

IN THE MATTER OF THE ARBITRATION

WASHINGTON FEDERATION OF STATE EMPLOYEES

and

AAA 01-16-0004-8887
Discipline

STATE OF WASHINGTON, DEPARTMENT OF
ECOLOGY

Appearances: For the Union: Sharon English, Esq.
Younglove & Coker

For the Employer: Charlynn R. Hull, Esq.
Asst. Attorney's General

DECISION AND AWARD

The undersigned was selected by the parties through the procedures of the American Arbitration Association. A hearing was held in the above matter on March 29, 2017 in Olympia, Washington. The parties were given the full opportunity to present testimony and evidence. At the close of the hearing, the parties elected to file briefs. The arbitrator has considered the testimony, exhibits and arguments in reaching his decision.

ISSUE

The parties agreed on the following issue:

Did the Employer violate Articles 2, 6, 20 or 27 of the Parties Agreement when it issued a reprimand to the Grievant? If so what is the appropriate remedy?

BACKGROUND

The State of Washington, hereinafter referred to as the Employer and the Washington Federation of State Employees, hereinafter referred to as the Union, entered into a Collective Bargaining Agreement covering several State Agencies, including the Department of Ecology. The Agreement in effect when the grievance arose covered the years 2015-2017.

Grievant has been employed by the Department of Ecology for over eleven years. He is an Economist Analyst 3. His position is Overtime Exempt. He works in the Water Resources Program and is the only economist working within that program. His position requires him to analyze costs for any regulations that might be proposed. He also does a cost to benefit analysis on grants and other projects. Grievant is a shop steward for the Union and he has held that position for several years.

David Christensen is Grievant's immediate supervisor. He has been Grievant's supervisor for over three years. Tom Loranger is Mr. Christensen's immediate supervisor. Mr. Loranger has the authority to issue reprimands. Any discipline more severe than a reprimand must be issued by his superior.

Mr. Christensen believed there were issues surrounding Grievant's use of his time. He thought Grievant was spending too much time on his phone doing personal activities. On August 14, 2014, he gave a memo to Grievant entitled "Clarification of Expectations." In that memo, he noted "we are professionals" and as such he does not "manage schedules." He emphasized the need for communication as to what Grievant is doing and said they should have "regular check-in meetings."

Grievant was issued an Oral Reprimand on October 9, 2014. The reprimand was for “inappropriate use of personal electronic devices during work time.” Mr. Christensen indicated he observed Grievant watching videos and that the conduct “was inconsistent with the Memo that I provided on August 14, 2014.” Grievant had not previously been disciplined by the Employer.

Grievant perceived Mr. Christensen was harassing him in that he was watching him far more than others. He filed a series of grievances with the Employer concerning his treatment from his Supervisor. One of the grievances was filed in June of 2014. Grievant had asked to have his work cubicle moved. The request was denied and he filed a grievance over that decision. Grievant maintains his issues with Mr. Christensen began right after that.

Grievant in October of 2014 sent several e-mails to Mr. Loranger about his concerns regarding his treatment by Mr. Christensen. It was around this same time he started filing a series of grievances over his encounters with Christensen.

Article 47 of the Parties Agreement is entitled “Workplace Behavior.” When it is alleged an employee, including supervisors, have engaged in inappropriate behavior, Human Resources must investigate the allegation. An Article 47 investigation was commenced concerning the treatment of Grievant by both Mr. Christensen and Mr. Loranger. An outside third party was hired to perform the investigation. She issued her report on June 30, 2015. It did not sustain the harassment charges. Both the Union and Grievant objected to those findings.

Mr. Christensen contends he observed Grievant using his cellphone and his computer improperly in the fall of 2015. Specifically, he said he saw Grievant with his head down on his cellphone on November 3 and 5, 2015. He indicated

Grievant was on his cellphone for over 30 minutes. Mr. Christensen also said he observed Grievant visiting Amazon.com on his computer. They met to discuss these issues on November 5.

The State of Washington was experiencing a serious drought in 2014-15. Farmers did not have enough water for their crops. The State authorized money for the farmers to dig wells to tap into a water supply. These were called drought wells. Mr. Christensen wanted to report to the Legislature in November of 2015 on the benefits obtained from this funding. He gave Grievant the task of doing a cost to benefit analysis of the funding.

Grievant and Christensen had been meeting weekly to discuss progress on projects given to Grievant. This new task was given top priority. It started in September of 2015. Neither one of them was certain at the beginning on what the best way would be to do this analysis. At the time of this project, the relationship between Grievant and his supervisor had already deteriorated. Grievant had requested a Union Representative be with him at each of these weekly meetings. That request was granted. Mr. Christensen believed it was necessary for him to have another manager present for these meetings given the addition of a Union Representative. Thus, there were four individuals present for their weekly meetings when this project was on-going. They met on October 13, 20 and 28 and November 9, 2015. Grievant believed Mr. Christensen was being unclear as to the methodology he wanted Grievant to use and that it changed at each meeting. He asked that he be sent an e-mail after each meeting that stated what it was he wanted Grievant to do. This was done.

The presentation to the Legislature was to take place on November 19. Mr. Christensen wanted Grievant's final report by November 9. Mr. Christensen got the report, but felt it was not accurate or adequate. He did not communicate with Grievant at that time his concern over the contents of the report.

Mr. Christensen reported to Human Resources his concerns about the report and Grievant's use of his computer and cellphone. Elizabeth Monroe, the Labor Relations Manager instituted an investigation into the charges. She appointed Corrina McElfish from Human Resources and Mr. Christensen to investigate the charges. The Union objected to the appointment of Mr. Christensen as an investigator. A request was made of the IT Department to pull a record of computer use by Grievant. It indicates what sites were open and the number of hits on each site, but does not show the length of the visit or the purpose of it. The information obtained showed that Amazon, You Tube and Facebook were sites that had been seen. There were three hits on Amazon and You Tube and one on Facebook. The Employer has a policy regarding the personal use of its equipment. It allows de minimus use of the computer for personal reasons, but prohibits certain usages. Policy 15—01 (5D) prohibits visiting shopping sites. 6(M) prohibits viewing social media sites, such as Facebook. Section 6 prohibits watching videos for personal use due to the bandwidth required.

Grievant was issued a written reprimand on March 15, 2016 following the investigation. There were several allegations included in the Letter. The first charge was "Failure to Meet Performance Expectations and Follow Supervisor's Directions." This involved the Drought Well Project. The second charge was for "Misuse of State Resources and Failure to follow Supervisor Directives." This

concerned his use of his cellphone. The final charge was for “Misuse of State Resources.” It referenced the three web-sites shown on the computer pull. The Union grieved the issuance of the Written Reprimand.

DISCUSSION

The Arbitrator shall review each of the three charges against the Grievant. Before doing so, however, certain observations should be noted. It is clear the relationship between Grievant and Mr. Christensen to say the least is not a good one. The fact that they both needed witnesses to their meetings makes that evident. There was one good moment between them. At the end of their October 28 meeting, Christensen told Grievant: “This has been a good couple of weeks” to which Grievant replied: “Thank you I appreciate the good faith. Best meeting in a year and a half.” Unfortunately, that dialogue is the exception, not the rule.

The Union questions the involvement of Mr. Christensen in the investigation given his role in the charges and their history. That is a valid concern. The purpose of an investigation is to try to gather all the facts. In any investigation, there can be differences in what each person interviewed says. There may be credibility issues, as there are here. It is impossible for the investigator to make that evaluation if that person is one of the people whose credibility is being challenged by the other side. Mr. Christensen is involved in every aspect of these charges. It is he who felt the product he received was insufficient. It was he who made the observations regarding the phone and the computer use. It is understandable that the Employer wanted his expertise regarding the first issue. However, he could explain to the impartial investigator exactly how he reached

that conclusion. The investigator can then judge the validity of that charge. That cannot be done when the person judging is the person making the allegation.

The Union argument is also valid that this situation was exacerbated by the fact that one of the grounds for discipline was the very subject covered by a grievance filed regarding Mr. Christensen. It was at the November 5 meeting that Christensen questioned Grievant's use of his cellphone. Grievant immediately filed a grievance regarding that meeting. That same subject is now being used to justify the reprimand. This is further demonstration of the conflict of interest by him being the investigator.

One of the roles of an arbitrator in determining if there is just cause is to look at the fairness of the investigation. The appearance of an impropriety can be as important as impropriety itself. Here, the appearance does raise a red flag regarding how the actual investigation was done. That must be a factor to consider when weighing the validity of the allegations in the Letter of Reprimand. Their decision to allow Mr. Christensen to participate infringed on the Due Process Grievant was entitled to get. The Arbitrator will now turn to the charges.

Failure to Meet Performance Expectations and Follow Supervisor's Directions

There are three aspects to this charge:

1. You failed to follow industry standard methodologies supplied by the Department of Agriculture.
2. You did not use all available data to ensure accurate analysis.
3. You failed to validate your information using available data and staff resources.

This allegation stems from Grievant's work on the drought well project. Mr. Christensen contends Grievant did not provide him with what he requested. Grievant maintains he gave him a report that contained all the information that

Mr. Christensen sought. To understand what was transpiring between them and to analyze what was done by Grievant, it is necessary to go through the notes from their weekly meetings and the e-mails that followed those meetings.

Both Grievant and Mr. Christensen agree this was an unusual project for them to undertake. At their first meeting on September 14, 2015, Christensen told Grievant “he was trying to have (Grievant)” use his professional judgment on how best to do the analysis.” During that meeting, they discussed a grant given to Stemilt, which would require significant analysis.

They next met on October 13. They discussed the goals of the project and determining the economic benefit from the funding. They again mentioned Stemilt. Mr. Christensen at that meeting told Grievant he could start “with an economic estimate for the Stemilt project.” Grievant also noted at the meeting that he was unclear as to what his boss wanted and asked him to e-mail him with exactly what it was he wanted Grievant to do. They did discuss using an “input/output” model which Grievant said would not work for this project. It was at this meeting that Grievant was told there was a timeline for completion and that was mid-November. Following the meeting, Grievant did receive the e-mail he requested. He told Grievant he should do an evaluation of “overall economic benefit of each project funded” by the State. He also told him he wanted him “to focus on the drought wells.”

They met again on October 20. Grievant gave out a draft of his report at the meeting based on information he obtained from the farmers. Mr. Christensen told him that was not what he wanted. They then reviewed what had been assigned and Christensen “agreed that the written documentation was not

explicit.” Grievant then told him “I want to be helpful.” He was then told what was not wanted was “anecdotal information.” Grievant asked that the request as to how to proceed again be put in writing. Grievant received an e-mail the next day. It was emphasized in the e-mail that if anything Grievant was told was unclear, he should ask for clarification. He then gave him four points to cover. Grievant was to use the data provided him showing who the applicants seeking funds were. He was to obtain the value of the crops the farmers who got the funds would grow. He then was to get “validation through a survey” of the farmers. Grievant had been given a letter from the Department of Agriculture which indicated a survey could be used, but to be valid it required 30% of the recipients to respond.

The next meeting was October 28. Grievant was asked if he could get to “30% of the acreage for all applicants.” Grievant told him “it would be challenging.” It was reiterated that he needed to get to that level of responses. Grievant was told the information was needed by November 13.

They did not meet again until November 9. Mr. Christensen asked Grievant why he did not do his analysis based on “pre-application data.” Grievant told him that was just an estimate and his information showed what water the farmers wound up using and what they did with it. Grievant was asked to merge the data from the applications with the information obtained from the farmers. Grievant received an e-mail the same day. Attached was a handwritten version of the information Mr. Christensen wanted on the spreadsheet. It listed the columns he wanted and the headings for each column.

Grievant did provide a spreadsheet to Mr. Christensen in the format requested. It contained information from nine different farmers, which would represent a 30% sample. The Chart including information from Stemilt. The Employer contends that was error as it claims Stemilt did not receive funds for a drought well. The Union disagrees. It contends it did.

Mr. Christensen testified the information given to him had errors in it. He did not discuss them with Grievant until the investigation that led to his discipline. That fact is once again symptomatic of the communication problems between the two of them, despite their weekly meetings. On October 28, as noted, Grievant was praised for his work. Two weeks later it was deficient.

The first charge is that he failed to follow industry standards. This refers to the need to obtain a 30% sample. If Stemilt is excluded, the chart only had eight names, which is approximately 26.7%. This Arbitrator when reviewing the discussion at the meetings, noted the references to Stemilt. He did so because of this issue. It was not just Grievant that mentioned Stemilt, but also Mr. Christensen. At no time did he say, forget Stemilt because they are not in the same category.

The Union argues this whole issue is a non-issue because Stemilt did get money for a drought well. It contends Exhibit 31 shows it got such funds. Regardless of whether Stemilt should or should not have been included, the discussions the two had made one thing clear. Mr. Christensen never stated to Grievant not to consider Stemilt. To the contrary, the above discussion would indicate the opposite was true. Therefore, even if the Employer is correct, the inclusion was the result of confusion and not an attempt to get the survey up to

30%. That seems to be what is inferred by the Employer. Furthermore, Grievant alerted Mr. Christensen that it would be challenging to get responses from 30% of the farmers. The farmers were busy tending to their crops and less interested in doing a survey. Mr. Christensen did at one point ask Grievant if he had done a written survey. Grievant told him that would not work. Instead he called farmers repeatedly, but used the same format for each call. Mr. Christensen never criticized him for that approach and encouraged him to contact them.

In summary, the Arbitrator finds that even if Grievant did not obtain the 30%, response rate, which is not at all clear, such failure was not intentional. There is no evidence Grievant knew the inclusion of Stemilt might be error, especially given their discussions about that entity. It alone would not warrant discipline.

The next two charges are his alleged failure to use all data and a failure to verify the data he did use. They both discussed at length whether to use pre-application data or actual numbers. Grievant was told to merge the two together via the chart. Mr. Christensen asked for the chart to be in a specific format and he got the chart in that format. He acknowledged during his testimony about the chart “that this part of the assignment was okay.” It is unclear from the meeting notes and the e-mails that there is some other part of the project that was not done. If he wanted something more than that, why did he not put that as part of the format on the chart he showed Grievant? Perhaps, he is referring to Grievant’s use of data from the U.S. Department of Agriculture instead of the State data. Grievant testified the information from the U.S. was more accurate. Grievant was told to use his professional judgment and he determined using the

U.S. data was best. While Mr. Christensen did mention the State Agricultural Department, he never explicitly told Grievant he must use only them.

If the allegation stems from an alleged failure to verify the information, he was told in the October 21 e-mail to do the verification from information obtained from the farmers, which he did. That was all the information he had available to him at that time. The final numbers as to the value of the crops would not be known until a year later. Witnesses made that clear. Thus, he could not get final verification in the timeframe needed for the report. If they had more time, perhaps they could have been clearer with each other, but they did not have the benefit of time. Grievant perceived he was giving Mr. Christensen what he wanted. He repeatedly told him he was trying to be helpful. It appears once again they failed to communicate. The Arbitrator cannot sustain these two charges. If what Grievant provided was not what Mr. Christensen wanted, it was his responsibility to be clear enough to describe what it was he did want. Throughout this project, there was no consistency on what or how the project should be done. Both Grievant and his boss were feeling their way throughout this project. It is unfair to put all the responsibility on Grievant.

Notice to Grievant regarding Cellphone and Computer Use

The Employer notes regarding the next two charges that Grievant was clearly on notice as to what he could and could not do with State resources. The Memo on Expectations and the Letter of Reprimand provided him with ample notice they argue. The Arbitrator agrees. Grievant was on notice regarding the proper use of the equipment. He knew what he could view on his computer and he knew as a professional that he needed to spend most of his time doing State business.

While he could do some personal business, there were limitations. Some things could not be done at all. When doing personal business on things not prohibited, such usage must be de minimus. The only question then for the next two charges, is whether he violated those expectations.

Misuse of State Resources and Failure to follow Supervisor Directives

This charge stems from Mr. Christensen's observations. He states that on November 2 and November 5 Grievant was on his cellphone for over 30 minutes. He contends Grievant admitted doing so. That is denied by Grievant. This same issue was the basis for the oral reprimand given to Grievant in October of 2014. His conduct would also violate the memo on expectations the Grievant was given several months prior to the oral reprimand if correct.

Grievant contends he was not on his cellphone for that long and that when he did use his phone it was to contact farmers in conjunction with the drought well project. He also maintains that ever since the oral reprimand when he is on the phone he turns his chair to face the opening in his cubicle so he can see if Mr. Christensen is watching him. He did not see him on either of these occasions. Grievant also introduced pictures of his work area to show how high the cubicles are and that it was impossible for his supervisor to see anything but the top of Grievant's head. Finally, he noted ever since the Oral Reprimand, he has been extremely cautious given his concern about being watched by his Supervisor.

Mr. Christensen testified he can see the cubicle from a walkway near the breakroom and that is where he saw Grievant. He acknowledged he did not stand there for the full 30 minutes, but went into the breakroom and when coming out Grievant was he contends still on the phone.

This is the classic he said, he said situation. It also points out once more the problem with Mr. Christensen being one of the investigators. He stated he had little involvement regarding this and the next issue, but he is the main witness. He was not interviewed. That is key in this type of situation. Nevertheless, the Arbitrator finds Grievant was on his cellphone for some part of the time. Grievant noted his father was sick and he needed to keep abreast of the situation. Mr. Christensen recounts how he told Grievant to take time off if he needed to deal with that. Grievant might certainly have been on his cellphone to address the issue with his father. That is most understandable. However, he should have alerted his supervisor in advance to let him know of the issue with his dad and what he might have to do to deal with it. For that, he can be faulted. Mr. Christensen believed Grievant was on his phone watching videos, which was the subject of the oral reprimand, but there is no evidence that is what he was doing. Mr. Christensen did not see the phone so could not know what Grievant was doing. On balance, the Arbitrator finds, Grievant must take some blame for his actions on these two dates, but not to the degree argued by the Employer. There is just too little evidence to determine whether the use of the phone was continuous or that some or the time was not business related. His fault, as noted, was his failure to communicate with his supervisor as he was told to do in the Memo of Expectations.

Misuse of State Resources- Violation of Agency Policy

This allegation relates to Grievant's use of the State computer. It alleges there is a violation of Policy 15-01. The Letter of Reprimand specifically lists the sites that the Employer contends violated the Policy. As noted earlier, they are

Amazon, You Tube and Facebook. The Union first argues there is no evidence it was Grievant that went to the sites. It was the computer on Grievant's desk that was the subject of the pull. Records confirm the computer pull was for Grievant's computer. There is no evidence anyone else used his computer. The Arbitrator is persuaded that the sites appeared while Grievant was using the computer.

The Union challenges the information obtained arguing it does not show nearly enough information and that other investigations contained much more detailed information than this one. Ms. Monroe testified there was a change in computer systems occurring at that time and the information referenced by the Union in those other investigations is no longer available. The Arbitrator finds that is a reasonable explanation as to why the information is in the format it was. That does not mean, however, the information that was obtained proves the Employer case. The information itself must be analyzed.

Anthony Jones is a Union Representative. He indicated he has been involved in similar cases as part of his job duties. He noted the information shows the kilobytes used for You Tube was very small. It was 612 kilobytes. He stated that amount of data is used in a matter of seconds. Further, there were three hits so this amount of time is spread over those three hits. Grievant maintains he did not view this site and it could have been attached to some item he was viewing. It is not unusual for there to be a video included with some article being viewed. That is different than intentionally going to You Tube and watching a video for personal enjoyment. The Arbitrator agrees with the Union that without knowing more, one cannot assume Grievant watched this site for personal reasons.

Exhibit 4 does show one hit on Facebook. How it appeared is unknown. If he was at some other site on the computer, it could have popped up from that other site. The time it was viewed was very small. It is not unusual if looking at a site that there be an icon for Facebook as part of it. It is there so one can get more information on the topic being checked. The evidence does not show how or why it was accessed. For the same reason as noted above, there is just insufficient information to conclude it was being viewed for personal reasons or that he intentionally accessed it.

Mr. Christensen stated he saw Amazon up on Grievant's computer. There are three hits on Amazon. Grievant maintains there are legitimate reasons for being on Amazon. He has viewed it as part of his duties. He might check the price of an item which he needs for calculations he must make. Christensen in response to that claim, testified that might be true on some projects, but this project did not require him to compare prices of items.

The three hits on Amazon used 907 kilobytes. That probably is not enough time to place an order, especially since it is spread over three hits. The Rule prohibits visiting shopping sites for personal reasons. Grievant has no recollection as to why he was on the site, but noted he only goes there for work purposes. He also does not know if this is a popup to a site he did visit. The burden is on the Employer to prove Grievant went to a shopping site for personal business. The limited number of kilobytes used and lack of any evidence he was doing personal shopping must lead the Arbitrator to find Grievant did not violate Policy 15-01 regarding Amazon. Given all the above findings, the Arbitrator does not sustain this charge for any of the three sites listed.

Articles 6- Hours of Work

The Union alleges this Article was violated. Articles 6 defines the term “Overtime Exempt.” There was no dispute that Grievant falls within the definition. An overtime exempt employee needs to work whatever hours are required to do the work. They must “respond to directions from management” and “consult with their supervisors to adjust their work hours.” Grievant at one point had a modified work schedule that allowed him to work four days a week with extended hours. That was changed by Mr. Christensen and subsequently reinstated. The record is not clear why the initial change was made. Mr. Christensen did say when reinstating the original schedule that it was a show of good faith. Section 6.9(E) does say when an employee is seeking “exchange time” for extra hours worked approval will not be “arbitrarily withheld.” There is no evidence that issue was involved here and thus there is no evidence to support a finding that a decision regarding such time was arbitrarily made. The Arbitrator based on the record cannot conclude this Article was violated.

Harassment and Retaliation Allegation- Article 2

Grievant maintains all the charges were brought against him because of his sour relationship with his supervisor. He feels he is constantly being watched and that Mr. Christensen does not devote that type of attention to other employees. He maintains Mr. Christensen has fabricated much of the information he provided to support the charges against him. Mr. Christensen, of course, denies that and is simply harassing him.

Grievant and the Union also argue that these charges were brought in retaliation for the grievances filed. It notes this Written Reprimand was issued shortly after a grievance against Mr. Christensen was filed. It contends this is not coincidental. The Employer maintains the issues here have nothing to do with the prior grievances filed on behalf of this Grievant. It is not retaliating.

What is clear is that neither of the two trust each other. Mr. Christensen believes Grievant malingers too often doing other things. Grievant feels he is constantly being monitored. No doubt, Mr. Christensen is watching Grievant more than others because of his views towards Grievant's work habits. While there is no remedy available to this Arbitrator to address the feelings they have towards each other, he does observe it is not a healthy situation which most definitely needs to be improved. Article 20 is entitled "Safety and Health." Grievant maintains his relationship with his Supervisor has harmed his health. Given their relationship, it is not at all unlikely that it has had an impact on Grievant's health. That fact makes it even more imperative that this broken relationship, and the Union is correct when it characterizes it that way, be mended. As was noted above, they did have a good meeting in October which they both acknowledged. So, it is possible for that to occur.

Fixing that relationship, however, is well outside of this Arbitrator's role. What he must address is the allegations that the charges were part of pattern of harassment and in retaliation for the filing of grievances. While the timing of the charges does raise suspicion, the Arbitrator is not satisfied that the nexus has been proven. The grievances are merely symptoms of the broken relationship. The constant monitoring of Grievant is also symptomatic of their distrust and

not the product of a program of retaliation. They need to get at the core of the disease and stop simply addressing the symptoms. Without doing that, the symptoms will never be abated and more grievances and charges will flow.

The Arbitrator finds neither of the two have clean hands. He finds Grievant must share some blame for what has transpired. The record is clear that his attitude towards his supervisor played a role in what followed and in the filing of these charges. He has been issued a Written Reprimand. While that level of discipline is not extreme, it is still a form of discipline that is exacerbated in Grievant's mind by his feelings towards his Supervisor. Given this Arbitrator's findings here as to all the charges, the Arbitrator cannot sustain the Written Reprimand and does find a violation of Article 27. The Written Reprimand should be reduced to a second oral reprimand based on his failure to communicate with his Supervisor as required by Article 6 and the Memo. While the Union argues there should be no discipline, the Arbitrator cannot totally ignore Grievant's role in what has transpired. This level of discipline takes all these factors into account.

AWARD

1. The Grievance is granted in part and denied in part.
2. The Written Reprimand shall be removed from Grievant's file and replaced with an Oral Reprimand.

Dated; June 21, 2017



Fredric R. Dichter, Arbitrator