

C. ALLEN POOL, Arbitrator
Arbitrator's Case No. 3-04-08

IN ARBITRATION PROCEEDINGS PURSUANT TO
AGREEMENT BETWEEN THE PARTIES

Service Employees International Union)	
Local No. 1021)	ARBITRATOR'S
)	
and)	OPINION AND AWARD
)	
Superior Court of California,)	June 23, 2008
County of Sonoma)	
)	
Grievance: Jayne Sill Discharge)	
_____)	

This Arbitration arose pursuant to Agreement between the Service Employees International Union, Local No. 1021 hereinafter referred to as the “Union”, and the Superior Court of California, Sonoma County, hereinafter referred to as the “Court”, under which C. ALLEN POOL was selected by the parties to serve as Arbitrator. The Parties stipulated that the matter was properly before the Arbitrator and that his decision shall be final and binding.

The hearing was held in the Santa Rosa, California on March 4, April 2, and April 28, 2008 at which time the parties were afforded the opportunity, of which they availed themselves, to examine and cross-examine witnesses and to introduce relevant evidence, exhibits, and argument. The witnesses were duly sworn and a written transcript was made of the hearing. Written closing arguments were timely submitted to and received by the Arbitrator on June 13, 2008 at which time the record was closed.

Appearances:

For the Union:

Vincent A. Harrington, Jr.
Weinberg, Roger & Rosenfeld
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Alameda, CA 94501-1091

For the Employer:

Suzanne Price
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1301 Marina Village Parkway, Suite. 310
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STIPULATIONS

1. The Grievant's date of hire was August 5, 2002.
2. The Grievant was on medical leave of absence from July 20, 2006 through April 23, 2007.
3. The Grievant's last day of service was November 9, 2007.

STIPULATED ISSUES

1. Was the Court's three-day suspension of Jayne Sill, served in August 2007, warranted? If the suspension was not warranted, it cannot be relied upon for any subsequent major discipline. Also, if the suspension was not warranted, the Arbitrator has no authority to award any damages/back pay.
2. Did the Court have cause to terminate Jayne Sill effective November 9, 2007? If not, what is the appropriate remedy?

BACKGROUND

At the time of the incidents that led to the Grievant's termination, she was one of 31 courtroom clerks employed by the Court. Specifically, she was serving as a courtroom clerk in Department 19 of the Court's civil court. The Grievant's date of hire was August 5, 2002.

Presiding over the civil court in Department 19 at the time was Judge Elaine Rushing, a 16-year veteran of the Court. Personnel present during a trial normally include the Judge, a Courtroom Clerk, a Judicial Assistant, and a bailiff. The duties of a Courtroom Clerk include taking minutes of courtroom proceedings, swearing in witnesses and keeping track of trial exhibits. The duties of a Judicial Assistant include assisting the judicial officer in scheduling calendar issues, communication with attorneys, sometimes post-judgment issues, preparation of jury instructions, and just basically compliments courtroom processes. Judicial Assistants are

normally adjacent to the judge (Trans. p. 59). A bailiff's primary duties are obviously safety and order.

Prior to the incidents that led to the Grievant's termination, she had been issued a Letter of Reprimand dated August 8, 2006. The action was the result of a letter of complaint from an attorney regarding the Grievant's behavior toward him in July 2006. Because the Grievant was out on a leave of absence, the Letter of Reprimand was sent to her on January 10, 2007 (Court Ex-2).

On Friday July 13, 2007 the Grievant was working in Department 19 where Supervising Judge of the Civil Division, Judge Elaine Rushing, was presiding over a complex personal injury case. Judge Rushing left the court at about noon on that day, a Friday. Before leaving, the litigants informed the judge that they were in settlement conversations/talks. Judge Rushing instructed the attorneys, George Oliver and Steve Worth, to contact her before 4:00 p.m. if they reached a settlement.

The judge told the attorneys to contact her through the Grievant. The Grievant gave the litigants her e-mail address and her cell phone number. Judge Rushing left no written instructions for the Grievant but did instruct her orally to call her if the parties reached a settlement. The Grievant had both Judge Rushing's home and cell phone numbers.

The Judicial Assistant normally assigned to the Judge Rushing's court was on vacation. The Judge Rushing did not request a replacement. She testified that the Judicial Assistants usually covered for each other if there was an absence. In this instance, the absence was not covered. She also testified that on prior occasions the Grievant had performed Judicial Assistant duties (Tran. 113-116).

At 4:41 p.m. that afternoon the Grievant received an e-mail message from one of the

attorneys informing her that they had reached a partial settlement. Attached to the e-mail was a letter written by the attorneys, George Oliver and Steve Worth, explaining what was happening. The Grievant forwarded the litigants e-mail message to the judge's workplace e-mail address.

At 4:45 p.m. the Grievant telephoned Judge Rushing and left a verbal message on Judge Rushing's cell phone informing her that the parties had reached a partial settlement and would appear in her court on Monday morning at 8:30 a.m. to advise her as to what was occurring (Court Ex.-2, p. 7). In her message, the Grievant proposed to the judge that, if was OK with her, she would go ahead and call for the next case to commence on Monday morning at 10:00 a.m. The Grievant said that she would also notify the attorneys in the next case, the trailing case, and the Jury Administrator. The Grievant's message to the judge was transcribed by the Court and placed into the evidence record (Court Ex. 7).

The judge missed receiving the Grievant's call because she was in another room when her cell phone rang. Judge Rushing, after listening to the Grievant's message, immediately called her back. The Grievant did not answer her cell phone. Judge Rushing called the Grievant's cell phone and left a message instructing the Grievant to put everything back the way it was when she left the court that day.

At 9:00 a.m. on Monday morning, the litigants in the personal injury case met with Judge Rushing and requested and were granted a continuance. That morning, the judge found that, as she had instructed, everything had been put back the way it was when she left the court on Friday (Trans. p. 1`21-122). It should be noted that the judge testified that the Grievant had not, as alleged by the Court, granted the parties a continuance (Trans. p. 123).

Later that day, Monday, Judge Rushing met with the Grievant and expressed her displeasure in that the Grievant had made judicial decisions that were outside the scope of her

duties. The Grievant apologized to the Judge for her “eagerness to assist” (Court Ex.-8).

Judge Rushing e-mailed a report of the incident to the Director of Court Operations, Michael Cline. Mr. Cline consulted with the Director of Human Resources, Valerie Alston. After an investigation and conferring with other supervisors, the consensus was that the Grievant had exceeded her authority and recommended the Grievant be given a 5-day suspension (Jt-2). The Grievant appealed the suspension. A Skelly meeting was held with the Deputy Court Executive Officer, Cindia Martinez, presiding as the Hearing Officer. Ms. Martinez upheld the recommendation for suspension but reduced it to a 3-day suspension.

In September 2007 the Courtroom Clerk Supervisor, Kathy Buskirk, met with the Grievant and was given a Counseling Memo. The Grievant was reminded that she should not act outside the scope of her duties. The Counseling Memo was dated September 19, 2007 (Court Ex. 4). However, a Counseling Memo is not a discipline according the Court’s Director of Operations, Michael Cline (Trans. p. 55).

On the afternoon of September 21, 2007 a Small Claims calendar was in session in Department 19. Presiding in the court was Pro Tem Judge Kathleen Miller, the Grievant, and Bailiff Ryan Reese. Late in the afternoon, the last case concluded with the judge ruling for the defendant. The defendant left the courtroom. The Plaintiff, Mr. Womack, was at his table arranging his papers and, at the same time, holding papers up and talking “at the judge”. The Bailiff testified that he told the Plaintiff two or three times to stop, that his actions were not appropriate. The Plaintiff did not stop. The Bailiff then positioned himself in front of the Plaintiff’s table and between the Courtroom Clerk’s desk and the judge.

From behind him, the Bailiff heard the Grievant say to the Plaintiff “Sir, you don’t want to make me mad”. The Plaintiff responded “Oh, you can’t get mad at me”. The Grievant

responded “Yeah, but I can get the Bailiff to deal with you and he’s got a gun” (C-5). The Plaintiff, with his wife, turned to leave the room. The Bailiff walked with him to the hallway where he pointed the Plaintiff to the office where the papers were to be processed.

On his return to the courtroom, the Bailiff spoke to the Grievant about her use of the word “gun”. She asked Deputy Reese “What should I do if I feel threatened?” His opinion was that her use of the word “heightened the tension”. A few days later the Grievant wrote to Deputy Reese asking that they meet to discuss the matter so that they could work better as a team (Court Ex. 9).

The following Monday, Deputy Reese reported the incident to his supervisor, Sergeant Ed Hoener. Sergeant Hoener ordered him to “write it up” (Trans. p. 142). Deputy Reese’s report was forwarded to the Grievant’s supervisors and an investigation followed. Her supervisors reached a consensus and recommended that the Grievant be terminated. A Notice of Intent to Terminate, dated November 9, 2007, was issued (Court Ex-14). A Skelly hearing was held with Deputy Court Executive Officer Cindia Martiniz presiding. Following the hearing, both Ms. Martiniz and Court Executive Officer Katy Buskirk recommended to uphold the termination. The effective date of the Grievant’s termination was November 9, 2007 (Court Ex-14). A grievance was filed and was processed to this Arbitration.

POSITION OF THE COURT

Issue No. One

The three-day suspension issued to the Grievant in July 2007 was warranted. The reasons for the suspension were insubordination, misconduct, and unsatisfactory job performance. The Grievant made judicial decisions on behalf of Judge Rushing without the Judge’s knowledge or consent. She grossly exceeded the scope and authority of her position as a courtroom clerk. She attempted to usurp the role of a judicial officer by continuing a trial date, contacting the jury

commissioner and attempting to cancel a jury panel, and scheduling a trial in the judge's court. She exercised extremely poor judgment and misused her position as a court employee. The three-day suspension was warranted and the grievance should be denied.

Issue No. Two

The Court had cause to terminate the Grievant. The reasons for the termination in November 2007 were insubordination, misconduct, and unsatisfactory job performance. The termination followed a series of progressive disciplinary actions for conduct that had similar characteristics exhibited in different contexts. In deciding to terminate the Grievant, the Court relied upon a Letter of Reprimand issued to her in August 2006, on a three-day suspension issued in July 2007, a Counseling Memo given to her in September 2007, and the statement prepared by the Bailiff describing the incident in Small Claims court on September 21, 2007. Her conduct in Small Claims court that afternoon heightened the tension when she told the plaintiff he may have to deal with the "guy with the gun", the bailiff. Her misconduct showed poor judgment and a lack of ability to understand her role as a courtroom clerk. Her conduct was part of a pattern of inappropriate conduct and poor judgment. Despite discipline and warnings, she continued to engage in this conduct. What was similar throughout the conduct was the serious error in judgment on her part, acting outside the bounds of her job duties and authority, creating risks of disrupting courtroom proceedings, and risks of security hazards by the conduct she engaged in. The grievance should be denied.

POSITION OF THE UNION

Issue No. One

The Court did not have cause to impose the three-day suspension on the Grievant in July 2007. The Grievant did not engage in misconduct deserving the discipline. At worst, her action

was an error of judgment, not intentional misconduct, and certainly not the kind of action which would warrant a suspension without pay. If anything, this is a training issue; if deserving of any discipline, it is a matter which may warrant a written notice reinforcing the Court's expectations. The three-day suspension without pay was not warranted and the Court should not be permitted to rely upon it with respect to the discharge action – the major discipline in dispute in this matter. The Court also did not follow the progressive discipline procedure set forth in the Court's Personnel Plan. The only prior discipline was a Letter of Reprimand for dissimilar conduct. The grievance should be sustained.

Issue No. Two

The Court did not have cause to terminate the Grievant. Only two percipient witnesses to the actual events of September 21 in the small claims court testified – the Grievant and the Bailiff. The combined effect of the testimony of these witnesses did not establish grounds, cause for discharge of the Grievant. The grievance should be sustained.

DISCUSSION

The Court's Personnel Plan states that discipline up to and including termination shall be "for cause". The Plan defined "for cause" to mean a fair and honest cause or reason regulated by good faith on the part of the Court. The Plan also states that disciplinary actions will usually follow a progressive discipline procedure and will include one or more warnings and/or a suspension before a termination is imposed (Joint Ex. 1).

A few preliminary comments about the "for cause" standard and progressive discipline may be helpful. The "for cause" standard, often referred to as the "just cause" standard, is essentially a system of fairness. The standard has been and still is a much debated concept. It consists of several components that have evolved over time and have attained acceptability when

applied to the question of whether there was cause for a discipline and/or discharge. Included in the components are the questions of whether there was sufficient proof of wrong doing, was the investigation fair, was there disparate treatment, etc. Which components will be applied and how weight will be given will vary according the circumstances of a case. However, there is one component that is nearly inviolable; that is, the requirement that there be sufficient proof of misconduct. If there is not sufficient proof of misconduct, there can be no cause for discipline or discharge.

The concept of progressive discipline is based on the principle that discipline, except for the most egregious behavior, shall be corrective not punitive. The hierarchy of discipline applied increases with each occurrence of a similar or like offense and with notice to the employee of further discipline up to and including discharge if the behavior is not corrected.

Issue No. One: Whether the three-day suspension was warranted.

The evidence record showed that on the day in question, the Grievant, a Courtroom Clerk, was left alone in the court and expected to perform duties usually performed by a Judicial Assistant. Apparently, the judge was comfortable with this. Her testimony was that the Grievant had, on prior occasions performed Judicial Assistant duties and that overall, she was quite happy with the Grievant's performance in the courtroom (Trans. p. 113-116). The Director of Court Operations, Michael Cline, testified that he was aware that the Grievant had very "graciously performed some duties of the judicial assistant in the past" (Trans. p. 68-69).

The Court's primary contention was that the Grievant performed judicial duties that were outside her authority and did so without authorization from the judge. The evidence did not support this contention. The Grievant, that Friday afternoon, was left with one oral instruction

from the judge; that was, “call me if the parties reach a settlement”. The Grievant received an e-mail message and letter from the parties informing her that a partial settlement had been reached and that they would be in court at 8:30 a.m. on Monday to meet with the judge. The Grievant then followed Judge Rushing’s instruction. She forwarded the e-mail with the attached letter to the judge’s e-mail work address. She also called the judge’s cell phone and left a message describing the contents of the parties e-mail message (Court Ex-7).

At this point, things went a little astray. The Grievant, in her eagerness to assist, said, in her message to the judge, that *if it was OK with the judge*, she would contact the Jury Commissioner and make arrangements to cancel the double panel jury for the case in question and call for the trailing case to come forward that Monday morning (Emphasis added) (Court Ex-7). Judge Rushing, upset with the attorneys’ actions, i.e. dictating to the court, called the Grievant and instructed her to “cancel that” and put everything back to where it was when she left court on Friday (Trans. p. 104, 106, 121).

On arrival at the court on Monday morning, the judge found that the Grievant had followed her instructions (Trans. p. 119-120). Everything was back the way they were on Friday. It was obvious that the Grievant had reversed whatever actions she had taken. She had made contact with Jury Commissioner and all of the attorneys involved in the civil case and the trailing case and she had affected a return to the status quo (Trans. p. 119-122). Judge Rushing’s testimony also countered the Court’s allegation that the Grievant had granted the litigants a continuance thereby overstepping her authority (Court Ex. C-3, p. 2). Judge Rushing testified that the Grievant had not granted a continuance as charged (Trans. p. 123).

The Court, in imposing a three-day suspension, also did not follow progressive discipline. The Court’s Deputy CEO, Cindia Martinez, served as the Skelly hearing officer at the Grievant’s

appeal. Ms. Martinez testified that the three-day suspension was warranted and since this was the Grievant's third incident, it was the next step in the discipline (Trans. p. 183-187). The evidence record did not support this assumption. In fact, the Grievant had no prior suspensions. The only thing in the Grievant's file was a Letter of Reprimand that arose from a complaint from an attorney in July 2006 that the Grievant behaved in an unprofessional manner towards him. This incident was not *alike or similar* to the events that occurred in November 2007 (Emphasis added). (On an aside, the above Letter Reprimand was not at issue in this instance. However, it was noticeable that the decision to issue the Reprimand was made without interviewing an eye witnesses to the exchange that took place between the Grievant and the attorney (Trans. p. 344, 348).

Therefore, for the reasons discussed in the above, the conclusion of the Arbitrator is that three-day suspension was not warranted. The Grievance is sustained.

Issue No. Two: Whether the termination was for cause?

The Court's position was that even if the three-day suspension was found to be unwarranted, the Grievant's actions in the small claims court on September 21, 2007 were serious enough to warrant her termination. The evidence record did not support the Court's position. There was not sufficient proof of any wrongdoing by the Grievant.

The Plaintiff, Mr. Womack, twice paid no attention to the Bailiff when he was told that his behavior was inappropriate. Further, the Plaintiff, after the Bailiff positioned himself in front of the Plaintiff's table, continued to pay no attention to the Bailiff's instructions. The Bailiff's position, at this time, was between the Clerk's desk and the Judge Pro Tem, Kathleen Miller. At this point, the Grievant spoke to the Plaintiff referring to the Bailiff as the "man with the gun".

However, what followed was essentially a difference of opinion between the Grievant and the Bailiff.

The Bailiff's belief was that the Grievant's words caused the Plaintiff to assume a "defensive" posture causing him to believe something could happen. The Grievant's belief was that the Plaintiff's behavior was cause for her to feel threatened. The Bailiff's belief was that there was no threat to the Grievant (Trans. p.145).

The Bailiff testified that he informed his supervising Sergeant of the incident because he felt that the Plaintiff may file a complaint and he wanted his Sergeant to learn of the incident first from him. When asked by the Sergeant if he knew nature of the possible complaint, he said he did not (Trans p. 142). As noted in the above, his supervising Sergeant "ordered" him to write up the incident (Trans. p. 142).

On at least two prior occasions, the Bailiff testified that the Grievant had used the word "gun" in court when he was present. On those occasions, the Bailiff did not speak to Grievant about the use of the word and he did not inform his supervising Sergeant (Trans. p. 162, 166-167). There was also testimony by other witnesses that other members of court in other proceedings had been heard referring to the Bailiff as "the man with the gun" (Trans. p. 354-356).

This was not quite a "he said, she said" situation. It was two people with a real difference of opinion. The Bailiff felt her use word "gun" caused the Plaintiff to assume a defensive posture. The Grievant felt threatened by the Plaintiff's actions and tried to get the Bailiff's attention by tapping her fingers (Trans. p. 409-410).

The truth of what actually happened might have obtained if the Court had conducted a fair investigation. There was a third witness to the incident and that witness was not interviewed.

That person was the Judge Pro Tem, Kathleen Miller. As was done with the Letter of Reprimand incident, relevant and material evidence, for reasons unknown, was not placed into the evidence record. The Court compromised the integrity of the so-called investigation. And, the Court failed to provide sufficient proof any wrongdoing by the Grievant.

For the reasons discussed in the foregoing, the decision of the Arbitrator is that the Court did not have cause to terminate the Grievant. The Grievance is sustained.

AWARD

Grievance No. One: The Court's three-day suspension served in August 2007 to Jayne Sill was not warranted. There is no remedy of any damages, back pay, etc. to be awarded.

Grievance No. Two: The Court did not have cause to terminate Jayne Sill effective November 9, 2007.

REMEDY

The Court is directed to immediately reinstate the Grievant with full back pay and other allowances retroactive to her last date of paid service.

The Arbitrator retains jurisdiction over any dispute that may arise in the implementation of the remedy.



C. ALLEN POOL, Arbitrator

Date: June 23, 2008