

**SOUTH DAKOTA DEPARTMENT OF LABOR
DIVISION OF LABOR AND MANAGEMENT**

**IUOE LOCAL 49 on behalf of DEB
MAXON,
Grievant,**

HF No. 6 G, 2004/05

v.

DECISION

**MEADE COUNTY, SD,
Respondents.**

This matter comes before the Department of Labor based on Grievant's Petition for Hearing on Grievance filed pursuant to SDCL 3-18-15.2. Kenneth R. Dewell appeared on behalf of Grievant. Kenneth L. Chleborad represented Respondent. The Department of Labor conducted a hearing on October 5, 2006, in Sturgis, South Dakota. Debbi Maxon, Bernie Tveidt, Meade County Sheriff Ron Merwin, Terry Hutchison, Elizabeth Henneman, and Laurinea Hathorn testified live at hearing. The deposition of Alysia Herrick was received into evidence. Upon consideration of the live testimony given at hearing and the other evidence presented at hearing, Grievant's Petition for Hearing and request for relief is hereby denied.

Facts:

Based upon the record and the live testimony at hearing, the following facts are found by a preponderance of the evidence:

1. Deb Maxon was hired by Meade County (Respondent) as a Corrections Officer (C/O) on July 5, 1994.
2. In May of 2004, Grievant was fifth in command at the Meade County Jail, giving her a "rating" of J-5. The jail administrator was J-1, who answers directly to the Meade County Sheriff, Ron Merwin.
3. Murrin Keffeler was J-2.
4. Monte Droppers was J-3.
5. Jerry Price was J-4.
6. Maxon was J-5.
7. Bernie Tveidt was J-6.
8. C/O Maxon ranked higher than C/O Tveidt.
9. Maxon was terminated from her position of employment as a C/O on July 9, 2004.
10. The stated reasons for Maxon's termination were conveyed by Chief Deputy Sheriff Tom Wilts as:
 1. That she was again discussing Inmate information with other inmates and that she had been reprimanded in the past for such violations.

2. That she had destroyed an inmate grievance, rather than turn it over to a corrections Supervisor.
11. Grievant and Maxon appealed the Meade County Commission's decision to terminate her employment contract.
12. The parties agreed and stipulated at the hearing that the procedure for appealing the grievance was done in a proper and timely manner and that this matter is properly before the Division of Labor and Management.
13. On or about May 31, 2004, Maxon administered a DNA test on an inmate named Elizabeth Henneman. During this testing, the two engaged in a conversation in which another inmate was mentioned and details regarding her personal situation were discussed. This conversation led Henneman to talk with the inmate, Alysia Herrick, regarding the details of the conversation.
14. Herrick asked for and was given a blank grievance form from C/O Price.
15. Herrick filled out and submitted the grievance form to jail staff.
16. Jail staff received the grievance form.
17. Sometime on the morning of May 31, 2004, Herrick and Maxon discussed the grievance. Herrick indicated her desire to withdraw the grievance.
18. The grievance was torn into two pieces by either Herrick or Maxon after their first conversation regarding the grievance.
19. C/O Tveidt took possession of the two pieces of the grievance.
20. Maxon thereafter ordered both Herrick and Henneman into the attorney/client room of the jail and engaged in a conversation with them. She discussed the grievance filed against her by Herrick and tried to resolve the grievance.
21. After her conversation with Henneman and Herrick, Maxon discussed the grievance with C/O Tveidt and C/O Price outside of the jail.
22. Maxon wanted the grievance shredded and the grievance was placed in the jail's paper shredder by C/O Tveidt.
23. The jail log indicates only that Herrick's request that the grievance be destroyed was granted.
24. Maxon failed to demonstrate that Sheriff Merwin and jail staff embellished these events in order to have a reason to terminate her.
25. Maxon failed to demonstrate by a preponderance of the evidence that Sheriff Merwin or other County employees altered the jail log. Maxon herself had motivation to change the jail log.
26. Henneman's testimony regarding Maxon's statements divulging information about Herrick is accepted as credible.
27. Based upon the totality of the evidence, Maxon shared inmate information in violation of the jail policies.
28. Maxon investigated a grievance in which she had a conflict in violation of the jail policies.
29. Maxon continued to investigate the grievance even after it had been turned over to C/O Tveidt.
30. Maxon's investigation into the grievance led to its destruction. Had the proper procedure been followed, Herrick's withdrawal of the grievance would have been

noted on the grievance itself and the grievance would have been investigated by the jail administrator, pursuant to the policies and procedures in the jail.

31. Other facts will be developed as necessary.

Analysis:

SDCL 3-18-1.1 defines a grievance:

The term "grievance" as used in this chapter means a complaint by a public employee or group of public employees based upon an alleged violation, misinterpretation, or inequitable application of any existing agreements, contracts, ordinances, policies or rules of the government of the state of South Dakota or the government of any one or more of the political subdivisions thereof, or of the public schools, or any authority, commission, or board, or any other branch of the public service, as they apply to the conditions of employment. Negotiations for, or a disagreement over, a nonexisting agreement, contract, ordinance, policy or rule is not a "grievance" and is not subject to this section.

The Department's role in resolving a grievance is defined by SDCL 3-18-15.2.

SDCL 3-18-15.2 reads, in part:

If, after following the grievance procedure enacted by the governing body, the grievance remains unresolved . . . it may be appealed to the department of labor . . . The department of labor shall conduct an investigation and hearing and shall issue an order covering the points raised, which order is binding on the employees and the governmental agency.

The burden of proof is on the grievant. Rininger v. Bennett County Sch. Dist., 468 N.W.2d 423 (S.D. 1991).

By the negotiated agreement, "The County agrees not to discipline any employee without good and just cause." "Good and just cause" are not defined by the agreement. When terms in a contract are not defined they are given their plain and ordinary meaning. Canyon Lake Park, LLC v. Loftus Dental, PC, 2005 S.D. 82, ¶ 17, 700 N.W.2d 729, 734.

Grievant argues that the evidence relied upon by Sheriff Merwin and the Meade County Commissioners in terminating C/O Maxon "does not rise to the level of competent, appropriate evidence upon which to base a termination from public employment under South Dakota law." In making this argument, Grievant relies upon Vetter v. Cam Wal Electric Cooperative, Inc., 2006 S.D. 21, 711 N.W.2d 612 and Cox v. Sioux Falls School District, 514 N.W.2d 868 (SD 1994) and SDCL 3-18-15.2.

Citing Vetter, Grievant argues that "under the collective bargaining agreement, the County's ability to discharge Maxon 'for cause' cannot be exercised in an arbitrary or unfair manner." Grievant also uses Vetter to argue that "by agreeing to restrict its right

to discharge Maxon for 'good and just cause' the County has impliedly agreed to not do so arbitrarily or unfairly." Grievant's reliance on Vetter is misplaced. The facts of this case are distinguishable from the facts in Vetter because Vetter decided a wrongful termination suit, not a grievance appeal. The employment contract in this case, unlike in Vetter, does not include an explicit promise from employer that good and just cause would not be "exercised arbitrarily or unfairly to any employee." The Court specifically held "whether the good faith standard should apply in South Dakota to some employment termination decisions must await another day." Vetter at ¶ 23.

Grievant argues that Vetter implies that the Department can now adopt the good faith standard because Maxon's employment agreement stops short of defining "good and just cause." This, the Department declines to do. The Department's role in an appeal of a grievance decision regarding a public employee is defined by SDCL 3-18-15.2. The Department must determine if the termination of Maxon violated, misinterpreted, or inequitably applied Meade County policies and procedures and/or the employment agreement.

Sheriff Merwin made the ultimate decision to terminate Maxon's employment with the County. In making this determination, Sheriff Merwin reviewed Maxon's personnel file, reviewed documentation from the Meade County Jail, and discussed the events with the Jail Administrator. Sheriff Merwin did not interview Maxon.

Sheriff Merwin explained his understanding of the sharing inmate information incident and his justification for disciplining Maxon:

- A: My understanding was that Ms. Maxon was working as a C/O and for whatever reason, and I don't know what the reason was, but her and inmate Henneman were, I believe, in the booking room for some reason and there was a conversation that took place between the two about something. And Ms. Maxon then stated to Ms. Henneman something along the lines that, Well, at least you're not as messed up as she is, or something like that, referring to an inmate Herrick.
- Q: And where did that information come from, your understanding of what information was shared?
- A: There's a statement from Ms. Henneman and also my conversation with the jail administrator.
- Q: Why is that a violation that would lead to termination?
- A: I guess I just don't feel that the correctional staff ought to be discussing one inmate's conditions or anything to do with one inmate with another inmate. It does nothing in the jail setting but antagonize and cause disruption, causes bad feelings. These people are housed together. They have to live together in very short quarters and by stirring things up between inmates does nothing but cause fights, cause all kinds of other trouble, so . . .

- Q: Based on your understanding of the information that was shared, is the sharing of such information a violation of any specific policy or procedure of the jail?
- A: We do have a policy in the jail that says that we are not to discuss any inmate's case or definitely not medical conditions and, basically, nothing with one inmate pertaining to another inmate.

Meade County Jail Policies & Procedures, Title: Case Records – Release of Information No: A-90 provides that “information that may be released about an offender consists of those information elements that are already a part of the public record.” It further provides:

Employees will be specifically advised of the adverse consequences of unauthorized release of information, up to and including prosecution in some cases. The specific privacy requirements that apply to the Jail will be incorporated into the training provided each employee.

C/O Maxon admitted in her testimony that she had received discipline for a 2001 incident involving an inappropriate statement made over the phone to a third party in reference to an inmate. C/O Maxon denied being disciplined for any other infractions, but insisted that “they” were “out to get her.” She insisted that Sheriff Merwin resented her for “rolling her eyes” at a meeting and for being a woman and for being outspoken. C/O Maxon also insinuated that the inmates involved in the alleged incident of sharing information had fabricated the story. Maxon failed to demonstrate that Sheriff Merwin or anyone on behalf of Meade County was personally motivated to fabricate or embellish events in order to justify terminating her employment.

The Department declines to accept Grievant's argument that Herrick's and Henneman's testimony is unreliable because they are both “convicted drug offenders.” Conviction of a drug offense does not render one's testimony unreliable without other factors. Herrick and Henneman had little or no motivation to lie about Maxon's actions. Based upon Maxon's own admissions and the testimony of Herrick and Henneman, Maxon shared inmate information in violation of the jail policy.

Herrick filled out and submitted an inmate grievance form. Herrick's grievance was received by jail staff. Maxon learned of the grievance and attempted to resolve the grievance filed against her, in violation of Meade County Jail Policies & Procedures, No: E-50, which states:

Upon receiving the grievance, on-duty staff may attempt to resolve the grievance. If there exists a conflict, or the on-duty staff cannot resolve the issue, the staff will forward the grievance to their supervisors. If issue is resolved, then notice will be served to the grieving inmate(s) and further filed with administration.

Maxon ignored this policy. Maxon's actions violated this policy. Maxon's actions in investigating a grievance filed against her directly led to the destruction of the grievance

in violation of the jail's grievance policy. Maxon's violations of jail policies and procedures constitute "good and just cause" for discipline.

Maxon denied any wrongdoing whatsoever in her handling of the situation with inmate Herrick and inmate Henneman. Maxon denied that any of her actions or statements concerning inmate Herrick and inmate Henneman warranted any type of disciplinary action. Maxon failed to prove by a preponderance of the evidence that her actions followed the policies and procedures of the Meade County jail. Based upon Sheriff Merwin's testimony regarding the purpose of the jail policies and the procedures, Maxon's discipline was for "good and just cause."

Maxon failed to establish by a preponderance of the evidence that Respondent violated, misinterpreted, or inequitably applied its agreement, contract, ordinances, policies, or rules. Grievant's requests for relief in its Petition for Hearing are denied.

Respondent shall submit proposed Findings of Fact and Conclusions of Law, and an Order consistent with this Decision within ten (10) days from the date of receipt of this Decision. Grievant shall have ten (10) days from the date of receipt of Respondent's proposed Findings of Fact and Conclusions to submit objections thereto or to submit proposed Findings and Conclusions. The parties may stipulate to a waiver of Findings of Fact and Conclusions of Law and if they do so, Respondent shall submit such Stipulation along with an Order in accordance with this Decision.

Dated this 14th day of September, 2007.

SOUTH DAKOTA DEPARTMENT OF LABOR

Heather E. Covey
Administrative Law Judge