

In the Matter of Arbitration Between)
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Washington Federation of State Employees,)
(WFSE or Union),)
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and)
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)
Washington Department of Social and)
Health Services,)
(Agency or DSHS))
)
_____)

OPINION AND AWARD
Martinez Grievance
AAA Case No. 01-17-0005-9075

BEFORE: David W. Stiteler, Arbitrator

APPEARANCES: For the Union:
Thomas Keehan
Attorney at Law
Younglove Coker
Olympia WA

For the Agency:
Margaret Maclean
Assistant Attorney General
Washington Attorney General's Office
Tumwater WA

HEARING LOCATION: Tumwater, Washington

HEARING DATE: October 30, 2018

RECORD CLOSED: December 15, 2018

OPINION & AWARD ISSUED: January 10, 2019

OPINION

INTRODUCTION

The Union filed this grievance to challenge the Agency's May 2017 decision to remove Grievant from his position. The Agency denied the grievance, and the parties were unable to resolve the dispute. The Union advanced the grievance to arbitration and the parties selected me as the arbitrator, using AAA procedures.

At the hearing, the parties agreed that there were no issues of arbitrability. They agreed I could retain jurisdiction for 90 days following the decision to resolve remedial disputes, if any. They had the full opportunity to present argument and evidence in support of their positions.

After the parties presented their evidence, they agreed to waive oral closing argument and submit post-hearing briefs. I closed the hearing record when I received those briefs.

ISSUE

The parties disagree about the nature of the case, and consequently, were unable to agree on a statement of the issue. Each offered its own issue statement, which reflect their differing views of the dispute.

The Union cites several articles in the grievance, but mainly claims that Grievant's removal was a disciplinary matter requiring just cause. It proposed this issue statement:

Did the Employer have just cause to terminate [Grievant] in late 2016, early 2017, where it ended his employment as a Residential Rehabilitation Counselor 2, or alternatively, if the Employer's action was non-disciplinary in nature was it barred for other reasons, such as detrimental reliance or other legal doctrine, since multiple superintendents or CEOs of SCC had explicitly waived their policies that would have otherwise resulted in automatic disqualification? If so, what is the appropriate remedy?

The Agency contends that Grievant's removal was non-disciplinary, and that this is a contract interpretation dispute. It suggested this statement of the issue:

Did the Agency violate Articles 27, 28, or 50 of the Collective Bargaining Agreement (CBA) between the parties when it undertook a non-disciplinary separation of Grievant based on his disqualification from his job? If so, what is the appropriate remedy?

After reviewing the record, and in light of the parties' offered issue statements, I find the issue to be:

Did the Agency violate the parties' collective bargaining agreement when it removed Grievant from his position, and if so, what is the appropriate remedy?

FACT SUMMARY

The Agency, among its responsibilities, operates various institutions in Washington. One of those is the Special Commitment Center (SCC). The SCC is located on McNeil Island, a 20-minute ferry ride from the mainland. The SCC houses residents who are committed because they are designated as sexually violent predators. Its goal is to treat and eventually release them back to the community.

Jobs at the SCC that may have unsupervised access to residents of the institution are considered "department-covered." Applicants for department-covered positions must undergo a background check in order to be hired.

The Agency maintains a list of criminal convictions referred to as the Secretary's List. The preamble to the list states:

A person who has a crime listed below is denied unsupervised access to vulnerable adults, juveniles, and children.

If "(5 or more years)" appears after a crime, the person is automatically denied unsupervised access unless 5 or more years has passed since the date of conviction.

After 5 years, an overall assessment of the person's character, competence, and suitability to have unsupervised access will determine denial.

The background check for applicants is done in part to determine if their record includes any of the crimes on the list that would disqualify them, either permanently or for the five-year period, from being hired into a department-covered position.

The Agency's policy, Administrative Policy No. 18.63, and the Agency's guidelines for implementing the policy, provide that an appointing authority is to deny hire or continued employment to an applicant whose background check shows a conviction for a Secretary's List crime. The policy and guidelines also provide that an appointing authority may not waive the requirements of the policy.

In 2008, Grievant applied for a position as a food service supervisor 2 at the SCC. Because that is a department-covered position, the SCC ran a background check. As pertinent here, the background check found convictions for two crimes that appear on the Secretary's List: an assault 4, and a no contact order violation.

Assault 4 is also listed as simple assault. On the Secretary's List, it includes the "5 or more years" proviso. Grievant's conviction, which was related to a domestic violence incident, occurred in 1996, more than five years before he applied for a job at the SCC. It would not have barred the Agency from hiring Grievant but would have required a character and suitability check.

Violation of a no contact order does not include the "5 or more years" proviso. Grievant's conviction, which involved contact with the victim in the assault case, occurred in 1998. Under the Agency's policy, that conviction should have barred the Agency from hiring Grievant.

In March 2008, after the SCC received the background check information, then-Superintendent Henry Richards sent Grievant a letter asking him to explain the convictions. Richards also met with Grievant to discuss the issue. About a week later, Richards noted on the background check form that it was okay to hire Grievant. On April 29, 2008, he sent Grievant a letter appointing him to the food services supervisor 2 position.

Grievant worked in that position from 2008 to 2012. By all accounts, he was a satisfactory or better employee. There is no evidence of any disciplinary issues.

In 2012, Grievant applied for a residential rehabilitation counselor 2 (RRC) position at the SCC. RRCs are responsible for the day-to-day management of the SCC residents in their area of the institution. That position is also a department-covered position, and it required another background check.

Following that check, then-Interim CEO Don Gauntz appointed Grievant to the RRC 2 position in December 2012.¹ As in the previous position, Grievant was a successful employee with average or better evaluations and no disciplinary issues following the promotion.

In 2014, Grievant bid into an RRC 2 position in program area 1, a high resident management area, at the SCC. This is also a department-covered position, and once again, Grievant was appointed to the position.² He remained in that position without incident until December 2016.

Grievant worked the graveyard shift in program area 1. By the time his shift started, residents were generally in their rooms for the night and he spent most of his time in the control booth. He had little direct interaction with residents during his shift in that area.

However, Grievant worked a significant amount of overtime, both mandatory and voluntary. His overtime work was during day shift. During day shift, the residents were not confined to their rooms and there were more opportunities to interact with

¹ At some point between 2008 and 2012, the job title for the head of the SCC changed from superintendent to CEO.

² Neither Richards nor Gauntz testified. The Agency offered no evidence about their application of the Secretary's List, and whether they erroneously determined that Grievant's conviction was not a disqualifying one, misinterpreted their authority to waive the disqualification, or knowingly hired and/or promoted him despite the policy's language.

residents. Because of staffing issues at the SCC, there are not always enough staff on shift to make sure that an RRC does not have unsupervised contact with residents.

At some point in 2016, the Enterprise Risk Management Office, an oversight arm of the DSHS, audited the SCC. One item audited was the background check files for employees in department-covered positions. Based on that review, the SCC was advised to re-examine the background checks of several employees, including Grievant. Then-CEO William Van Hook temporarily reassigned Grievant from the residence hall where he had been working to the SCC's business office in Steilacoom while that review took place.

During the review, the SCC identified Grievant's conviction for violating the no contact order, which is listed as permanently disqualifying on the Secretary's List. Van Hook met with Grievant in late January to explain the situation and advise Grievant that the SCC could not keep him in the RRC position because of that conviction. Van Hook also noted in the background check file that Grievant would be given the opportunity to see if he could get the no contact conviction vacated from his record.

Van Hook sent Grievant a letter on March 21, 2017, reiterating his determination that he could not retain Grievant in the RRC 2 position, and that he had decided to "pursue a non-disciplinary separation" of Grievant from that department-covered position. He further advised Grievant that, pursuant to Agency policy, the SCC would conduct a vacancy search in an effort to find a non-department-covered position for Grievant before separating him from service.

HR Specialist Colleen Nilsen conducted the job search. Grievant did not provide an updated resume or college transcripts so her search was somewhat limited. She checked available positions once a week for five weeks.

In early April while the vacancy search was ongoing, the SCC changed Grievant's temporary assignment from the business office to the fire house. Around the same time, the Union filed this grievance, alleging violations of Article 2 (Non-

Discrimination), Article 27 (Discipline), Article 28 (Privacy and Off-Duty Conduct), and Article 50 (Entire Agreement).

Labor Relations Specialist Patricia Boecceher conducted the step 2 grievance hearing. She believed that the Agency complied with the requirements of the policy in concluding that Grievant's conviction was disqualifying for the RRC position, and that it exceeded its obligations in attempting to find him a satisfactory non-department-covered position. The Union proposed restructuring Grievant's position, but the SCC determined that it was not feasible to do so.

Nilsen's vacancy search was completed by May 8, and she had not identified any positions for which Grievant had the necessary requirements and which was within the geographical area he was willing to work. That same date, Van Hook sent Grievant a letter to notify him that he would be separated from his job effective May 23.³

The background check audit at the SCC identified two other employees in department-covered positions who had disqualifying convictions on their record. One of those employees voluntarily resigned. The SCC found a non-department-covered position for the other.

DISCUSSION

The dispute concerns the Agency's decision to remove Grievant from his position at SCC. The parties describe the dispute differently. However, no matter how Grievant's removal is characterized—as disciplinary or non-disciplinary—the question is whether the Agency violated the contract in removing him. For the reasons explained below, I conclude that Grievant's removal violated the parties' agreement and sustain the grievance.

³ Van Hook also did not testify. Current CEO Sjan Talbot was not involved in either Van Hook's decision to remove Grievant or his denial of the grievance at the second step, but she testified that she believes both actions were correct.

The parties' differing views on the issue come into play in considering which bears the burden of proof. If, as the Union asserts, this was a disciplinary removal subject to just cause requirements, the burden would be on the Agency to demonstrate that it had just cause for that action. On the other hand, if this is a contract interpretation matter as the Agency claims, the burden would be on the Union to establish that the Agency violated the contract. As discussed below, I find that Grievant's removal was not disciplinary, and therefore the burden of proof remains with the Union.

The facts here are simple. The Agency first hired and later promoted Grievant into department-covered positions. He was hired and promoted even though his background checks showed that he had a criminal conviction that, under the terms of Agency policy, should have permanently disqualified him from employment in such positions at SCC.

There is no dispute that the hiring authorities were aware of the conviction. The record is silent on whether they hired/promoted Grievant erroneously (such as mistakenly believing they had the authority to waive the employment bar or that it somehow did not apply to Grievant's conviction) or consciously (such as knowing that Grievant's conviction disqualified him but deliberately disregarding it). After employing him for about 10 years, the Agency dismissed him based on that conviction.

The Union cited three contract provisions in the grievance: Article 27, Article 28, and Article 50. Article 27 covers discipline and requires the Agency to have just cause for discipline. Article 28 addresses privacy and off-duty conduct and provides in part that off-duty conduct will not be grounds for discipline unless it is a conflict of interest, or is detrimental to the employee's performance or the agency's programs. Article 50 is the entire agreement (or "zipper") clause; it includes both a waiver of the right to bargain during its term and a bar to past practices.

Initially, the Union's main contention was that Grievant's removal was disciplinary. According to the Union, the Agency did not have just cause, as required by Article 27, to discharge him.

In its post-hearing brief, the Union highlighted Section 28.3 in addition to its Section 27.1 just cause argument. The Union points out that the Agency did not claim that Grievant's off-duty conduct—his 1998 conviction—created a conflict of interest. It also argues that the Agency did not determine that his off-duty conduct was detrimental either to his performance or Agency programs, as it was required to do by Section 28.3. Thus, the Union asserts that it was not consistent with just cause for the Agency to discharge Grievant after a decade of satisfactory service since it was aware of this off-duty conduct when he was hired and promoted.

For its part, the Agency contends this was a non-disciplinary removal and thus not subject to the just cause requirement of Article 27. The Agency concedes that it did not have just cause as that term is understood in discipline/discharge cases. Instead, the Agency asserts that Grievant's removal was required by operation of policy and unrelated to Grievant's conduct and/or performance during the time he was employed by the SCC. According to the Agency, Grievant was not "qualified" to hold a department-covered position by virtue of his no-contact order conviction.

Regarding the nature of the removal, I agree with the Agency. I find no evidence to support a conclusion that the Agency was acting for any disciplinary reasons when it removed Grievant. He was by all accounts a good employee, with satisfactory or better evaluations, no prior discipline, and reasonably long tenure. The evidence establishes that the Agency was prompted to act when it was required to review certain employee background checks and the hiring authority then in place discovered that Grievant had a disqualifying criminal conviction on his record.

Because the Agency's action was not disciplinary, I conclude that the just cause requirement of Section 27.1 is not applicable. In a similar vein, Section 28.3's

requirements regarding off-duty conduct relate back to Section 27.1's just cause requirement, so I conclude that it too is inapplicable.

The Union next argues that the Agency's removal of Grievant violated Article 50 because the removal was not authorized by any provision of the parties' contract. According to the Union, the contract sets out several avenues for the Agency to remove employees, such as just cause discharge and disability separation, but there is no provision authorizing a non-disciplinary separation. The Union asserts that the provisions of Article 50 bar the Agency from creating a non-contractual method for removing employees.

The Agency responds that the Union failed to meet its burden of proving that the removal violated Article 50. The Agency contends that its policies do not conflict with any provision of the contract. The Agency also claims that its action was consistent with those policies, which require the Agency to deny employment in a department-covered position if an individual's background check includes a disqualifying conviction.

The Agency acknowledges that several appointing authorities misapplied the policy in hiring and promoting Grievant but points out that the policy does not allow waivers. The Agency also notes that the policy provides options to address a disqualifying conviction for an existing employee and that the Agency considered such options, including job restructuring and a transfer, but ultimately had no choice but to let him go.

On this point, I find that the Union has the better argument. Article 50 is labeled "entire agreement." Such articles are sometimes referred to as zipper clauses. They are often included in collective bargaining agreements as a kind of boilerplate without specific bargaining regarding intent. As here, they are often written in broad general language. Depending on the wording, zipper clauses may serve several purposes, including operating as a waiver to bargaining during the term and limiting the extent of the parties' bargain to what is set out in the contract.

The use of broad language in drafting an entire agreement clause, however, may create ambiguity about its purpose. That is the case here.

In a contract interpretation dispute, the arbitrator's role is to try to determine what the parties intended. Where their intent is not apparent from the words they chose to express their agreement, the arbitrator may consider other evidence of intent, such as bargaining history or interpretive rules to aid in finding intent.

Article 50 has several elements. The parties agreed that the CBA was their entire agreement and nullified past practices not specifically included. They agreed to waive the right to demand bargaining during the contract term over subjects covered in the CBA. They also agreed that the CBA supersedes agency policies that conflict with it.

I find that Article 50 is ambiguous because it is capable of being interpreted in more than one way. Did the parties intend to limit the Agency's discretion to dismiss employees for non-disciplinary reasons to those specified in the agreement? Or is their silence on non-disciplinary removals, other than those specified (such as disability separations), intended to mean that the Agency had the discretion to enact policies such as the one in question?

Their intent is not clear from the language of Article 50. Neither party offered bargaining history or other extrinsic evidence of intent, so it is necessary to use interpretive tools.

One such tool is the concept of good faith and fair dealing. It is inherent in every collective bargaining agreement. The concept exists to prevent one party from taking an action that will result in interfering with the right of the other party to receive the benefit of the bargain. It is used by arbitrators to determine if an employer acted reasonably.

In the CBA, the parties negotiated a variety of benefits for employees. These range from financial benefits such as wages, health insurance, and pensions, to other

benefits such as seniority. The latter is often critical in providing employees priority in competing for jobs and protection in layoffs.

The CBA also includes provisions the parties bargained about methods of separating employees. For example, they agreed the Agency would not discharge employees as discipline without just cause. They also agreed to one specific form of non-disciplinary separation in cases of disability. They agreed on an extensive management rights article. However, nowhere in the management rights clause nor anywhere else is there a provision addressing the Agency's ability to dismiss employees on the basis that occurred here.

The problem with the Agency's action is this. If it can dismiss an employee without restriction, then it can circumvent its contractual obligations to employees and the Union.

Grievant was a successful employee for about 10 years. He had a fair amount of seniority. He earned a good salary. He was vested in the pension system. To have all that taken away because of "mistakes" made by Agency managers is not consistent with good faith and fair dealing. Allowing Grievant's dismissal would allow the Agency to effectively evade its contractual obligations to Grievant, who is blameless in this matter. He lived up to his end of the bargain, providing satisfactory service. In exchange, he had a right to expect to continue to enjoy the contractual benefits mentioned above.

The Agency claims that it had no choice and that the various managers who hired, promoted, or transferred Grievant "erroneously believed" they had the authority to waive the disqualification.

First, there is no objective persuasive evidence to support that contention. None of the three testified and there is no documentary evidence consistent with that claim. And given the express and unambiguous policy language stating that a disqualification may not be waived, it is difficult to accept. It is at least equally plausible that the managers chose to ignore the requirements of the policy.

In the end though, it does not matter whether these hiring authorities chose to deliberately flout the express language of the policy or were guilty of making an egregious error. The Agency, by the actions of these managers, created this problem by hiring Grievant and compounded the problem by promoting him. The result was that Grievant, a good employee, was harmed by the loss of his job. It is hardly consistent with good faith for the Agency punish Grievant for its managers' misapplication of the policy.

The Agency deprived Grievant of job security, seniority, and significant financial benefits by belatedly removing him from his position. While the Agency may have the managerial discretion to adopt policies regarding disqualification, it must exercise such discretion reasonably and not in a manner that conflicts with its obligations under the contract. In removing Grievant, the Agency acted unreasonably, contrary to its duty of good faith and fair dealing and in violation of Article 50.

The Union also advanced equitable arguments in support of the grievance. First, it argues that the doctrines of waiver and acquiescence bar the Agency from discharging Grievant. The Agency's hiring authority knew about and considered his conviction at the time he was hired.

In a related argument, the Union contends that the principle of equitable estoppel should prevent the Agency from discharging Grievant. The Agency knew about Grievant's conviction when it hired and promoted him, yet now asserts that the conviction requires an automatic disqualification. Grievant relied in good faith on the Agency's decision to hire and promote him, and he provided good service for around 10 years. Grievant clearly was harmed by the Agency's reversal of its hiring decision as evidenced by his significant reduction in income. Estoppel is required to prevent the manifest injustice of the discharge of a loyal and good worker who will suffer future losses, such as a reduction in pension benefits. Finally, there is no evidence that the

Agency's functions or programs would be harmed if its action is estopped, given that Grievant served successfully for so long.

I considered these arguments and find that they provide additional support for my decision. That said, my conclusion is based on my finding that the Agency violated the contract by acting contrary to its duty of good faith and fair dealing.

I want to stress that that my conclusion is limited to the specific facts of this case. Though I conclude that that the Agency violated the contract, I do not hold that the Agency's policy is invalid in general. Rather, I hold that it is invalid as applied here to Grievant.

To remedy the violation, the Union requests an award ordering the Agency to reinstate Grievant to his position, and make him whole for lost pay and benefits, including lost overtime. I agree that reinstatement and a modified make whole remedy would be appropriate.

AWARD

Having considered the whole record and for the reasons explained in the Discussion, I enter the following Award:

1. The Agency violated the parties' agreement by removing Grievant from his position at SCC. The grievance is sustained.
2. The Agency is ordered to reinstate Grievant to the RRC 2 position he held at the time he was removed.
3. The Agency is ordered to make Grievant whole for lost wages and benefits. The back pay award will be reduced for interim earnings and will not include an amount for overtime.
4. I will retain jurisdiction for 90 days to resolve disputes about this Award.
5. The parties shall equally share responsibility for my fees and expenses.

Respectfully issued this 10th day of January, 2019.



David W. Stiteler
Arbitrator