

OPINION AND AWARD
BEFORE
RICHARD L. AHEARN

AAA NO. 01-17-0006-7523
(TRYG HOFF GRIEVANCE)

WASHINGTON FEDERATION OF STATE EMPLOYEES
and TRYG HOFF,
Grievant,

and

WASHINGTON STATE DEPARTMENT OF ECOLOGY,
Employer.

Appearances:

For Grievant:

Edward Earl Younglove III
Younglove & Coker
PO Box 7846
Olympia, WA 9850-7846

For the Employer:

Elizabeth Delay Brown
Assistant Attorney General
Labor & Personnel Division
7141 Cleanwater DR SW
PO Box 40145
Olympia, WA 98504-0145

OPINION

I. Introduction

The Union and the State of Washington (Employer) are Parties to the collective bargaining agreement (CBA) that was in effect at all times relevant to this matter. Grievant, a member of the bargaining unit covered by the CBA, began his employment with the Department of Ecology (Department) in 2005 and transferred into the water resources program the following year. His responsibilities focus on economic or financial analysis of legislation, legal developments or key agency actions that impact the work of the Department. Based on alleged threatening and retaliatory behavior and a series of allegedly insubordinate emails, the Employer issued grievant a disciplinary suspension without pay that began April 10, 2017 through April 21, 2017.¹ On April 25 he filed the grievance that is the subject of this matter.

With no mutual resolution of the grievance, a hearing on this matter was held in Tumwater, Washington on November 14 and 15, 2018. Although the grievance initially raised alleged violations of multiple contractual articles, the Parties stipulated that the issue before me is confined to Article 27-Discipline. At the hearing the Parties had full opportunity to call witnesses, to make arguments and enter documents into the record. Witnesses were sworn under oath and subject to cross-examination by the opposing Party. Both Parties stipulated that the grievance was properly before me for a decision on the merits and thereafter to aid in the implementation of any remedy, should that be necessary. With the filing of comprehensive post-hearing briefs on December 28, 2018, the matter was closed.

II. The Issue

In accord with the Parties' stipulation, the issue before me is:

Did the two-week suspension of the Grievant violate Article 27 of the Parties' CBA?

¹ All dates herein 2017 unless otherwise specified.

If so, what is the appropriate remedy?

III. Relevant Articles in the CBA

Article 27.1 "The Employer will not discipline any permanent employee without just cause."

Article 27.2 "Discipline includes oral and written reprimands, reductions in pay, suspensions, demotions, and discharges. Oral reprimands will be identified as such."

Article 27.9 "Disciplines greater than oral reprimands may be grieved/arbitrated."

IV. Background

In November 2013, David Christensen (Christensen) became the supervisor of grievant and about a dozen other employees in the Department. He reported to Tom Loranger (Loranger), who in turn reported to Polly Zehm (Zehm), the Deputy Director of Ecology. Almost immediately upon assuming the position, Christensen issued to all his subordinates, including grievant, a document describing his expectations. The following are representative of Christensen's statement:

- We need to hold ourselves and each other accountable. All of us have an obligation to tell each other when you think they are not meeting your expectations.
- Be open to positive as well as critical feedback-from me, your team, and others.
- I also need to hear when you don't have enough to keep yourself busy. We are public servants. We need to approach our jobs with a sense of duty and accountability.

Around April of 2014, bargaining unit employee Chris Anderson (Anderson) approached Christensen and complained that grievant was engaging in excessive personal cell usage and otherwise abusing his work time. In accord with his own subsequent personal observations, in August 2014 Christensen issued grievant a "Clarification of Expectations" in which he restated the original expectations and added several comments and concerns directed specifically to grievant. The memo included Christensen's observations that grievant had been using personal devices excessively during work time and that he was

arriving late, leaving early and extending his lunch period. Christensen's additional directions included:

- Use of personal devices should be restricted to less than five minutes a few times a day.
- Grievant is expected to put in 40 hours a week and to confirm with Christensen his regular working schedule.
- Christensen's willingness to be flexible with outside demands and his expectation that grievant would make up time when deviating from his regular schedule.

Subsequently, on October 10, 2014 grievant received an oral reprimand regarding his continued use of personal devices for extensive periods during the workday. The reprimand constituted the first discipline grievant had received from the Employer.

Also, during 2014 grievant began submitting by email frequent complaints to Loranger that Christensen was bullying him and creating a hostile work environment. As a result of grievant's assertions, Loranger initiated an investigation of the nature of Christensen's supervision, finding no basis for concern. However, given the apparent hostility, Loranger determined that another manager would need to be present when grievant and Christensen met during their scheduled weekly meetings. Following the meetings Christensen typically memorialized the discussion in writing, sending them to grievant and providing an opportunity for suggested changes. In a further effort to minimize the friction, Loranger urged Anderson to avoid injecting himself in grievant's activities.

According to James DeMay, (DeMay) a Department supervisor at the time who was frequently present during the meetings between grievant and Christensen, the tone of the meetings was "generally heated, lots of emotions, contentious, sometimes combative." DeMay further testified that grievant made the meetings about Christensen's management style rather than grievant's work performance.

During a July 2015 exchange of emails principally regarding the issue of trust, Christensen highlighted grievant's need to improve his work performance and also expressed: "Speak professionally about me and others in written and verbal communications." The message contained no mention of adverse consequences for failure to comply.

In October 2015 Christensen reiterated in writing to grievant his expectations that grievant would not misuse public resources and would spend his "work time doing work" and not on his "personal device." Later, in March 2016 the Employer issued grievant a written reprimand for failing to follow supervisory directives regarding his alleged misuse of personal devices.²

V. Events Leading to Suspension

The Investigation

In October 2016 Zehm, who had been copied on an email that grievant sent to Christensen that began with the claim that nobody believes Christensen acts in good faith, requested an investigation of that and other derogatory emails that grievant had sent Christensen, Loranger and other members of management. Corrina McElfish (McElfish) of Human Resources was assigned to investigate various email communications from grievant that were arguably of an unprofessional, insubordinate or defiant nature.

March 1 Report

Of the emails grievant sent during the timeframe March to December 2016, McElfish determined in her extensive March 1 report that twenty -one (21) appeared to fit into the category of unprofessional, defiant, disrespectful or insubordinate. Samples of grievant's allegedly improper email allegations concerning Christensen include:

- He is knowingly trying to sabotage my work.
- He has a habit of mischaracterizing events all the time or lying about events.

² On June 21, approximately 2 months after the suspension, an arbitration award reduced the written reprimand to an oral.

- He does not work cooperatively with me.

The emails also contained assertions that Loranger was unwilling to meet or communicate with grievant. Although the recipients of the emails varied and included upper management, the vast majority were addressed to Loranger.

When interviewed during the investigation by McElfish, grievant reported that he believed the emails were “respectful and professional” and that they were “factual.” He also blamed Christensen for the need to submit the emails. At no time during the investigation did McElfish inform grievant that the emails were unacceptable.

McElfish concluded her lengthy and comprehensive report with the following pertinent findings:

- Grievant’s emails were “insubordinate, defiant, disrespectful, and/or unprofessional in violation of performance and conduct expectations, Ecology’s core competencies, and the CBA. Additionally, the emails were often accusatory, combative and demonstrated an overall lack of respect for supervisory authority.”
- Grievant was untruthful in his emails on multiple occasions, as well as during his investigative interviews, including when he claimed that he failed to get any response, or mischaracterized the responses he received from Christensen or Loranger.

February 9 Event

The background for the February 9 incident is that at an arbitration hearing the prior day concerning grievant’s evaluation, Christensen testified that Anderson had initially informed management about grievant’s purported misuse of his personal device.³

³ Although Anderson was not a witness at the February 8 hearing that concerned grievant’s appraisal, Christensen testified regarding Anderson’s complaint to management. Grievant was present at the February 8 arbitration hearing, at which he was also the grievant.

The following day, February 9, Anderson, whose work cubicle was next to that of grievant, overheard a conversation concerning Christensen between grievant and James Pacheco (Pacheco), an employee whose cubicle adjoined grievant's on the other side. Anderson interrupted the conversation to inform grievant that he did not believe grievant's comments about Christensen were appropriate. Grievant reacted by telling Anderson to "mind his own business."⁴ However Anderson persisted, with grievant again telling him to "mind his own business." Anderson next expressed "that's not going to happen." According to Anderson, grievant then asserted that "all of the 13 grievances I have are your fault because you went to management and told them about my phone use." At hearing grievant testified that maybe he said something about 13 grievances that day and further that some of it was because Anderson had interjected in his business. Both Anderson and Pacheco testified that grievant's voice was elevated during this exchange and that grievant appeared agitated. A couple days later grievant apologized to Anderson, because he had heard that Anderson was "emotionally upset."⁵

March 2 Report

Anderson promptly reported the above incident to Human Resources, and explained the incident made him "uncomfortable."⁶ Alex Monroe (Monroe) was assigned to conduct an investigation. Following her investigation that included handwritten notes of her multiple witness interviews, as well as a summary statement of grievant's testimony during his interview, Monroe issued her report on March 2. The report indicated that Anderson believed grievant was threatening him and faulting him for grievant's issues with management that had resulted in numerous grievances. This was the first time grievant had ever made such remarks to Anderson and he was concerned that grievant will continue "this verbal assault." The report also included the recollection of various

⁴ The record reflects that similar exchanges between Anderson and grievant had occurred on multiple occasions in the past, with Anderson interrupting and grievant telling him to "mind his own business."

⁵ Although grievant and Anderson had many prior similar exchanges, this was the first time grievant apologized to Anderson for any remarks.

⁶ Anderson at hearing testified that he considered the exchange to be "threatening."

witnesses to the conversation that grievant's demeanor or tone was "direct, angry, forceful, agitated, aggressive or strong."

Monroe's report relied in part on the following policies and directives:

Executive Policy 7– 11 – Providing a Secure Workplace

Executive Policy 7 – 11 prohibits threatening behavior in the workplace and states:

"No Ecology employee may threaten or attempt to intimidate any employee or customer through either physical, verbal, or visual means."

Threatening behavior is defined in the policy as:

"physical verbal or visual intimidation or threats that have the purpose or effect of unreasonably interfering with an individual's work performance, or creating in it intimidating, hostile, or offensive work environment."

Executive Policy 9 – 02 – Establishing Guidelines for Internal Personnel Investigations

Executive Policy 9 – 02 established guidelines for internal investigations of alleged workplace misconduct. Paragraph 19 states that "retaliation against any employees who participate in any way in an investigation under this policy" is not tolerated.

Monroe further observed that the grievant had been made aware of the above policies regarding retaliation through Employee Briefings he received on three (3) different occasions during 2015.⁷

On the basis of the information obtained through the investigation Monroe concluded that grievant was aware that Anderson was a witness in a workplace investigation and that it was "more probable than not" that grievant's February 9 statements to Anderson "were of a threatening and intimidating manner in violation of Executive Policy 7– 11." She further found that it was "more probable than not" that grievant's statements related directly to Anderson's prior reports to management of grievant's behavior and Anderson's

⁷ Employee Briefings, a standard protocol of the Employer's workplace investigations, include a statement that retaliation against employees or witnesses for their participation in investigations is not tolerated.

participation in a workplace investigation related to grievant, which violated Executive Policy 9 – 02 and prior directives to grievant regarding retaliation.

March 3 Pre-Discipline Letter

On March 3 Zehm issued grievant a pre-disciplinary notice that explained that the Department was considering disciplinary action against him, up to and including dismissal. The letter included a description of his numerous allegedly insubordinate and disrespectful emails, his alleged threatening and retaliatory comments to Anderson on February 9, as well as his allegedly threatening and disrespectful comments about Christensen on the same date. The notice also included:

- A summary of the investigatory interviews in which he participated,
- A detailed description of the 21 emails that were the subject of the investigation by McElfish,
- A description of an additional five emails that were sent in 2017 and not included in the investigation.⁸

The notice concluded with the statement that a pre-disciplinary meeting was scheduled for March 23, 2017, at which grievant would have an opportunity to respond to the allegations before Zehm made a final decision.

VI. The April 6 Notice of Suspension

On April 6 Zehm notified grievant that he was being suspended without pay for a period of two weeks beginning April 10 through April 21. In reaching her decision that grievant violated agency policy, supervisory directives, performance and conduct expectations and core competencies. Zehm relied on:

- Grievant’s “intimidating and threatening comments” on February 9 to Anderson.
- His “threatening and disrespectful comments” on February 9 about Christensen.⁹

⁸ According to Zehm, she did not want to prolong the investigation by investigating each new email as it arose, as that practice could preclude a conclusion to the investigation

⁹ Although mentioned in the suspension letter as a contributing factor, as the Employer in its brief did not contend that grievant’s February 9 comments about Christensen supported the suspension, I assume it is no longer relying on this conduct. Accordingly, I have not addressed the merits of this issue in my Opinion.

- His repeated email communications with Christensen and other supervisors in an insubordinate, defiant, disrespectful and unprofessional manner.
- A number of statements grievant made in his email communications and investigative interview statements that are untrue.
- His prior progressive disciplines for violating supervisory directives and policies, specifically the October 2014 oral reprimand and March 2016 written reprimand.
- His failure to meet performance expectations and misuse of state resources and time.

In mentioning that grievant's retaliatory behavior toward Anderson was particularly concerning, Zehm observed that she considered termination as the potentially appropriate penalty based upon the retaliation against Anderson alone. Nevertheless, Zehm mentioned that she decided against a longer suspension or termination because grievant acknowledged that his behavior toward Anderson was inappropriate and unprofessional, and that he apologized, offering assurances that it would never happen again.

VII. Parties' Positions Summarized

Union

The Union contends in summary:

- There is no credible support for the allegation that grievant made threatening or disrespectful remarks about Christensen on February 9.
- The allegation that grievant issued a retaliatory threat against Anderson fails because it does not account for the long-standing history between grievant and Anderson in which grievant had repeatedly asked Anderson to mind his own business.
- There was no evidence that the mention of Anderson's name at the arbitration hearing the prior day had any impact on the comments.

- The Employer ignored Anderson’s role in interjecting himself into the conversation and continually challenging grievant.
- The Employer was long aware of the allegedly disrespectful and insubordinate emails from grievant, yet never commented negatively about them in any form and never alerted grievant that it considered them inappropriate.
- In light of the foregoing, the suspension lacks just cause.

Employer

In summary the Employer argues:

- Grievant was aware that he could be disciplined for retaliating against an employee for that individual’s participation in an employee matter.
- The day after hearing Christensen in a different arbitration hearing testify that Anderson’s comments informed Christensen about grievant’s allegedly improper cell phone use, grievant, in an angry and aggressive tone, threatened Anderson that he was the reason grievant had to file 13 grievances.
- Grievant’s claim that Anderson had been meddling does not detract from the retaliatory nature of grievant’s threat.
- Grievant’s numerous emails to supervision were defiant and disrespectful, and grievant accepted no responsibility for his relationship with Christensen.
- The emails also violate Executive Policy 7 – 11.
- The Employer followed progressive discipline as grievant had received prior warnings.
- The evidence establishes just cause for the suspension.

VIII. Analysis

Just Cause

Although just cause is not defined in the CBA, arbitrators have long recognized that “just cause” is a term of art incorporating numerous principles of arbitrable jurisprudence. The following factors generally predominate in any analysis:

- Did the Employer establish by adequate proof that the grievant committed the misconduct or dereliction of duty on which the discipline was based?
- Did the Employer fulfill its procedural obligations in enacting the discipline?
- Did the Employer apply progressive discipline?
- If the above is established, is the penalty imposed reasonable in light of the nature and severity of the offense and in consideration of any mitigating circumstances?

Brand & Biren, *Discipline and Discharge in Arbitration*, 30-32, (2nd ed. 2008). Particular factors influencing whether a specific level of discipline meets the “just cause” principle include the nature of the offense, clarity of the rules, consistency of treatment, adherence to progressive discipline procedures and the quality of the grievant’s work record. In Article 27.1 of the CBA the Parties have incorporated the principles described above by providing that no permanent employee shall be disciplined or discharged “except for just cause.”

Although the Union makes a vigorous argument that the clear and convincing standard must apply to my analysis, I appreciate that most arbitrators continue to apply the preponderance of the evidence standard to suspensions and even ordinary discharge cases. As expressed in a leading treatise:

“Generally, three factors are considered in determining the standard of proof necessary, though none alone seems to be determinative. Specifically, arbitrators consider whether the employee’s conduct constituted criminal behavior, whether it involved moral turpitude or social stigma, and whether the sanction imposed was discharge or some lesser discipline.” Elkouri & Elkouri, *How Arbitration Works*, 15-28, (8th Ed., 2016).

In weighing the above factors, I am not persuaded that the circumstances here justify deviation from the customary preponderance of the evidence burden. In that regard I find that the penalty of suspension rather than discharge, and the lack of any alleged behavior that would constitute a crime or moral turpitude militate against a higher than customary burden of proof. However, regardless of any legalistic standard, I adhere to the view that I must always be as certain as possible in my judgment that the alleged misconduct occurred and the penalty is appropriate.

In accord with these principles I must therefore determine whether the Employer has met its burden of demonstrating that it had sufficient evidence of misconduct and whether the nature and severity of the offense makes a two-week suspension a reasonable and just remedy, evaluated in light of relevant mitigating circumstances.

The Emails

Proof of Alleged Misconduct

Although employees have a right, and substantial latitude, to express their concerns about workplace matters, it is also well-established that employers retain the right to manage their enterprise free of intimidating, threatening or insubordinate behavior. Ecology Executive Policy 7 – 11 provides explicit prohibition against threatening or intimidating behavior and supports a legitimate employer objective. Further, although the most common form of insubordination involves an employee's refusal to perform a task assigned by a supervisor, abusive, insulting and disrespectful language directed to a supervisor may also constitute insubordination. Brand & Biren, *supra* at 197.

Although It is an established principle that otherwise insubordinate messages may be excused if management was responsible for any provocation, the record fails to suggest grievant was provoked by any improper action by management. Rather, it appears from a survey directed by Loranger that other employees in the department were satisfied with Christensen's supervision.

I also recognize that the relationship between grievant and Christensen had deteriorated to such a degree that Loranger directed that their meetings must include third parties. Indeed, in an earlier proceeding involving these same parties Arbitrator Dichter observed that the relationship between grievant and Christensen was "broken." Although it is not my task to determine responsibility for the deeply troubled nature of their relationship, I find that it is not an excuse for grievant to engage in otherwise prohibited behavior.

In light of the foregoing absence of any basis to excuse grievant's activities, I am persuaded that his emails asserting that Christensen was attempting to sabotage

grievant's work output, that Christensen was a bully, that he was lying and not "having any good faith" arguably tend to demean Christensen's character and were arguably intimidating and threatening in violation of Executive Policy 7-11. See *American Shipbuilding Co.*, 44 LA 254 (Teple, 1964) (referring to a supervisor as a "god-damned liar). In addition, I am persuaded that certain of grievant's assertions, including that Loranger refused to meet or act on any of his concerns, are contradicted by the evidence.

In light of the foregoing I must examine the Union's contention that the Employer's alleged failure for years to warn grievant that his numerous emails were improper and could lead to discipline requires me to find no violation in that regard.

Lax Enforcement

One of the cardinal rules of just cause is that an employer is expected to act consistently, thereby sending a clear and unmistakable message of the expected behavior and consequences for failing to adhere to a rule. On the other hand, failure to enforce a work - place rule sends a message to employees that it condones conduct otherwise ostensibly prohibited by the rule. Brand & Biren, *supra* at 97. In such circumstances, the employer may not suddenly enforce the rule without first giving clear notice to employees of its intentions.

As detailed above, since 2014 grievant had been sending emails to management similar in tone and substance to those 2016 emails on which the Employer relied. Most of the emails were directed to Loranger and Christensen; some were also received by Zehm and other supervisors. Significantly, none of grievant's prior warnings or appraisals informed him that the content or tone of his emails constituted threatening, intimidating or insubordinate behavior that could subject him to discipline. Indeed, even during the investigation meeting with grievant on March 23, the Employer did not inform grievant that it considered the emails to be in violation of its rules. Further, although Kerry Graber (Graber) did advise grievant to be professional and polite, comments from a representative of the Union, presumably intended to help diffuse the volatile relationship between grievant and Christensen, cannot satisfy the Employer's obligation to provide

appropriate advance warning to grievant about potential discipline. In light of all the foregoing I am persuaded that grievant was led to believe that his email communications did not violate any rules or regulations. See *Trenholm Technical Coll.*, 122 LA 688, 692 (Wolfson, 2006) (grievant came to expect she would not be subject to discipline).

Moreover, I find the cases on which the Employer relied factually distinguishable, as none involved a failure to issue adequate warnings prior to the disrespectful activities. Rather, in the absence here of any such forewarning, I am persuaded that the Employer “may not suddenly begin enforcing a rule without giving clear notice of this intent.” Brand & Biren, *supra* at 98. See *Tenneco Packaging Corp.*, 106 LA 606 (Franckiewicz, 1996) (discharge reduced to warning as employee’s prior insubordination did not result in discipline). Under these circumstances, I am compelled to conclude that the Employer may not rely on grievant’s emails as support for the suspension.

On the other hand, it is also well-established that following clear notice to employees and the union, an employer may begin to enforce a rule following a period of lax enforcement. Brand & Biren, *supra* at 98. Consistent with that principle, I am persuaded that the Employer’s suspension of grievant, and its position during this arbitration constitute clear and unambiguous notice to grievant, the Union and employees that the Employer will in the future enforce the rules against the type of threatening, intimidating or insubordinate statements set forth in the emails. *Id.* at 495. Accordingly, grievant would act at his peril if in the future he engaged in issuing emails similar in content and tone to those described in the report by McElfish.

Alleged Retaliation Toward Anderson

Proof

Unquestionably, through three prior employee briefings and the Employer’s Executive Policy 9-02, grievant was on notice that employees could be disciplined for retaliatory conduct against an individual who is involved in a workplace investigation or proceeding.¹⁰

¹⁰ The briefings resulted from the Employer’s practice to provide them to employees when participating in workplace investigations.

Thus, the threshold issue I must decide is whether the evidence supports the conclusion that on February 9 grievant engaged in threatening or retaliatory conduct against Anderson as a result of testimony about Anderson at an arbitration hearing the day before.

Initially I recognize that the timing of the confrontation, the day following the arbitration, provides circumstantial evidence that tends to support a nexus between the two events. In addition, I consider it reasonable to infer that grievant, who was present, heard Christensen's testimony at the February 8 hearing.

In addition, I am persuaded that several factors support a conclusion that grievant's February 9 statements were threatening. For instance, Anderson's prompt report of the incident to management appears to reflect a genuine concern about grievant's intent. Significantly, there is no evidence of similar reports by Anderson following the numerous occasions in which grievant had told him to "mind his own business." Likewise, grievant's unprecedented apology tends to support a conclusion that he understood Anderson was particularly upset.

On the other hand, on February 9 grievant made no direct mention of the prior day's hearing and his comments only followed Anderson's repeated interruptions of the conversation between grievant and Pacheco, grievant's admonitions that Anderson "mind his own business" and Anderson's observation "that's not going to happen." Further, Anderson initially described his reaction to grievant's statement as "uncomfortable," a term that does not suggest he felt fear or intimidation.

Based on a careful assessment of the above factors, I am persuaded that the immediacy of the two events makes it more likely than not that grievant had Christensen's testimony in mind during the morning of February 9. I also find that Anderson's prompt complaint suggests genuine concern about grievant's intent. Further, I am persuaded that grievant's statements are the type that would tend to chill employees' participation in workplace investigations, as the statements were directly related to Anderson's participation in reporting grievant's alleged misconduct. The foregoing considerations compel me to

conclude that the Employer has met its burden of establishing that grievant's February 9 remarks to Anderson were threatening and retaliatory with regard to Anderson's role in workplace investigations.

The Appropriateness of the Suspension

Generally

Having concluded that grievant's February 9 statements were retaliatory and threatening in violation of the Employer's expectations and rules, I must address another pivotal element of just cause, whether the suspension is proportionate to the offense. With regard to discipline, it is well settled that employers have substantial discretion in determining the appropriate penalty for misconduct and that arbitrators should be very hesitant to substitute their judgment for that of management. *Rural Metro Ambulance*, 123 LA604, 613 (Sergent, 2007). However, it is equally settled that a decision that is arbitrary, discriminatory or capricious may be modified or rescinded. In particular, arbitrators will generally consider discipline excessive... "If it is disproportionate to the degree of the offense, if it is out of step with the principles of progressive discipline, it is punitive rather than corrective, or if mitigating circumstances were ignored." Brand & Biren, *supra* at 103.

In particular, having determined that the Employer lacked just cause to rely on either the emails or the February 9 statements about Christensen, I must determine whether the statements to Anderson alone are sufficiently serious to support just cause for the suspension. In that regard arbitrators examine and weigh numerous factors, including the magnitude and seriousness of the harm grievant caused, the context in which the incident arose, any mitigating circumstances and whether progressive discipline was followed.

Progressive Discipline

It is well accepted that the essential objective of employee discipline is to correct behavior rather than to punish. Thus, unless the misconduct is highly serious, employers are normally expected to follow progressive discipline by issuing one or more oral warnings

before a written warning, a written warning before a suspension, and a suspension before termination.

Here the Employer's suspension letter asserted it was acting consistent with progressive discipline, citing grievant's 2014 oral reprimand and 2016 written reprimand, as well as his 2015 grievant's performance reviews for 2014 and 2015 – 16. Had the written warning not been challenged, the Employer's argument would likely be persuasive. However, an arbitration decision, reached 2 months after the suspension, directed that the 2016 written reprimand must be reduced to a second oral reprimand. The foregoing persuades me that the Employer's good faith belief that grievant had received one prior written warning was misplaced.¹¹ In circumstances in which an employer relies on a good faith but mistaken belief that the individual engaged in misconduct, arbitrators have not hesitated to overturn the discipline, as any penalty in such circumstances would be unjust. As progressive discipline would normally contemplate a written warning before suspension, similar reasoning persuades me that the Employer's good faith but mistaken belief that grievant had received a written warning compels a conclusion that the suspension was inconsistent with progressive discipline.¹² Accordingly I must determine whether grievant's misconduct falls within any exception to the progressive discipline doctrine.

In that regard it is well settled that arbitrators recognize that certain types of conduct, including theft, violence, insubordination and other extreme acts warrant suspension or even discharge without regard to progressive discipline. Significantly, grievant's statement did not include any threat of specific action and there is no evidence that any work was unduly disrupted or interrupted. In addition, although Anderson's report to management indicates he was genuinely upset, nothing in the record suggests Anderson considered grievant to pose any immediate or likely danger. In light of the foregoing, I am unable to conclude that grievant's statements to Anderson were sufficiently egregious to

¹¹ In addition, in separate proceedings the negative portions of the 2015 to 2016 evaluations were removed.

¹² In addition, I am unaware of any principle that 2 oral warnings generally constitute the functional equivalent of a written warning for purposes of progressive discipline.

be included in the category of highly serious conduct to which progressive discipline does not apply.

Other factors that are considered in assessing the relative seriousness of misconduct include whether the acts were intentional. Brand & Biren, *supra* at 106. Here I find no evidence that grievant intended to confront Anderson on February 9. Rather, as his statement arose only after Anderson had twice interjected himself into the conversation and then expressed that he would not cease, I am persuaded that grievant's conduct was a reaction to that of Anderson and was not premeditated or intentional.

The Suspension

I recognize that determining the appropriate penalty is neither an art nor a science, and that the Employer's determination is entitled to substantial deference. I also deeply appreciate and support the Employer's need and desire to protect employees from retaliation, particularly for the participation in workplace investigations. Further, I acknowledge that the Zehm considered several mitigating factors, including grievant's acknowledgement of misconduct, his apology to Anderson and his assurance that he would not repeat.

However, in balancing the legitimate and vital interests of the Employer with the imperatives of just cause, I am persuaded several factors support a finding that the penalty of suspension was excessive under all the circumstances. Thus, the failure to establish just cause for either the email communications or the comments about Christensen, both important factors on which the Employer relied in support of the suspension, substantially weaken the Employer's position. Moreover, in the context of the foregoing factors, I find the failure to follow progressive discipline particularly significant. Under all these circumstances I am compelled to conclude that the suspension was inconsistent with progressive discipline, disproportionate to the February 9 offense and thus in violation of just cause.

The Remedy

On the other hand, I recognize that the 2016 and October 2014 oral warnings could provide the customary prior steps for purposes of progressive discipline. In that regard it is well accepted that the preceding misconduct and warnings do not have to be identical to the following one, "but the two offenses must be comparable." Elkouri & Elkouri, *supra* at 15-79. Thus, a warning for attendance lapses might not support escalated discipline for unrelated misconduct. Here however I am persuaded that grievant's February 9 statements were related to the 2014 oral warning, that concerned "inappropriate use of personal electronic devices during work time." In addition, the subsequent arbitration over the 2016 warning concerned, in part, grievant's alleged misuse of his cellphone and other state resources. In light of the foregoing, as the February 9 statements concerned Anderson's role in initially alerting the Employer to grievant's alleged misconduct regarding his cellphone use, I am persuaded that the 2014 and 2016 oral warnings and grievant's February 9 statements are sufficiently connected that the reprimands constitute an appropriate vehicle for progressive discipline.¹³

Under all these circumstances I am compelled to conclude that the penalty of an unpaid two-week suspension should be reduced to a written reprimand, the next step normally considered appropriate following oral reprimands. In so doing, I am also persuaded that a written warning will serve as a sufficient deterrent in support of the Employer's important rules and concerns, particularly given grievant's apology and expressed commitment to refrain from similar activity.

In reaching my conclusions, I carefully considered the record evidence, the excellent briefs submitted by both Parties, as well as the authorities and evidence relied upon by them, even if not specifically addressed in this Opinion.

¹³ I recognize that the 2016 warning ultimately was confined to violations of Article 6 and Christensen's 2014 memo. However, the February 8 hearing concerned in part a warning regarding grievant's cell phone use. Moreover, both oral warnings concern a failure to follow supervisory directives, a broad category that encompasses the failure to follow the Employer's briefings and rules.

AWARD
(HOFF GRIEVANCE)

For the reasons set forth in the Opinion that accompanies this Award, the grievance is sustained in part and denied in part.

1. The Employer will convert the April 2017 two- week unpaid suspension to a written reprimand.

2. The Employer will reimburse grievant for the loss of any back pay and other benefits suffered as a result of the unpaid suspension.

3. The Employer's personnel records may reflect that grievant received a written reprimand as a result of his statements on February 9, 2017 to Anderson regarding Anderson having caused him to file multiple grievances.

4. Consistent with the Parties' stipulation I will retain jurisdiction to resolve any disputes that may arise over implementation of this remedy.

5. In accordance with Article 29.3(E) of the CBA, my fees and expenses will be shared equally by the Parties.

Respectfully submitted,



Richard L. Ahearn
Arbitrator
January 28, 2019