

In Re the Arbitration of:

WASHINGTON FEDERATION OF)
STATE EMPLOYEES,)
Union,)
) AAA No. 75 390 00194 07 LYMC
and)
) Jacki Bergener Grievance
)
WASHINGTON STATE)
EMPLOYMENT SECURITY)
DEPARTMENT,)
Employer.)
_____)

OPINION AND AWARD

Date of Award: March 5, 2008

Arbitrator
Carol J. Teather
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OPINION OF THE ARBITRATOR

Proceedings

On January 11, 2007, the Washington Federation of State Employees, AFL-CIO (“Union” or “WFSE”) filed a grievance on behalf of Jacki Bergener (“Grievant”) over the action of the State of Washington Employment Security Department (“ESD” or “Employer”) in demoting Grievant from her position of Employment Security Program Coordinator 3 to the position of Employment Security Program Coordinator 2 effective January 16, 2007. Exhibits (“Exs.”) U-1 and R-9. The parties were unable to resolve their dispute in the initial steps of the grievance procedure, and the grievance was brought to arbitration pursuant to Article 29, Section 29.3, Step 4 of the Collective Bargaining Agreement between the State of Washington and Washington Federation of State Employees (“CBA”). The arbitrator was selected through the American Arbitration Association.

A hearing was held on December 10, 2007, in a conference room at the Washington Attorney General’s Office in Olympia, Washington. The Union was represented by attorney Julie Kamerrer of Younglove Lyman & Coker, and ESD was represented by Cathleen Carpenter, Assistant Attorney General. At the hearing, the testimony of witnesses was taken under oath and the parties presented documentary evidence. A formal record was made of the hearing by a court reporter.¹

The parties filed post-hearing briefs which were received by the arbitrator on January 30, 2008, and the hearing was declared closed on that date. The parties stipulated that there are no issues of arbitrability or timeliness in this case. TR 107.

¹ The transcript of the hearing is referenced herein as “TR” plus the page number.

List of Exhibits²

Union Exhibits

- U-1 – Grievance dated January 11, 2007
- U-2 - Employment Security Program Coordinator 3 Job Operating Instructions
- U-3 - Denied Claims Accuracy Procedures Manual, pages 29-35
- U-4 - Medical Record of Grievant visit August 9, 2006
- U-5 - Notice of Reassignment dated August 18, 2008
- U-6 - Notice of Demotion dated December 22, 2006

Employer Exhibits

- R-1 – Notice of Demotion dated December 22, 2006
- R-2 – Investigative Report dated October 2, 2006, and attachments
- R-3 – PC Hard Drive Analysis Report dated November 6, 2006
- R-4 – Grievant Training Record
- R-5 – Policy Acknowledgment Form signed by Grievant January 23, 2006
- R-6 – Policy Acknowledgment Form signed by Grievant June 2, 2006
- R-7 – ESD Policy 1016 dated July 26, 2002
- R-8 – ESD Policy 2009 dated May 1, 2002
- R-9 – Grievance dated January 11, 2007
- R-10 – Demand for Arbitration dated February 13, 2007
- R-11 – Office layout
- R-12 – 2005-2007 Collective Bargaining Agreement By And Between The State of Washington And Washington Federation of State Employees

List of Witnesses

Mary Kirker, Bruce Johnson, Iris Riutort, Juan Ortiz-Carrion, Nan Thomas, Grievant

Issues

The parties agreed that the issue to be decided is:

Did the employer violate Articles 2.1, 27.1 and/or 27.3 of the 2005-2007 collective bargaining agreement between the State of Washington and the Washington Federation of State Employees when it demoted Grievant? If so, what is the remedy?

² All of the exhibits were admitted into evidence.

Relevant Provisions of the CBA

ARTICLE 2 – NON-DISCRIMINATION

...

2.1 Under this Agreement, neither party will discriminate against employees on the basis of religion, age, sex, marital status, race, color, creed, national origin, political affiliation, status as a disabled veteran or Vietnam era veteran, sexual orientation, any real or perceived sensory, mental or physical disability, or because of the participation or lack of participation in union activities. Bona fide occupation qualifications based on the above traits do not violate this Section.

ARTICLE 27 – DISCIPLINE

...

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

27.3 When disciplining an employee, the Employer will make a reasonable effort to protect the privacy of the Employee.

Background Facts

Grievant has worked for ESD for approximately twenty years. At the time of the events in question, she held the position of Employment Security Program Coordinator 3 (“PC 3”) in the Unemployment Insurance Performance Audit Unit (“the Unit”), Benefit Accuracy Measurement Program (“BAM”). TR 213; Ex. R-2, p. 11. She was placed in this position in July 2005 as a result of a reduction in force. TR 11, 211. Her immediate supervisor was the manager of the Unemployment Insurance Performance Audit Unit, Mary Kirker. TR 7, 11.

As a PC 3, Grievant supervised seven investigators. TR 11, 33, 60-61, 80, 124; Ex. R-2, p. 11. She assigned and reviewed their cases, and ensured the cases were closed in a timely manner and in compliance with the Department of Labor (“DOL”) standards and guidelines. TR 11-12; 213; Ex. U-2. She evaluated her staff and was a resource for all technical issues. TR 11-12, 213-214; Ex. U-2. She was also responsible for the time sheets, leave requests, budget requests, personnel transactions, and disciplinary actions of the staff under her supervision. Ex. U-2.

The primary duty of the investigators under Grievant was to review unemployment insurance cases to ensure the information provided was accurate and complete, and to perform redeterminations of a claimant's eligibility for unemployment insurance. Ex. U-3; TR 35, 59-60, 90. This work was performed under 60 day and 90 day case completion deadlines imposed by the Department of Labor. Ex. U-3; TR 12-14, 18, 36-37. Manager Mary Kirker, however, had a stricter requirement of 100 percent of the cases being completed by the investigator, reviewed by the supervisor, any errors or omissions corrected by the investigator, and finally signed off by the supervisor within 60 days of the case being assigned to the investigator. TR 18-19, 53. To aid in ensuring that cases were closed out in a timely manner, Ms. Kirker set a performance requirement for Grievant that for any case her staff closed, she must review and close out the case herself within two weeks of the investigator's closing date. Ex. U-2, p. 98.

On August 15, 2006, three employees of the Unit, Iris Riutort, Susie Milholland and Kristi Fehlig, came to Manager Mary Kirker with complaints regarding Grievant's conduct and behavior.³ TR 19-20, 47, 101. After hearing what they had to say, Ms. Kirker told the three employees that she would meet with her manager and they would look into the allegations. She asked them to put their concerns in writing. TR 20.

In a signed statement dated August 16, 2006, Iris Riutort, described unprofessional conduct on the part of Grievant which was having an adverse affect on her health and that of a coworker. Ex. R-2, pp. 20-22; TR 21. She alleged that Grievant engaged in the following conduct: (1) taking longer breaks and meal periods than the time allotted, (2) disappearing from the office for long periods of time without telling staff where she was going, (3) using vulgar language, (4) sending vulgar e-mails to certain staff, (5) using sexual innuendos in the workplace, especially with male staff, (6) touching staff, (7) giving certain staff

³ Iris Riutort and Susie Milholland were two of Grievant's subordinates. Kristi Fehlig was an Administrative Assistant who worked in the Work Search Verification Program in the Unit reporting directly to Mary Kirker. TR 35-36; Ex. R-2, p. 30.

members special treatment, (8) using gifts to bribe staff to “side with her,” (9) suggesting certain staff “hold back” completed cases for a period of time so her review of closed cases would be timely, (10) spreading rumors and telling lies about staff in the workplace, and (11) hiding files to suggest others misplaced them. Ex. R-2, pp. 20-22. Ms. Riutort indicated that Grievant’s behavior was causing her so much stress that she would be forced to request a transfer or quit her job if it continued. *Id.*

In an undated signed statement, Susie Milholland alleged Grievant behaved as follows: (1) saying things that were untrue, (2) extending her lunch hour and break times beyond the allotted time, (3) leaving the office early at the end of the day, (4) using inappropriate language and engaging in inappropriate discussions in the workplace (5) failing to review closed cases in a timely manner, and (6) making aggressive or untruthful statements to staff. Ms. Milholland stated that she did not trust Grievant and questioned both her integrity and work ethic. She felt there was an undercurrent of tension in the office and that Grievant was trying to sabotage Mary Kirker. Ex. R-2, pp. 25-26.

In a typed statement sent by e-mail, Kristi Fehlig documented events which she claimed to have personally seen or heard. Ex. R-2, pp. 28-30. Ms. Fehlig alleged Grievant engaged in the following conduct: (1) participating in secretive communications, (2) grooming subordinates through gifts, (3) disappearing for long periods of time, (4) taking breaks and meal periods beyond the time allotted, (5) leaving work early at the end of the day, (6) using vulgar language with sexual innuendoes, (7) talking down to a subordinate employee, (8) complaining about manager Mary Kirker to staff, (9) failing to review cases in a timely manner, (10) hopping around the office on a blown-up ball distracting everyone, and (11) making incorrect statements as to why a staff member left the Unit. Additionally, Ms. Fehlig stated that Ms. Riutort told her that Grievant had asked her to “hold back” completed cases so she would be able to review the cases timely, and she felt she harassed by Grievant who kept touching her and her hair, and would not

stay out of her personal space. According to Ms. Fehlig, Grievant's behavior was adversely affecting her health as well as that of Ms. Riutort and Ms. Milholland. Ex. R-2, pp. 28-30.

Ms. Fehlig sent her written complaint to Ms. Kirker and to her superior, then Deputy Assistant Commissioner Nan Thomas, by e-mail. TR 21, 30. Ms. Kirker subsequently learned that an investigator under Grievant, Juan Ortiz,⁴ had seen a copy of Ms. Fehlig's complaint and called Ms. Riutort at her home, wanting to know why she was making allegations against Grievant. TR 30. Mr. Ortiz had contacted Ms. Riutort on Friday, August 18, 2006, and asked her if she was aware that Kristi Fehlig had written a letter in an e-mail to Ms. Kirker alleging that Grievant was harassing Ms. Riutort. TR 102-103. The things Mr. Ortiz described as being in Ms. Fehlig's e-mail letter to Ms. Kirker were things Ms. Riutort had included in her own complaint and events that had happened in the office. TR 103. Mr. Ortiz told Ms. Riutort that Grievant had a copy of Ms. Fehlig's letter and she had shown it to him. TR 103-104.

Ms. Kirker reported the complaints of Ms. Riutort, Ms. Milholland and Ms. Fehlig regarding Grievant's behavior to then Deputy Assistant Commissioner Nan Thomas, Assistant Commissioner Annette Copeland, and the head of Human Resources, Peggy Zimmerman. TR 22. Ms. Thomas also received the written complaints prepared by Iris Riutort, Susie Milholland and Kristi Fehlig at the request of Ms. Kirker. TR 169.

On Wednesday, August 16, 2006, or Thursday, August 17, 2006, the same day Ms. Thomas received the Riutort, Milholland and Fehlig complaint letters, Grievant came to Ms. Thomas's office to discuss her dissatisfaction with Mary Kirker and the team, which she thought was a dysfunctional. Grievant indicated that she felt she was being treated unfairly and described several instances of what she felt was unfair treatment. TR 169-170. Grievant told Ms. Thomas that Ms. Kirker would not allow her to work a flex schedule and leave work at 4:30 p.m. so

⁴ At hearing, Mr. Ortiz stated his name as Juan Ortiz-Carrion. TR 122.

as to facilitate her going to the gym without getting involved in 5:00 p.m. traffic. Ms. Kirker had said that Grievant was a supervisor and needed to be at work during work hours. TR 170. Grievant also told Ms. Thomas that she thought Ms. Kirker was not only hard on her, but on the rest of the staff in the Unit as well, as she was very strict and demanding about their work. TR 170.

In view of Grievant's claims of unfair treatment, and the seriousness of the allegations against her, an independent investigator from outside the agency, Ryan Hammond of the law firm Littler Mendelson, was hired to investigate the complaints. TR 172-173. Also, in view of information indicating that someone had accessed Ms. Kirker's e-mail and out of concern for the employees who made complaints, during the course of the investigation, Grievant was reassigned to the Central Unemployment Insurance Office to work under the Unemployment Insurance Policy and Training Manager. Ex. U-5; TR 173-174.

Mr. Hammond investigated the allegations against Grievant contained in the written complaints, along with complaints and issues that came to light during the course of his investigation. Ex. R-2. He then provided the agency with a written report containing his investigative procedure, witness interviews, a chronology of events, his impressions on the credibility of witnesses, and his findings and conclusions. Ex. R-2. Attached to the report were witness statements, documents and additional information provided by some of the witnesses, along with other evidence. Ex. R-2.

Following receipt and review of Mr. Hammond's investigative report, a pre-disciplinary letter was provided to Grievant and the Union on or about November 6, 2006, along with copies of the investigative report and attachments and other documents.⁵ TR 174-175; Exs. R-2 through R-8. Subsequently, on November 16, 2006, a pre-disciplinary hearing was held to give Grievant an

⁵ Then Deputy Assistant Commissioner Nan Thomas made the decision on Grievant's discipline on delegated authority from Assistant Commissioner Annette Copeland. TR 166. Upon the retirement of Ms. Copeland, Ms. Thomas became acting Assistant Commissioner in January 2007, and was hired permanently as the Unemployment Insurance Assistant Commissioner several months later. *Id.*

opportunity to respond to the allegations against her before a final determination on discipline was made. TR 175-176. Present were Deputy Assistant Commissioner Nan Thomas, who presided over the hearing, Human Resources Consultant Tanna Christianson, Grievant, and Grievant's union representative, Joanne McCaughan. TR 175. After the pre-disciplinary hearing, Deputy Assistant Commissioner Thomas determined Grievant had committed six acts of misconduct. TR 176-177. As a result, by letter dated December 22, 2006, Grievant was notified of her demotion from the position of Employment Security Program Coordinator 3 to the position of Employment Security Program Coordinator 2 effective January 16, 2007. Ex. R-2. The stated reasons for the demotion were as follows: (1) On September 12, 2006, Grievant lied to an investigator hired by the Employer regarding whether she had seen a written complaint against her; (2) In August 2006, she asked two of her subordinates, Juan Ortiz and Iris Riutort, to hold their cases so she could catch up on her workload; (3) She made demeaning, personal and inappropriate comments in the workplace to Iris Riutort; (4) She continued to touch Ms. Riutort's hair after Ms. Riutort repeatedly asked Grievant to stop touching her; (5) She called supervisor Mary Kirker a "fucking bitch" and "bitch" in front of subordinates; and (6) She sent "sexually-related emails" to her staff in the workplace on her state computer. Ex. R-1.

Positions of the Parties

The Employer claims the evidence establishes that Grievant committed the charged misconduct and her demotion was fair and appropriate. According to the Employer, Grievant clearly violated agency policy when she behaved inappropriately toward subordinate staff through her actions and comments. She also violated agency policy by her use of state resources to send inappropriate e-mails to subordinate staff. She repeatedly displayed behavior that was inappropriate for a supervisor and demeaning to the chain of command in the

office. The Employer maintains it had just cause to demote Grievant and it did not violate the collective bargaining agreement by its action.

The Union, on the other hand, contends the Employer lacked “just cause” to discipline Grievant. The Union claims Grievant did not lie to the investigator, never intentionally or knowingly sent any non-work-related e-mails, did not ask any of her subordinates to hold cases, did not use profanity in referring to manager Mary Kirker in front of subordinate staff, did not continue to touch Ms. Riutort’s hair, and did not make demeaning, personal and inappropriate comments in the workplace. The Union further claims that the Employer failed to protect Grievant’s privacy during the investigation.

Burden of Proof

The Employer bears the burden of showing by a preponderance of the evidence that the charged misconduct occurred, that the penalty assessed was commensurate with the seriousness of the offense, and that the elements of due process were observed in taking the disciplinary action.

Discussion

1. Grievant lied to the investigator during the course of his investigation

Grievant testified that she was told about the allegations against her by a friend who worked for the agency, Dennis Mansker, who had seen the e-mail sent to Ms. Kirker. TR 225, 227, 250, 251. Grievant admits that she accessed her supervisor’s e-mail and viewed a statement containing allegations against her composed by Kristi Fehlig in August 2006.⁶ TR 178, 227, 230, 251, 256. Yet, when, during the course of his investigation, investigator Hammond interviewed Grievant on September 12, 2006, and asked her if she had ever viewed a written complaint about herself, Grievant replied that she had not. Ex. R-2, p. 8; TR 230.

Grievant attempted to explain why she told Mr. Hammond she had not seen a written complaint by stating:

⁶ It appears Ms Kirker had set up her delegations in the agency’s e-mail system to allow all employees in the Unit access to her e-mail. See Interview of Gary Mortenson, Ex. R-2, p. 10.

Well, I'm thinking written complaint, something written that goes in my (personnel) file, written complaint to me. When I saw this thing written by Kristi, I was like – it was so out of touch with reality. It was an e-mail. I didn't – it didn't make sense.

TR 230-231. She testified that in her mind what she told Mr. Hammond was not a lie and that after she thought about it, she talked to the investigator again and admitted to having seen Kristi Fehlig's complaint. TR 231, 253. She also testified that to her "it wasn't a written complaint." TR 231.

When Grievant was shown Mr. Hammond's summary of his second interview of her on September 12, 2006, wherein she denied having seen a written complaint against her, Grievant changed her position and indicated that evidently her admission to having seen a written complaint was to Nan Thomas not to Mr. Hammond. TR 253, 255-256; Ex. R-2, p. 8. During the pre-disciplinary hearing on November 16, 2006, Grievant had admitted to Deputy Assistant Commissioner Thomas that she went into Ms. Kirker's e-mail and accessed Ms. Fehlig's complaint, and that she told investigator Hammond she had not seen the complaint. TR 175, 178, 256. This admission, however, occurred after Grievant had received a copy of an analysis of her computer's hard drive which revealed that a copy of Ms. Fehlig's written complaint was on her computer. Ex. R-3. The hard drive analysis report, along with other information, was attached to the November 6, 2006, pre-discipline letter given to Grievant.

I find incredible Grievant's claim that she told Mr. Hammond she had not seen a written complaint against her because she did not believe the letter Kristi Fehlig sent to Nan Thomas and Mary Kirker by e-mail was a "written complaint." It was a communication containing allegations against Grievant "written" on a computer rather than on a typewriter or by hand, and delivered electronically rather than through the mail or in person. The difference in preparation and delivery does not make it any less a "written complaint" which one needed to read, as opposed to a verbal communication which is heard. Furthermore, I am

convinced Grievant was fully aware that Ms. Fehlig had submitted a written complaint by reason of her e-mail. She testified that she had accessed Ms. Kirker's e-mail because she heard from someone that there were allegations against her in there and she wanted to find out what was going on. TR 227, 250. She also admitted to knowing this was not an appropriate action for her to take, and that her focus was self-preservation. TR 227-228, 251, 252. Additionally, she showed Fehlig's e-mail to Juan Ortiz, and he and understood it to be a complaint against Grievant. TR 139.

The Union argued, in effect, that investigator Hammond's question to Grievant was unclear and that his lack of precision resulted in her giving an erroneous answer. I carefully considered this argument, but found it unpersuasive. The fact that investigator Hammond did not specifically ask Grievant if she had ever viewed an e-mail by Kristi Fehlig to Mary Kirker accusing Grievant of doing inappropriate things was not confusing to her. She was aware that investigator Hammond was referring to the e-mail containing allegations against her that was in Ms. Kirker's e-mail. As she herself indicated, she accessed Ms. Kirker's e-mail in order to read for herself the allegations someone was making against her.

I find a preponderance of the credible evidence shows that Grievant intentionally did not tell the truth when she denied ever seeing a written complaint against her to investigator Hammond on September 12, 2006. Charge 1 is sustained.

2. Grievant asked one of her subordinates to hold her cases.

The Employer charged Grievant with asking two of her subordinates, Juan Ortiz and Iris Riutort, to hold their cases so that she could catch up on her workload. Exs. R-1, U-6. Each Monday, cases are assigned to staff and within a 60-day time frame, the cases must be completed by the investigator, submitted to the supervisor to review for accuracy and completeness, any errors or omissions corrected by the investigator, the case resubmitted to the supervisor for final review and sign off, and the data entered into the Unit's computer system. TR 14,

16. Holding back cases means that after an investigator has done a complete investigation and gathered all the facts, instead of recording the case as complete and submitting it for supervisory review and sign-off, the investigator would hold the completed case for a period of time. TR 23-27, 88.

In a signed written statement, Iris Riutort stated that a week before Grievant went on vacation, she approached Ms. Riutort and asked her why she closed her cases so early, pointing out that they had 90 days to complete cases and she had up until two weeks before a case was due to close it out. Ex. R-2, p 21. Grievant told Ms. Riutort that she was going on vacation and any cases an investigator closed out would show up on a report. Ms. Kirker would then come back at her for those cases she had not reviewed within two weeks of the investigator closing them. *Id.* Ms. Riutort further stated that she chose not to hold any cases back.

At the hearing, Ms. Riutort testified that Grievant made “a couple of suggestions” that she hold her cases back. TR 88. She stated that Grievant asked her why she closed her cases so early and she told her that once she had completed a case she wanted to close it out and get it off her desk. TR 88. Grievant then told Ms. Riutort that she did not need to close her cases so quickly, she had 90 days to complete a case and she could wait up to two weeks before it was due to close it out, and this would give Grievant time to review it. TR 89. When Ms. Riutort inquired as to why she should hold a case back, Grievant told her that Ms. Kirker was “riding (her) butt,” and that if she did not close a case within two weeks of the investigator closing the case, Ms. Kirker would “give (her) hell.” TR 89.

Ms. Riutort additionally testified that Juan Ortiz also told her she did not have to be in such a hurry to close cases, and that she could wait until two weeks before they were due and then close them. TR 89-90. When she asked Mr. Ortiz why she should wait to close cases, he told her they should do that to help Grievant because Ms. Kirker was after her and riding her butt. TR 89-90. According to Ms. Riutort, she informed Mr. Ortiz that she would not help with the cases, and that once she completed a case, it was off her desk. TR 90.

Mr. Ortiz testified that he did not tell Ms Riutort to hold back closing cases; he told her that he was closing his cases by batch number and slowing down. TR 137, 138. Then, when questioned as to why he wanted to slow down, Mr. Ortiz stated that it was because Grievant had told him Ms. Kirker was on her for not closing cases fast enough. TR 137. Yet, when interviewed by investigator Hammond, Mr. Ortiz denied ever having had discussions related to holding cases with Grievant. Ex. R-2, p. 7. He initially made the same denial at hearing, but then he testified that one day Grievant had told him Ms. Kirker was on her for not closing cases fast enough, and that he told Grievant he could help her because they had 60 days to close the cases. TR 155. He further testified that his suggestion regarding helping Grievant was for him to take a look at the cases, and if they were all right, she could go ahead and close them. TR 155.

Grievant admitted that she was often behind on cases, but denied ever asking a subordinate to hold back cases. Ex. R-2, p. 9; TR 235, 236.

I find Grievant did in fact ask Iris Riutort to hold back her cases to assist Grievant in meeting the two-week review standard established by Ms. Kirker. Although she may not have specifically asked Ms. Riutort to hold her cases and not to close them as quickly as she had been doing, Grievant's words had the same effect. When a supervisor tells a subordinate that they need not be in such a hurry to close cases, and that they could take up to two weeks before the due date to close their cases, the supervisor is letting the subordinate know she wishes the subordinate would slow down and hold completed cases for awhile before closing them. This is particularly true when the subordinate is also told that the supervisor is under pressure from the manager to review closed cases within two weeks of the investigator's closing date, that the supervisor will be in trouble if she does not meet this standard, and that the supervisor is about to go on vacation. Ms. Riutort clearly understood that Grievant was asking her to hold cases, but chose not accede to this request.

There is some evidence in the form of testimony from Grievant and Mr. Ortiz that Ms. Riutort has memory or mental problems as a result of an accident she suffered in the past. Their statements to this effect, however, are unsubstantiated. There is no medical evidence indicating Ms. Riutort suffered a head or brain injury affecting her cognitive ability. There is also no credible evidence showing she has anything more than normal memory problems. Her testimony and statements were consistent and often supported by other evidence. She showed no bias toward Grievant, only a desire to have Grievant stop behaving in a manner she found stressful and inappropriate. I found her to be a reliable and credible witness.

I further find, however, that the evidence is insufficient to establish that Grievant asked Mr. Ortiz to hold back cases. From his testimony, it is clear Grievant told him that she was under pressure from her manager for not closing cases fast enough. Yet, it is unclear whether Grievant ever told him that he did not need to close his cases as quickly as he was doing or that he could take up to two weeks before the due date to close a case. Although Mr. Ortiz indicated that he wished to help Grievant with her case review problem, it is unclear whether this was in response to a request from her or was of his own volition.

I also find the evidence does not establish that Grievant approached Ms. Riutort regarding slowing down the closing of cases in August 2006. Rather, this appears to have occurred sometime before August 2006. TR 25, 27 (significant downturn in Ortiz's cases in July 2006), 219 (Grievant's vacation took place before August 2006). The error regarding the month in which the misconduct occurred, however, is not material. The crux of the charge is the misconduct of asking a subordinate to hold cases, and Grievant showed no confusion as to this fact.

The Employer has established that Grievant asked one of her subordinates, Iris Riutort, to hold her cases so Grievant could catch up on her work load. This charge is sustained.

3. Grievant made demeaning, personal and inappropriate comments.

Grievant was charged with having made demeaning, personal and inappropriate comments in the workplace to Iris Riutort. Ms. Riutort testified that after Grievant had been in the Unit for a period of time, she began to make comments which made her feel uncomfortable. TR 81. Grievant began by commenting on Ms. Riutort's clothing, and then started commenting on her body parts and touching her hair. Ms. Riutort felt uncomfortable with the comments and touching, as she did not like anyone touching her. TR 81, 82.

Ms. Riutort recalled Grievant making the following comments: (1) asking her if her breasts were real and if she had had a "boob job;" (2) telling her she was skin and bones and should put on some muscle, (3) saying she had no butt; (4) saying her legs were skinny and she needed to go to the gym. TR 82-83. Ms. Riutort did not specifically mention these comments in the written statement she prepared at the request of Ms. Kirker. She told investigator Hammond, however, about comments Grievant made to her regarding her nails and how she dressed, and asking her why her hair was so long. She told him that she found these remarks both unprofessional and offensive. Ms. Riutort also told Mr. Hammond that Grievant had commented to her "you don't have any butt," "you're legs are so skinny, you need to go to the gym," and "you're showing cleavage, guys in the office might like that." Ex. R-2, p. 6. Ms. Riutort testified that Grievant constantly made remarks about her body, that she was uncomfortable with the remarks, and that she found them to be inappropriate and offensive. TR 81, 83. *See also* Ex. R-2, p. 6.

Ms. Riutort testified that she told coworkers Kristi Fehlig and Juan Ortiz about Grievant's behavior toward her. TR 83-84. She further testified that Ms. Fehlig must have spoken to Grievant about her concerns, as Grievant then told Ms. Riutort that she did not mean anything by it and she did not mean to offend her. TR 84, 86. A couple of weeks later, however, Grievant would engage in the same behavior. TR 86, 87.

Mr. Ortiz testified that Ms. Riutort had confided in him that she did not like comments made by Grievant regarding her physical appearance. TR 154. He did not recall if he had ever heard Grievant comment on Ms. Riutort's physical appearance. TR 154. He also could not remember Ms. Riutort asking him to talk to Grievant about stopping the comments. *Id.* According to Mr. Ortiz, he told Ms. Riutort that she needed to speak to Grievant about her concerns. TR 154. Mr. Ortiz also testified that Ms. Riutort is truthful. TR 153, 162.

Grievant admitted talking to Ms. Riutort about going to the gym, but claimed it was just a general conversation. TR 238, 239. She denied making the rest of the comments she is alleged to have made to Riutort. TR 238, 257; Ex. R-2, p. 9. According to Grievant, she and Ms. Riutort had a general conversation about workouts and gyms, and Ms. Riutort mentioned one time that her legs were too skinny. TR 238-239.

As previously stated, I found Ms. Riutort to be a credible witness. Furthermore, her testimony was supported by that of Mr. Ortiz, who confirmed that she told him of her unhappiness with Grievant's comments about her physical appearance. The Union pointed out that Mr. Ortiz could not recall hearing Grievant make any comments about Ms. Riutort's personal appearance. I noted that Mr. Ortiz's cubicle is next to Ms. Riutort's and the wall separating their two offices is only approximately four feet high. Ex. R-11; TR 10, 243. Yet, I also noted that Mr. Ortiz was very reluctant to say anything negative about Grievant and was very protective of her. Furthermore, he did not say he did not hear Grievant make comments regarding Ms. Riutort's personal appearance, he said he could not recall any such comments.

The Union also pointed out that Bruce Johnson, another investigator under Grievant during the relevant period, testified that he never heard Grievant make demeaning comments to anyone. TR 72. Although I found Mr. Johnson to be a very credible witness, I also found his testimony in this regard insufficient to rebut Ms. Riutort's testimony regarding her experience with Grievant. Mr. Johnson's

cubicle was in the farthest corner of the office, well away from the cubicles of Grievant and Ms. Riutort. Ex. R-11; TR 10.

Ms. Riutort's testimony is consistent with what she told investigator Hammond. Her description of Grievant's behavior is also consistent with the evidence discussed below regarding Grievant sending inappropriate e-mails to subordinate staff. I find it is more likely to be true than not that Grievant made the comments regarding Ms. Riutort's physical appearance that Ms. Riutort said she made, and that Ms. Riutort found the comments to be demeaning, inappropriate and offensive. This charge is sustained.

4. Grievant repeatedly touched Ms. Riutort's hair

Grievant is charged with continuing to touch Ms. Riutort's hair after she repeatedly asked her to stop touching her.

Ms. Riutort described her hair as being very long. She testified that Grievant would come and pull her hair, saying it was too long and she should cut it. TR 82. Ms. Riutort stated that she would say no, and Grievant would then giggle and laugh. TR 82. Ms. Riutort further stated that she told Grievant she liked her hair long and that her husband liked her hair long. She testified that she told Grievant not to touch her, and when Grievant would pull her hair, her body gestures and manners indicated she was not pleased. Ms. Riutort clearly stated that she did not like Grievant touching her and pulling her hair. TR 84, 85.

Ms. Riutort testified that she told Mr. Ortiz what Grievant was doing and asked him for help with this situation. TR 84-86. She further testified that she also told Kristi Fehlig and that Ms. Fehlig must have said something to Grievant because Grievant called her into the office and told her she did not mean anything by her actions and did not mean to offend Ms. Riutort. TR 84, 85-86. Yet, Ms. Riutort also testified that Grievant did not stop her behavior but continued to touch her and make comments about cutting her hair. TR 83-84, 97. Ms. Riutort indicated that she felt uncomfortable and threatened by Grievant's behavior. TR 85, 87.

Ms. Riutort described Grievant's touching of her hair. She stated that Grievant would come up to her from behind and grab and pull her hair. She would actually pull Ms. Riutort's hair up and run her hands over it. Grievant would also criticize Ms. Riutort's hair and say she was going to get a pair of scissors and cut it. Ms. Riutort testified that she found Grievant's actions invasive. TR 97.

Ms. Riutort stated that she did not report Grievant's behavior to Manager Kirker because Grievant kept saying she hoped she had not offended Ms. Riutort and to please forgive her. TR 87. Yet, after awhile she noticed a pattern to Grievant's actions. Every time Grievant threatened Ms. Riutort about her hair and made a comment, she would say she hoped she was not offending Ms. Riutort but would not stop the behavior. TR 87. This went on for a period of time until Ms. Riutort could not take it anymore. She could not sleep; she was vomiting; and she was getting migraine headaches. TR 87-88. Grievant's actions frightened her. TR 105. At the direction of her physician, her husband, and Ms. Fehlig, Ms. Riutort finally went to Ms. Kirker with her concerns. TR 99-100.

Ms. Riutort was very reluctant to put her concerns in writing when she was asked to do so by Ms. Kirker, but she finally did. TR. 101-102; Ex. R-2, p. 20. She testified that she did not put everything that happened in the office in her statement, only the main points. TR 102. Although she mentioned Grievant's touching of staff, she did not describe Grievant's touching of her hair or the comments which made her feel uncomfortable. She indicated that the touching of staff was a difficult subject for her. Ex. R-2, pp. 20-22.

When interviewed by investigator Hammond, however, Ms. Riutort described Grievant's actions in touching her hair over her objections and making comments about her personal appearance, which she found to be unprofessional and offensive. Ex. R-2, pp. 20-22. Ms. Riutort also provided specifics regarding Grievant's comments about her body and the need for her to go to the gym. *Id.*

Ms. Riutort's testimony about Grievant's behavior toward her is supported by the statements of Kristi Fehlig, the summary of investigator Hammond's

interview of Ms. Fehlig, and the testimony of Juan Ortiz. Ex. R-2, pp. 4, 29, 32; TR 153. Ms. Fehlig stated that she personally observed Grievant pulling Ms. Riutort's hair and touching Ms. Riutort's clothing. Ex. R-2, p. 32, paragraph number 8. Mr. Ortiz saw Grievant touch Ms. Riutort's hair one time and mention something about a new hairdo. TR 153. Mr. Ortiz also confirmed that Ms. Riutort told him she did not like Grievant touching her hair and making comments about her personal appearance. TR 153, 154. Mr. Ortiz testified that he told Ms. Riutort that if she did not like Grievant touching her, she should tell her this. TR 154. Mr. Ortiz could not remember Ms. Riutort requesting that he ask Grievant to stop this behavior. TR 154-155.

Ms. Kirker testified that she had observed Grievant touching Ms. Riutort's hair. Ms. Kirker stated that early in the summer of 2006, she saw Grievant stroking Ms. Riutort's hair. TR 29, 48. She explained her failure to investigate the matter by saying that she had not seen anything indicating Ms. Riutort was becoming upset. TR 48-49. It is unlikely, however, that she made a very studied observation, as it seems she was simply passing by Ms. Riutort's office when she observed Grievant's actions.

Grievant testified that she only touched Ms. Riutort's hair one time and it was during a conversation about medications and health issues. TR 240. According to Grievant, Ms. Riutort held up her hair and asked her to touch it saying it was very dry. *Id.* Grievant admitted it is not appropriate for a supervisor to touch an investigator's hair. TR 240.

I found Ms. Riutort's description of Grievant's behavior toward her more credible than that of Grievant. She admitted to telling Grievant that her medication makes her lose her hair and maybe get dry. TR 118. She gave no indication, however, that she asked Grievant to touch her hair. To the contrary, she testified that she was losing hair and had a very sensitive scalp, and that she was concerned about her hair and did not want anyone touching it. TR 118. She stated that she told Grievant many times not to touch her, not to touch her hair.

TR 118. She vehemently testified that Grievant would pull her hair and say that she would use scissors to cut her hair, and this “freaked (her) out.” TR 119. As discussed above, Ms. Riutort was a credible witness.

Grievant was less credible. Her testimony regarding Ms. Riutort holding up her hair and asking Grievant to touch it is contradicted by the testimony of Mr. Ortiz and Ms. Kirker about the times they observed Grievant touching Ms. Riutort’s hair. It is also contradicted by the evidence showing Ms. Riutort did not like to be touched. It is extremely unlikely that she would hold up her hair for a coworker, much less a supervisor, to touch.

I find a preponderance of the credible evidence shows Grievant touched Ms. Riutort’s hair and continued to touch her hair after Ms. Riutort asked that she stop touching her. This charge is sustained.

5. Grievant called her manager names in front of subordinates.

Ms. Riutort testified that, in her presence, Grievant called Ms. Kirker a “fucking bitch.” TR 89, 93. Another subordinate of the grievant, Bruce Johnson, testified that Grievant routinely made negative comments about Ms. Kirker in the workplace. TR 62-64; Ex. R-2, pp 10-11. Additionally, Susie Milholland, another subordinate of the grievant, told investigator Hammond that Grievant referred to Ms. Kirker as “bitch” in her presence. Ex. R-2, p. 5

Grievant denied calling Ms. Kirker a “fucking bitch” or “bitch” in front of staff. TR 240, 263-264. She claimed that someone else in the Unit did, but not one of her staff. TR 241. She also claimed that Ms. Riutort used “cusswords” in their discussions about work pressures from Ms. Kirker. TR 241.

As indicated above, I found Ms. Riutort to be a credible witness and her testimony is supported by the statements of Mr. Johnson and Ms. Milholland. Furthermore, Ms. Riutort readily admitted that she occasionally uses “cuss words” in the workplace, but not with reference to a coworker or superior. She stated that once in awhile she says “shit happens.” TR 114.

I did not find Grievant's denial credible. She was extremely biased against Ms. Kirker and seemed to have nothing good to say about her. Her attitude toward Ms. Kirker lends credence to the testimony of Ms. Riutort regarding the derogatory term used by Grievant with reference to her manager, Ms. Kirker.

I find a preponderance of the credible evidence shows Grievant called her supervisor a "fucking bitch" and "bitch" in front of subordinate staff. This charge is sustained.

6. Grievant sent sexually-related e-mails to her staff

The Employer charged Grievant with sending a number of sexually-related e-mails to her staff in the workplace on her state computer. Ex. U-6. The charge is supported by the testimony of Ms. Riutort, Juan Ortiz, and Bruce Johnson.

Ms. Riutort testified that she received what she considered inappropriate e-mails from Grievant some time after Christmas, possibly February 2006. TR 93-94. She described one of the e-mails as depicting types of women's bottoms using punctuation and another as road signs with crude language. TR 94. She said another one was a cartoon of old ladies with sayings about "saggy boobs, saggy butt," and things like that. TR 95. Ms. Riutort also testified that Grievant showed her an e-mail about a cure for lesbianism that said try men again. TR 95. Ms. Riutort additionally testified that the e-mails also went to other staff members. After receiving the emails, Ms. Riutort deleted them. TR 95. She did not send any of them to anyone else. TR 95-96.

Ms. Riutort did not confront Grievant about receiving the e-mails, as she felt threatened by her. TR 96. Instead, she told Juan Ortiz about the e-mails and that she considered them to be inappropriate and offensive, especially coming from a supervisor. TR 96.

Mr. Ortiz testified that he received an e-mail from Grievant regarding women's bottoms using punctuation. TR 142. He considered it a joke. *Id.* He also recalled receiving an e-mail from Grievant containing a joke about women

with different breast sizes.⁷ TR 143-144, 146. Mr. Ortiz further testified that he received an e-mail from Grievant with road signs and people and “a bunch of stupid remarks.” TR 149-151. Mr. Ortiz was not offended by the e-mails, but considered it inappropriate to receive such e-mails from a supervisor. TR 146-147. He too deleted the e-mails and did not forward them to anyone else. TR 144, 151.

Bruce Johnson also testified to receiving inappropriate e-mails from Grievant. TR 66, 67. One of the e-mails was related to changes to women’s breasts over time. Ex. R-2, p. 11; TR 66. He stated that he received more than one inappropriate e-mail from Grievant, but he could only recall the specific content of one of them. TR 66-67. He was surprised at receiving the e-mails and was concerned about having them on his state computer. 67. He deleted the e-mails. TR 67.

Grievant denied sending the sexually-related e-mails to some of her subordinate staff. TR 232-233. She claimed she was given Bruce Johnson’s computer to use, and that something might have been in there and accidentally gotten forwarded to staff as an attachment. TR 232-233. This explanation, however, is simply not credible.

The analysis of Grievant’s hard drive did not turn up evidence of sexually-related e-mails. Ex. R-3. Yet, this finding is inconclusive. As Grievant admitted there are a number of reasons why deleted e-mails would not show up. TR 234-235.

I was troubled by the lack of physical evidence of the e-mails. Yet, the testimonial evidence is compelling. Mr. Johnson was a credible witness and showed no animosity toward Grievant. He is no longer working in the Unit and has nothing to gain or lose by his statements. Mr. Ortiz was biased in favor of Grievant and attempted to avoid direct answers to questions, yet he had to admit

⁷ At one point Mr. Ortiz stated that it was not two e-mails but one e-mail with bottoms and breasts. TR 149.

she sent him sexually-related e-mails. Given this evidence, along with the convincing testimony of Ms. Riutort, I concluded that Grievant did in fact send sexually-related e-mails to at least three of her subordinate staff in the workplace using her state computer. This charge is sustained.

Just Cause for Discipline

The parties' CBA requires "just cause" for discipline, including demotions. CBA Article 27, Sections 27.1 and 27.2, Ex. R-12, p. 62. The term "just cause" is not defined in the CBA. Yet, it is common standard for imposing discipline in labor relations. The following elements are commonly considered when examining whether just cause exists for discipline: 1) Notice to the grievant of the rules to be followed and the consequences of non-compliance; 2) Proof that the grievant engaged in the alleged misconduct; 3) Procedural regularity in the investigation of the misconduct; and 4) Reasonable and evenhanded application of discipline, including progressive discipline where appropriate.

Notice

Over the course of her career, Grievant has received an extensive amount of training on how to behave in the workplace, how to interact with and respect other employees, ethics, team building, communication, harassment and sexual harassment. Ex. R-4. Among others, she has taken classes on Performance Management and Discipline, Interaction Principles: Building Our Team, ESD Policy regarding Harassment, Creating and Sustaining a Respectful Workplace, Self-Esteem, Discipline and Risk Taking, Understanding the Diverse Workforce, Ethics in Government, Violence in the Workplace, Understanding People Through Strengths, Communication Skills/Women, Sexual Harassment Supervisors/Managers, Conflict Strategies, etc. Ex. R-4; TR 188. She has also read, understood, and agreed to adhere to the workplace standards set forth in the agency's policies and procedures, which require employees to live up to common standards of acceptable work behavior. Exs. R-5, R-6, R-7, R-8.

ESD Policy No. 1016, “Employee Conduct” provides that “It is the policy of the Employment Security Department (ESD) that employees shall conduct themselves in a way that contributes to cooperative relationships with coworkers and customers, and makes appropriate use of time and resources.” It also provides that:

Inappropriate behavior or abusive language will not be tolerated. Abusive language is defined by (or may include) any remark that can be construed as unreasonable or derogatory, particularly when those remarks concern race, ethnicity, gender, age, appearance, disability, disability, sexual orientation, and/or marital status. This policy encompasses remarks made either to or about a customer or coworker. For this portion of this policy, failure to comply will be grounds for nothing less than disciplinary action, up to and including dismissal.

Ex. R-7, p. 1, Section 1.A(2). ESD Policy No. 2009, “Use of Agency Telecommunications Technology Systems,” provides that “Employees may never use agency telecommunications technology systems to: ... 2. Adversely reflect on ESD e.g., ... , inappropriate jokes, racial, ethnic, religious, or gender slurs.” Ex. R-8, p. 3. Thus, Grievant knew or should have known that she could not behave in the manner she was found to have behaved without facing the possibility of discipline. She was advised of the rules to be followed and the consequences of non-compliance.

Proof of misconduct

As discussed above, the Employer established that Grievant engaged in the conduct with which she was charged.

Procedural regularity in the investigation of misconduct

Assistant Commissioner Nan Thomas stated her interest in ensuring that employees are given notice, an opportunity to be heard, and an independent and fair investigation. TR 166. In this case, the investigation was conducted by an independent investigator from outside the agency, who appears to have conducted a thorough and fair investigation. After receiving the report of investigation,

Assistant Commissioner Thomas determined that the evidence indicated Grievant engaged in conduct for which she should be disciplined. Grievant was then advised of the charges against her in a pre-discipline letter and she was provided with copies of the report of investigation and all of the documents considered in connection with the decision to discipline. A pre-disciplinary hearing was held to allow Grievant to respond to the charges against her. Grievant attended the hearing with her union representative, and there is nothing to indicate that she was prevented in any way from providing her side of the story. Grievant's response was fully considered by Assistant Commissioner Thomas in reaching her decision to discipline Grievant for six instances of misconduct she felt were established by the evidence. TR 187. I found procedural regularity in the investigation. Grievant was afforded due process.

Employer did not violate Articles 2.1 and 27.3 of the CBA.

There is no evidence of discrimination against Grievant in connection with her demotion. To the contrary, she was demoted solely on the basis of her misconduct. The Employer did not violate Article 2.1 of the CBA.

Article 27.3 of the CBA states that: "When disciplining an employee, the Employer will make a reasonable effort to protect the privacy of the employee." Ex. R-12, p. 62. The Union contends that the Employer violated this provision when Ms. Kirker met with Kristi Fehlig, Iris Riutort and Susie Milholland all together to discuss their complaints regarding Grievant. The Union argues that these employees were privy to each other's complaint and had the opportunity to make sure their stories coincided before any of their complaints were put in writing.

It is undisputed that Iris Riutort, Susie Milholland and Kristi Fehlig brought allegations of misconduct on the part of Grievant to the attention of Ms. Kirker on August 15, 2006. TR 19. Yet, it is unclear whether they approached Ms. Kirker together or separately. From the testimony of Ms. Riutort, it appears that Ms. Fehlig, either alone or accompanied by Ms. Milholland, approached Ms. Kirker

first with issues concerning Grievant and mentioned Ms. Riutort. TR 100-101. Ms. Kirker then called Ms. Riutort into her office and asked her what was going on, as she had noticed Ms. Riutort was getting sick. TR 100. Ms. Kirker told her to tell the truth and that other people had talked to her already. *Id.* After hearing what Ms. Riutort had to say, Ms. Kirker told her to calm down, that she was going to consult with her manager, and that if Ms. Riutort wished to go home she could do so. TR 101. Ms. Riutort chose to stay and do her work. *Id.* Following this, Ms. Kirker called everyone into her office and told them to put their concerns in writing. TR 101.

Upon careful consideration of the evidence, I do not see a violation of Article 27.3 of the CBA. The Employer was not disciplining Grievant on August 15, 2006, or even considering it at that time. Rather, Ms. Kirker was listening to employees who had approached her to express their concerns about things that were happening in the workplace. If the employees came together to discuss their concerns, it is reasonable for their manager to listen to them as a group. Since they came as a group, it was likely a group concern and the members had no expectation of privacy among themselves. Furthermore, Grievant also had no reasonable expectation of privacy concerning the allegations of employees who approached Ms. Kirker together to discuss her behavior. There is no evidence that Ms. Kirker broadcast the information she received from Ms. Fehlig, Ms. Milholland and Ms. Riutort regarding Grievant to other employees. Rather, the record reflects she only reported the matter to her superiors and to the Human Resources Director.

The evidence does not establish a violation of Article 27.3 of the CBA.

Application of discipline was appropriate.

Grievant had twenty years of service with ESD with no prior discipline. She had held a supervisory position before she came to the Unit and had received a considerable amount of training as a supervisor. Yet, she did not exhibit an awareness of how to behave in the workplace. All of Grievant's actions reflected

a general inability to act appropriately as a supervisor under ESD Policy No. 1016. Asking a subordinate to hold up their work and slow it down could have hurt the auditing process and the people served by ESD. TR 191. Her behavior toward Ms. Riutort caused her subordinate to feel threatened and to suffer stress to the point of becoming ill. The use of vulgar, disrespectful and derogatory language in referring to Manager Kirker in front of her subordinates served to undermine her authority and cause dissension in the workplace. The sending of sexually-related e-mails to subordinate staff was unprofessional, inappropriate and a violation of ESD Policy No. 2009. Assistant Commissioner Thomas stated that because of her misconduct, she could not in good conscience allow Grievant to continue supervising other people. TR 192.

Grievant testified at length about what she perceived to be unfair treatment by Mary Kirker. She indicated that Ms. Kirker's management style resulted in a dysfunctional workplace. Janet Dunn and Juan Ortiz also believed that Ms. Kirker had mistreated them. After completing his investigation, investigator Hammond concluded that Ms. Kirker is a "demanding and strict manager" and that her "demanding and strict management style had a detrimental effect upon the moral of the employees working in the unit." Ex. R-2, p. 15. As the Union points out, despite this finding by the investigator, Ms. Kirker was not disciplined.

There is no evidence that what Grievant considered to be unfair treatment on the part of Ms. Kirker was either the cause of or had any bearing on the misconduct for which Grievant was disciplined. Therefore, it does not serve as a mitigating factor. Also, the fact that Ms. Kirker was not disciplined for her strict and demanding management style does not show disparate treatment. Ms. Kirker does not appear to have violated any rules or policies by her management style and her behavior did not rise to the level of "misconduct." Grievant, on the other hand, violated ESD Policies numbered 1016 and 2009 by her misconduct, and her offenses were all the more egregious by the fact she was a supervisor.

The penalty of demotion was appropriate under the circumstances.

Summary

Grievant committed serious misconduct. She violated ESD policies and behaved in manner inconsistent with her role as a supervisor. The Employer had just cause to demote Grievant out of her supervisory position.

AWARD

The Grievance is DENIED.

Date: March 5, 2008

Carol J. Teather
Arbitrator