct did not constitute just cause for termination. While off-duty at 1:40 a.m., the corrections officer telephoned his friend and co-worker who was on duty at the state prison's control center. The corrections officer threatened to "do a Bender." "Bender" was an obvious reference to a former corrections officers who had committed homicide. The corrections officer (CO) stated, "I know of eight people and where [they] are. I'm going to take care of them." The friend on duty informed his supervisor about the conversation. The state police were notified and the prison's security officers were instructed to be on alert if the off-duty CO attempted to enter the grounds. At 1:57 a.m. the CO sent the following cellular text message to his Sergeant:

Ur gonna get whats coming 2 U. Better cover Ur tracks well & watch
Ur back. PSP (Pennsylvania State Police) is not going 2 Like what Happens 2 U

The sergeant was off duty and did not retrieve the text message until 9:00 am. The Sergeant called the sending number and recognized the CO's voice. The sergeant informed prison officials about the text message when he reported to work at 2:00 p.m. The CO was suspended pending an investigation. During the investigation, the CO admitted to telephoning his friend but not the content of the conversation. During the investigation, the friend stated that the CO had been crying during the telephone call and may have been intoxicated. The friend went on to say that the CO had not threatened him or any other prison employees. During the investigation the CO also admitted to sending the text message to the Sergeant but claimed it was in response to a text from the Sergeant. The Sergeant attributed the text message to the CO's mistaken belief that the Sergeant was having an affair with the CO's ex-wife. At the conclusion of the investigation and after a disciplinary conference, the CO was discharged.

A grievance was filed and was processed to arbitration. After an arbitration hearing, the arbitrator found that there was a "nexus" between the CO's off-duty conduct and the workplace since the CO called his friend when the friend was on duty and because the CO sent a text message to the Sergeant. The arbitrator found that there was just cause to discipline the CO for making inappropriate statements. The arbitrator concluded, however, that termination was not appropriate because the conduct of calling in to the facility to discuss violent actions the CO

thought to take does not rise to the level to substantiate the CO's termination because no evidence was produced to establish the CO was involved in violent activity or that his actions had a significant adverse affect on the prison. The arbitrator reduced the discipline to a five (5) day suspension and ordered the CO to submit to a fitness for duty evaluation by a licensed psychiatrist before returning to work.

The Department of Corrections argued to the Commonwealth Court that the arbitration award should be overturned because it never bargained away its ability to terminate a corrections officer for the type of conduct exhibited by the CO and that, if left unchecked, that conduct could impair the Department's ability to discharge its core function of maintaining a safe and secure correctional facility for inmates and employees. The Department argued that the threats of violence interfered with that core function by distracting prison officials from their primary duties. The Union countered that there was no connection between the CO's conduct and his employment relationship with the Department and, in any event, his actions did not have a direct or indirect negative impact on the Department's core functions.

The Commonwealth Court in applying the narrow standard of review of a grievance arbitration award under Act 195 accorded great deference to the award of the arbitrator. The Court applied the two (2) prong "essence test" and determined that: the issue as defined was within the terms of the parties' collective bargaining agreement and that the arbitrator's decision was rationally derived from the collective bargaining agreement. The Court reiterated that a court will only vacate an arbitrator's award where the award indisputably and genuinely is without foundation in, or fails to logically flow from the collective bargaining agreement.

The Commonwealth Court examined the "core function" doctrine that a government employer can not bargain away its power to fire for misconduct bearing directly upon the performance of its essential functions. The multi-part test for determining whether a "core function" is or is not implicated in cases involving government employees is:

- 1) whether serious misconduct is of a sort which has a direct negative impact on the public function of the employing agency, such as preying upon or otherwise putting at risk those persons the agency is charged to serve
- 2) where the conduct is of a type which will have only indirect or potential impact on the agency's public duties, such as embezzlement or breach of trust, two conditions must be met:
 - a. the misconduct must be work-related;
 - and
 - b. must involve dishonesty or other misconduct so egregious that if the agency is unable to curtail such behavior, it risks relinquishing control of the orderly functioning of its operations.

Under the indirect conduct test, it is not necessary that the particular act/s of the discharged employee, standing alone, impairs or threatens the agency's operations, but rather that it is the type of conduct which, if left unchecked, may lead to such a result.

In this case, the parties did not dispute that the first prong of the essence test was met because the issue is within the terms of the parties' collective bargaining agreement. The Commonwealth Court found that the arbitrator was correct in determining that the misconduct

was not directed towards the employer nor did it have a negative impact on the Department's public function. The Court next considered whether the CO's conduct had an indirect or potential impact on the Department's core function. The arbitrator had found no evidence that the CO discredited his position or breached the public's trust and confidence in corrections officers. The Court addressed the inchoate nature of the misconduct, that is, conduct which was contemplated, but no action was taken. The court stated it would be highly speculative to conclude that the CO's act of calling his friend to discuss violent actions that the CO was contemplating rise to the level of being a type of conduct which, if left unchecked, could impair or threaten the Department's operations. Similarly, the Court noted that the Sergeant did not feel threatened by the text message he received from the CO. In affirming the arbitration award, the Commonwealth Court determined that the arbitration award did not lead to the Department of Corrections relinquishing control over its ability to discharge its core function.