

INTRODUCTION

This arbitration arises out of grievances filed by the Washington Federation of State Employees (Union) on behalf of Thomas Gibbons (Grievant) against the State of Washington Department of Natural Resources (Agency). Two grievances were filed. One alleged that the Agency improperly disciplined the Grievant when it issued him a Letter of Reprimand on March 16, 2007. The second grievance alleged that the Agency disciplined the Grievant wrongfully when it terminated his employment in October, 2007. Both grievances asserted that the Agency's conduct violated the just cause provision of the parties' Collective Bargaining Agreement (CBA).

Responding, the Agency denied both grievances and asserted in its defense that there was just cause to support the disciplinary actions taken.

When the parties were unable to resolve these grievances through the regular grievance steps, the undersigned was selected from a panel of arbitrators provided by the American Arbitration Association for a consolidated arbitration hearing covering both grievances.

The arbitration was heard on October 2 and 3, 2008, in Olympia, Washington, at the State office building located at 7141 Cleanwater Drive. At the commencement of the hearing, the parties stipulated that:

1. the matter was properly before the Arbitrator and there were no procedural issues pending.
2. the Arbitrator may retain jurisdiction over the matter for a period of 60 days after the award, to consider questions relating to any remedy that might be ordered.

The Union was represented by Christopher J. Coker, of the law firm of Younglove & Coker, with offices in Olympia, Washington, and the Agency by Kari Hanson, Assistant Attorney General for the State of Washington. Both parties were afforded a full opportunity to offer written evidence, examine and cross-examine witnesses, and present arguments in support of their positions.

At the conclusion of the hearing, it was agreed that the parties would submit written closing arguments to the Arbitrator, to be postmarked no later than November 21, 2008. The briefs were duly mailed on that date, and upon receipt the record was closed.

The parties further stipulated that, in light of the upcoming Thanksgiving and Christmas holiday periods, and because the Arbitrator was scheduled to be out of his office for a two week period in early December, they would waive the normal 30 day deadline for submission of the award.

ISSUE

The parties stipulated that the issue presented for determination regarding the letter of reprimand grievance is:

Under Article 27.1 of the Collective Bargaining Agreement between the State of Washington and the Washington Federation of State Employees, did the Washington State Department of Natural Resources have sufficient just cause to issue a Letter of Reprimand, dated March 16, 2007, to the Grievant for alleged inappropriate behavior towards his supervisor?

If not, what is the appropriate remedy?

The parties failed to stipulate to the exact framing of the issue regarding the termination grievance, leaving it for the Arbitrator to determine. I have framed it as follows:

Under Article 27.1 of the Collective Bargaining Agreement between the State of Washington and the Washington Federation of State Employees, did the Washington State Department of Natural Resources have sufficient just cause for its termination of Thomas Gibbons, effective October 26, 2007?

If the termination was not justified, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE

ARTICLE 27 - DISCIPLINE

27.1 The employer will not discipline any permanent employee without just cause.

27.2 Discipline includes all unwritten reprimands, reductions in pay, suspensions, demotions and discharges. Oral reprimands will be identified as such.

POSITION OF THE PARTIES

THE AGENCY

Letter of Reprimand Grievance:

The Agency contends that the Grievant's supervisor properly issued the Letter of Reprimand because of the Grievant's conduct toward her during a meeting between them. At this meeting, the supervisor was inquiring of the Grievant why he had changed his position and elected not to make written comments giving the Agency's position regarding a Consent Decree or Memorandum of Understanding which was then being finalized between a private party and another state agency.

This meeting occurred after a prior discussion at which the supervisor and the Grievant had come to an agreement that he should submit such comments.

When the supervisor asked for an explanation as to why the Grievant had made a determination not to issue the written comments and why he had done so unilaterally without informing her, he acted in an unprofessional manner, refusing to give her eye

contact and with his body language indicating that he was angered by her questions. His failure to communicate and engage in cooperative, two-way communication, was found by her to be disrespectful and unprofessional.

Discharge Grievance:

The Agency cites three separate grounds supporting its decision to terminate the Grievant from his employment. The major ground concerned the Grievant's failure to satisfactorily complete a work assignment: an Oil Spill Response Plan to be used by agency staff and others when responding to an oil spill. (Also referred to at the hearing as an Oil Spill Response Guidance.) The preparation of this document had initially been assigned to the Grievant in 2004, but little work had been done on it by the Grievant until his new supervisor came onto the scene.

In 2006, his new supervisor indicated to the Grievant that this assignment should have a higher priority and she emphasized its importance. In April of 2006, she set a new deadline of December, 2006, for its completion. That deadline was not met.

To accentuate the importance of this assignment to him, in January, 2007, the Grievant was informed that this was now to be his top priority. Other staff members were assigned to assist him with some of the planning of the organization and drafting aspects for the Guidance, and he was given a deadline of April, 2007, for its completion.

The Grievant failed to submit an acceptable draft on April 9, 2007, for which failure he received a Letter of Reprimand, (not at issue in this case). He was given a new deadline of May 4, 2007, for submission of a final draft.

On May 4, he submitted a draft Oil Spill Response which failed to incorporate his supervisor's prior feedback and suggestions and which raised new issues for the first time that were inappropriate or went beyond the scope of the assignment. The draft

Guidance was not of sufficient general quality for the next phase of the project: its distribution for comments to other State agencies.

Additionally, the Agency relies on two secondary instances of misconduct by the Grievant to support its decision to terminate his employment:

The first of these was the Grievant's failure to submit a proper request and obtain advance approval from his supervisor prior to attending a training program. The Grievant had specifically been instructed that such advance approval for training was necessary because of the impact of training costs on the Agency budget and because of the Agency's need to have supervisory oversight of how staff allocated their time.

Furthermore, the Grievant was found to be disrespectful to his supervisor and unprofessional in his response to his supervisor's questions regarding his having attended the training without asking for and receiving her approval.

The second additional ground relied upon to support the Grievant's discharge concerned his intended participation in a meeting of the Oil Spill Advisory Council (OSAC). The management of the Agency was concerned about a possible hidden political agenda of the OSAC, as it was being headed up by an individual who had run against the head of the Agency in a statewide election for his post, Commissioner of Public Lands.

Additionally, there was hesitancy about whether the Agency's participation might impinge upon the prerogatives of the Washington Department of Ecology, which is the agency designated as primarily responsible for activities pertaining to oil spill incidents.

Because of these factors, the Grievant was instructed not to actively participate in the meeting of the Oil Spill Advisory Council. He was directed instead only to attend

the meeting in order to listen to and monitor what transpired, without participating in any way. He was to be “a fly on the wall.”

Instead, the Grievant permitted himself to be placed on the agenda and listed as a speaker and presenter at the meeting of the OSAC, and was scheduled to play an active role at it. This was done without the approval of his supervisor and in direct disobedience of her specific instructions to him not to participate at the meeting in any way.

THE UNION

Letter of Reprimand Grievance:

The Grievant and the Union deny that he was disrespectful and improperly non-communicative in his meeting with his supervisor, which led to the Letter of Reprimand. The relationship between the Grievant and his supervisor had become quite strained by the time of the occurrence of this incident. The Union asserts that this poor relationship was the fault of the supervisor, as evidenced by the fact that the Grievant’s relationship with his previous supervisor had been without difficulty.

At the meeting with his supervisor, which led to the issuance of the Letter of Reprimand, the Grievant claims that his supervisor was agitated and angry, and displayed an elevated voice and tense body language. She seemed to become mad and upset when he tried to respond to her questions and explain the reasons for his decision not to issue written comments pertaining to the consent decree and the memorandum agreement.

Under these circumstances, he did not know what to do, so he chose to remain silent. This was not intended as disrespect. It was simply his attempt to avoid further exacerbating an uncomfortable situation.

Discharge Grievance:

The Union responds that the Grievant did, in fact, submit an acceptable draft of the Oil Spill Response Guidance by the required date of May 4, 2007. Whether the Guidance submitted by the Grievant was suitable is a matter of opinion, the Grievant claiming it was acceptable and his supervisor claiming it was not.

Because the relationship between the Grievant and his supervisor had deteriorated substantially by this point in time, (as evidenced by the facts surrounding the Letter of Reprimand issued two months previously), his supervisor's opinion was not objective and cannot be relied upon as a fair assessment of the acceptability of the draft Guidance submitted.

The Letter of Termination improperly refers to the fact that the Oil Spill Response Guidance assignment had not been completed over a period of a number of years. Initially the assignment was of a low priority, on which the Grievant was to work only as his spare time permitted.

Later in 2006, when it became a higher priority for his new supervisor, the Grievant was handicapped in performing this task by the failure of the Agency to quickly resolve legal issues relating to whether the Agency had any role as a Trustee and thus whether the law required a "firewall" to be erected separating the Grievant from other Agency staff because of such a Trustee role.

Those legal issues were not resolved until December, 2006, when a legal memorandum was issued from the Attorney General's Office, declaring that there was no valid trustee or firewall concern. Only then was the Grievant truly able to proceed to work on completing the Oil Spill Response Guidance.

This work by the Grievant began in earnest in January, 2007, at which point it was made Grievant's top priority assignment. An acceptable draft was submitted by him at the beginning of May, 2007. Since the supervisor's own testimony indicated that her estimate of the time necessary for completion of the plan was four months, the work was clearly completed in a timely fashion and should have been deemed acceptable.

Regarding the secondary grounds relied upon by the Agency to support the Grievant's termination, the Grievant responds:

His failure to ask for prior approval to attend the training program was an inadvertent oversight, since he was only informed that a space was available for him to attend a few minutes before the training commenced, and he had to 'run for it'.

In any event he was not overly concerned, since his understanding of the reason for requirement to seek advance approval for training was because of the budgetary impact on the Agency. As this training was being done on the Agency premises, there would be no cost, either for tuition or travel expenses, for him to attend.

The training was in Geographical Information Systems (GIS) and was pertinent to the needs that had been outlined in his performance development plan. He denies that his response to his supervisor regarding his failure to seek advance approval to attend the training was disrespectful.

Regarding the Oil Spill Advisory Council meeting, the Grievant denies he had any involvement in placing his name on the agenda of the meeting. This was done without his knowledge or consultation, and he was surprised to see his name on the agenda when a copy of it was sent to him. He should not be held responsible for what another agency or entity has done.

After he discovered that he was listed as an active participant on the agenda of the meeting, he discussed this matter with his supervisors, and it was determined that he would not attend the meeting in person, but would only listen in on a telephone hookup in a listen-only mode. In the end, because he was recovering from an injury, he did not participate at all.

DISCUSSION

This is not an easy matter to decide. Some of the allegations with which the Grievant is charged pertain to his interaction with his supervisor and whether he was disrespectful to her. This leads to a “he said, she said” type of dispute, with no witnesses present other than the parties themselves. Such a circumstance requires careful consideration by the arbitrator of the nuances of personal interaction; a judgment of what likely occurred, and how that would have been seen had an impartial observer been present.

Even more difficult is the assessment of the quality of the draft Oil Spill Response Guidance submitted by the Grievant. Was it adequate? If not, how deficient was it? Did it justify a disciplinary action like discharge? Except for a “good job” type of comment from a third person who assisted the Grievant informally in the development of its organization and format, we again have only the testimony of the Grievant and his supervisor regarding the Guidance. However, here at least the arbitrator has some back up documentation of prior drafts and comments made on them, as well as some commentary from other staff members who were assigned to a team to assist the Grievant in his development of the Guidance.

The Grievant's classification must also be considered. He was an Environmental Specialist 4. This is a highly skilled position, with commensurate high pay, and high expectations of performance. He came to the position with both a BA degree in earth science and a BS degree in environmental/engineering ecology. He was expected to work independently and perform at a high level, requiring minimal supervision.

He was also a long term employee of the State of Washington. Beginning in 1991, he worked in a number of positions in the Washington State Department of Ecology and this Agency, the Washington Department of Natural Resources. At the time of his discharge, he had approximately 16 years of service with the State of Washington. No prior discipline was shown to have been given to him during those 16 years.

Discharge is the most severe penalty an employer can impose within the workplace setting. Some commentators have referred to it as industrial "capital punishment." An arbitrator must be especially careful when considering discharge cases involving long term employees. Both the nature of the offense and the principles of progressive discipline must be considered.

However, the management rights of the Agency must also be considered. It reasonably may expect employees at Grievant's rank to perform at a high level of competence. When such a level of performance is not maintained, it may properly take corrective action and, if need be, terminate an employee who fails to perform at the requisite standard needed for the administration of the Agency's responsibilities.

When assigned the preparation of a document like the Oil Spill Response Guidance, the Agency was entitled to expect the Grievant to prepare a quality product. That includes not only one with the requisite technical information, and in readable form,

but also one focused on the needs of its target audience: field staff who are faced with responding to oil spill incidents.

Letter of Reprimand Grievance

I find that there is no true dispute regarding what occurred in the meeting between the Grievant and his supervisor which led to the issuance of the Letter of Reprimand. It was at this meeting that he informed her that he had failed to prepare and submit the Agency's comments regarding a Consent Decree and Memorandum of Understanding which they had agreed he was to do.

He testified that, after he had initially thought the comments were needed, he consulted with more experienced staff at the Washington Department of Fish and Wildlife. He said he learned that the kind of comments he was considering submitting would be better made at a later point in the process when restoration planning was under consideration.

Whether or not the Grievant acted reasonably in making the determination not to submit the Agency's comments, I must find that his failure to consult – or even inform – his supervisor of this decision was improper. They had agreed on the need for Agency comments on the CD and MOU. His supervisor might not have agreed with decision to defer the comments until a later point. She might have offered other reasons why the comments were needed then. She was given no opportunity to reverse his decision until the deadline for the comments had passed.

Moreover, she felt that the Grievant was being disrespectful to her when they met to discuss it. He was described as being uncommunicative with her, angry and unprofessional.

The Grievant's own testimony supports her impression that he was being deliberately uncommunicative with her. He stated that he felt she was agitated and angry when they met. In response, he decided to sit there with his supervisor in silence as he, in his own words, "did not want to pour gasoline on any fire."

Under the circumstances it was proper for her to respond to the Grievant's unexplained silent treatment of her at the meeting by the issuance of the reprimand. A reprimand is corrective in nature, and helps an employee learn where his conduct needs improvement or change. In this case, based on the Grievant's observed conduct, his supervisor was reasonable in her determination that he needed such correction.

Since it reasonably appeared to her that the Grievant's conduct was intentional and disrespectful rather than inadvertent, and since he seemed to be refusing to communicate with her verbally, her decision to use a written reprimand rather than an oral one cannot faulted.

I will be denying the reprimand grievance.

Discharge Grievance

I will first discuss the two secondary grounds supporting the decision to terminate the Grievant's employment:

1) his failure to obtain prior approval for training and his related response to his supervisor's inquiry, and

2) his participation with the Oil Spill Advisory Council (OSAC) in disobedience to his supervisor's specific instructions.

Not obtaining advance authorization for training program

It is not denied that the Grievant participated in a training program, Geographical Information Systems (GIS), without providing the required advance notice to his

supervisor and receiving authorization to participate. The Agency properly has the right to monitor how its annual training budget is expended, as well as how its staff time is allocated.

What is less clear is whether the Agency's requirements were clearly made known to the Grievant. Previously, when the Grievant had learned of the necessity for receiving advance approval for trainings, it was in the context of off-site training programs which required the expenditure of funds for both travel cost and training fees. He had been instructed that, to have such costs paid for by the Agency, advance approval was needed.

The Grievant certainly knew that he should keep his supervisor informed of his trainings. But it is unclear if he was ever clearly notified that advance approval was an absolute requirement for an in-house training which required neither travel funds nor payment of training fees.

In light of this ambiguity, I cannot find that his failure to receive advance approval for the GIS training can support disciplinary action beyond a corrective warning. Such a conclusion is especially appropriate in light of the Grievant's understanding that the GIS training was within the framework of the training needs as outlined in his Performance Development Plan, which had been approved by his supervisor.

Such a corrective warning would be especially appropriate, in light of an email the Grievant sent his supervisor, in which he appeared to minimize his failure to get advance approval for the training and seemed to attempt to shift the responsibility to his supervisor to take the initiative to inquire about his activities.

Participation in Oil Spill Advisory Council Meeting

The meeting of the Oil Spill Advisory Council (OSAC) presented the Agency with
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some sensitive decisions to make, with some political implications. The OSAC was an ad hoc agency, apparently set up by the Governor's office outside of the normal framework of state government. It was headed by a politician who had run in a statewide election for the position of Commissioner of Public Lands against the Agency's own Director.

As an additional consideration, the primary responsibility for oversight of oil spill issues had been assigned by the Governor to the State Department of Ecology. Accordingly, the Agency was sensitive about being perceived as intruding on the 'turf' of a sister agency, with which it had to maintain a cooperative relationship.

Agency management decided that it would be useful to send an Agency staff person to attend the first meeting of the OSAC, to learn of its plans and activities. Since the Grievant was the individual most knowledgeable and involved with oil spills, he was selected to attend. He was told to attend by phone only, to listen in to the meeting without actively participating, and then to report back informing his Agency what had been discussed.

A few days before the scheduled meeting, while the Grievant was out, his supervisor noticed a copy of the OSAC meeting agenda on Grievant's desk. She was surprised to find that his name was listed as a resource person or discussion leader for three different agenda topics. Such active participation was disobedience of the explicit instructions given to the Grievant for this assignment. When this was discovered – two days prior to the meeting, the Grievant was called at home and instructed not to actively participate and not to attend in person.

In his testimony, the Grievant claimed that his name had been put on the meeting agenda without his knowledge or approval. He said when he discovered this, it had

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been his intention to call and demand that his name be removed, but that he had received the agenda just as he was rushing to leave work for the day, two days prior to the meeting.

Later that evening he was called at home by his supervisor and told to notify the OSAC that he would not be attending the meeting in person and would not be actively participating. The Grievant did admit to his supervisor that he had been contacted by OSAC staff and been persuaded to attend the meeting in Seattle in person, and was to car pool there with OSAC staff.

This is a serious matter. If the Grievant had taken it upon himself to actively participate in the OSAC meeting, disobeying his explicit instruction otherwise, disciplinary action would be called for. Before such discipline was imposed, principles of just cause required the Agency to conduct some investigation. It needed to determine if, indeed, the Grievant had improperly agreed to participate in the meeting, or whether the Grievant's claim that his name had been placed on the agenda without his knowledge was true.

At the request of an Assistant Division Manager of the Aquatics Program, a supervisor from that program who was acquainted with OSAC's lead staff person was directed to make inquiries of her and determine how it came to be that the Grievant was put on the meeting agenda. He was told that the Grievant had contacted her and "told her he wanted to come to the meeting, learn more about what they were doing and get involved." She further related that, in a later conversation, the Grievant told her he was not comfortable being on the agenda and speaking for the Agency.

The Grievant's own testimony confirms that he did not speak to the OSAC staff person between the time he claimed to have received the agenda which denoted his WA Federation of State Employees/WA Dept. of Natural Resources. Page 16 of 21 (Thomas Gibbons, Grievant)

participation and his being ordered by his supervisor to contact OSAC and have his name removed from the meeting agenda. Accordingly, the later conversation when the Grievant expressed unwillingness to be on the agenda must have occurred after he had been ordered to decline active participation.

Although the Grievant claimed not to have learned that he had been slated as an active participant in the OSAC meeting until Monday, August 20, 2 days prior to the meeting, the evidence shows he had actually received notice, in the form of an email cc'd to him on Thursday, August 16. Thus his credibility regarding this incident has been impugned.

Accordingly, I must sustain this allegation.

Oil Spill Reponse Plan

I cannot support those portions of the Letter of Termination which assert that the Grievant had repeatedly failed to complete the Oil Spill Response Guidance. It was initially assigned to him by his former supervisor as a low priority task, to be worked on as time permitted, when nothing else was more pressing. There was no deadline.

Later, even when his new supervisor made it a higher priority assignment, the Agency concedes that his work on it was properly delayed until the legal questions he raised regarding trustee and firewall issues were resolved. The legal opinion answering these questions was not issued until December, 2006.

This delay was a result of the Grievant's insistence on raising these legal questions which ultimately were determined to be without merit. But as his supervisor agreed to have the issues researched by legal staff, and to have him delay his work until the answers were determined, he cannot be blamed for her decision.

In January, 2007, the Guidance was made the Grievant's top priority. Based on his supervisor's testimony that four months would be a reasonable time for its completion, he should have completed an acceptable draft document by late April/early May, 2007. He did actually meet that deadline, but the draft he submitted was found to be inadequate.

I have reviewed the draft submitted by the Grievant. I concur with his supervisor's objections. It is too detailed and at too high a policy level to be useful for its intended purpose: to be used by field staff and others when initially confronted with an oil spill incident. Additionally, it was improper for the Grievant to spring a new issue, Agency liability, into this 'final' draft at the last minute.

Much of the fault of Grievant's failure to complete an acceptable draft is of his own making. He seemed intent on aggrandizing his position, making himself into a "trustee" and insulating him from other staff with a "firewall." He enjoyed raising legal problems for the Agency, as he did with the last minute liability issue.

This kind of conduct is not unusual with expert technical staff who may be more knowledgeable than their managers. Sometimes they just think they know more.

Although he had no prior experience in drafting a document like the Oil Spill Response Plan, the Grievant failed to effectively utilize the other staff who had been detailed to provide him assistance in its planning and organization. They reported that he was resistant to the help offered, preferring to continue to do things in his own way. They felt their time was wasted.

The evidence supports a finding that, although with much more assistance and training the Grievant might eventually become proficient in the preparation of these

types of documents, at the moment he is not. And it is reasonable to expect that an employee of his grade level should be so.

At hand is the question I am faced with: should a 16 year employee face discharge for being unable to complete a specialized writing assignment that may require organizational and writing skills which he lacks?

Alternatively, in a small work unit where highly paid technical staff needs to be multi-skilled, is it reasonable to require the continued employment of an individual skilled in some aspects of the job, but who is unable to perform all of the functions required by the position?

Finally, I must ask, what consideration should be given to the other conduct of the Grievant which I have discussed above.

FINDINGS

After much thought, I have reached the conclusion that the Grievant's failure to complete an acceptable draft Oil Spill Response Plan by the deadline set, while meriting discipline, does not by itself justify the level of discipline imposed: termination. A suspension, followed by more training and closer supervision, would be more appropriate.

But, when viewed in light of the Grievant's resistance to supervision, his arrogant attitude and communication problems with his supervisor, and the other incidents noted, I must conclude that even though I would have imposed a lesser penalty, the Agency's decision to terminate him is supported by just cause and is within its discretion.

These other incidents are:

a. The Grievant's willful conduct when he disobeyed his supervisor's specific instructions not to participate in the Oil Spill Advisory Council meeting. Furthermore, his false claim that he had only learned on August 20 that he was slated for active participation at the meeting when, in fact, he had been notified of his scheduled participation on August 16, and

b. The Grievant's inappropriate attempt to shift responsibility to his supervisor for his failure to obtain approval prior to undertaking the GIS training, (notwithstanding that I concluded no discipline was justified for his failure to obtain approval for this specific training).

Further, while the Grievant may not be penalized twice for the same conduct, it is proper, when attempting to determine an appropriate level of discipline, to consider the circumstances of prior incidents which led to discipline being imposed. The written reprimand issued to the Grievant in March, 2007 is one such incident.

At that time, the Grievant, with neither the consent of, nor even notice to, his supervisor, unilaterally decided that he would not provide the Agency's written comments regarding the Memorandum of Understanding and Consent Decree. He and his supervisor had previously agreed that he would provide such written comments. By his action, his supervisor was prevented from overruling his decision prior to the deadline for submission of the comments.

Furthermore, he exhibited rude and noncommunicative behavior at the meeting with his supervisor when he was confronted regarding this decision.

AWARD

The Grievance contesting the March, 2007 written reprimand is DENIED.

The Grievance contesting the Grievant's termination of Employment is DENIED.

Respectfully submitted on February 20 2009 at Eugene, Oregon

Martin Henner, Arbitrator