

In the Matter of the Arbitration
between
State of Washington Employment Security Department
and
Washington Federation of State Employees

Bergener Evaluation Grievance

AAA Case No. 75 390 00102 07

Arbitrator's Opinion and Award

Arbitrator William Greer
P.O. Box 80847
Portland, Oregon 97280

September 26, 2007

Grievance and statement of the issues

Introduction. The State issued an evaluation to Jacki Bergener in August 2006. The Federation grieved, alleging that the evaluation violated Article 5 of the parties' collective bargaining agreement. I conclude that the State included five sections of Bergener's evaluation in violation of Article 5.1 of the contract.

The parties presented their cases in a hearing on July 17, 2007, in Olympia, Washington. The State was represented by Glenn Frye, Labor Negotiator, Office of Financial Management, Labor Relations Office, PO Box 43113, Olympia, Washington 98504-3113. The Federation was represented by Julie L. Kamerrer, Attorney, Younglove Lyman & Coker, PO Box 7846, Olympia, Washington 98507-7846.

The advocates fully and fairly represented their respective parties. The hearing was orderly; the parties had a full opportunity to present evidence and examine and cross-examine witnesses. The hearing closed on August 21, 2007, upon receipt of the parties' post-hearing briefs.

The parties agreed that the grievance is substantively and procedurally arbitrable. They authorized me to retain jurisdiction over the grievance for 60 days following issuance of my opinion and award, for the purpose of resolving any dispute regarding any remedy that I may direct.

Statement of the issues. The parties agreed that the issues are:

1. Did the Employer violate Article 5 of the 2005/07 WFSE/State of Washington collective bargaining agreement during the course of administering Jacki Bergener's 2005/06 Performance Development Plan (performance evaluation)?

2. If so, what is the appropriate remedy?

Witnesses and exhibits. All witnesses testified under oath. The Federation offered 13 exhibits and testimony from one witness (Bergener). The State offered 12 exhibits and testimony from two witnesses (Steve McClain, Mary Kirker). Except for Union Exhibits 10, 11, and 12 (which involved the substantive arbitrability of a similar grievance but were not referred to at hearing), all of the exhibits were received.

I have thoroughly reviewed all of the evidence that was received, relevant, and material, and I have thoroughly considered the parties' arguments and post-hearing briefs.

Facts

The parties. The State is an agency of the State of Washington government. The Federation is the exclusive representative of a bargaining unit of personnel employed by the State in certain job classifications. Bergener is a member of the Federation's bargaining unit.

Collective bargaining agreement. Article 5 of the parties' 2005-07 collective bargaining agreement provides, in part (emphasis added):

Article 5—Performance Evaluation

5.1 Objective

The Employer will evaluate employee work performance. The performance evaluation process will include performance goals and expectations that reflect the organization's objectives.

The performance evaluation process gives supervisors an opportunity to discuss performance goals and expectations with their employees, assess and review their performance with regard to those goals and expectations, and provide support to

employees in their professional development, so that skills and abilities can be aligned with agency requirements.

To recognize employee accomplishments and address performance issues in a timely manner, discussions between the employee and the supervisor will occur throughout the evaluation period. [1] *Performance issues will be brought to the attention of the employee* [2] *to give the employee the opportunity to receive any needed additional training and to correct the problem before it is mentioned in an evaluation.*

5.2 Evaluation Process

B. The supervisor will discuss the evaluation with the employee. The employee will have the opportunity to provide feedback on the evaluation. The discussion may include such topics as:

1. Reviewing the employee's performance;
2. Identifying ways the employee may improve his or her performance;
3. Updating the employee's position description, if necessary;
4. Identifying performance goals and expectations for the next appraisal period;
5. Identifying employee training and development needs.

C. The performance evaluation process will include . . . a written performance evaluation on forms used by the Employer, the employee's signature acknowledging receipt of the forms, and any comments by the employee. . . .

D. The evaluation process is subject to the grievance procedure. The specific content of performance evaluations are not subject to the grievance procedure.

Article 29—Grievance Procedure

29.3.D. Authority of the Arbitrator. 1. The arbitrator will: a. Have no authority to rule contrary to, add to, subtract from, or modify any of the provisions of this Agreement; b. Be limited to his/her decision to the grievance issue(s) set forth in the original written grievance unless the parties agree to modify it

Background. Bergener has been employed by State agencies for over 20 years. In July 2005, she became a benefit accuracy measurement (BAM) supervisor/program coordinator 3 in the unemployment insurance (UI) performance audit unit of the State of Washington Employment Security Department (ESD). In that position, Bergener supervised seven employees.

As of the hearing date, Mary Kirker, a 28-year State employee, had been manager of the unit for about eight years. Kirker supervised Bergener from July 1, 2005 to August 18, 2006.

On Bergener's first day of work in the unit, Kirker gave Bergener a copy of Bergener's classification description. It states that the purpose of her position is: "Supervise the Performance Audit staff who review, monitor and evaluate randomly chosen paid and denied claims in the UI Program. . . ." Her duties included: (a) acting as a resource "for all technical issues . . .;" (b) conducting "timely performance evaluations of staff in the unit;" (c) assuring "accurate time sheets . . . of staff under [her] supervision;" (d) reviewing "all casework . . . to ensure accuracy and conformance with laws . . .;" (e) conducting "review of case files in a timely manner to ensure DOL timeliness standards are met;" and (f) working "40 hours per week, 8:00 am to 5:00 pm, Monday through Friday." The "Expectations & Performance Standards" include: "Be courteous and professional in all ESD staff and public contacts."

Bergener's April 2006 position description also stated that she was to "be courteous and professional in all ESD staff and public contacts" and to work "a standard 40 hour work week."

2005-06 performance evaluation. In August 2006, Kirker presented Bergener with a draft of a performance evaluation regarding Bergener's 2005-06 work performance. Bergener proposed several revisions. Kirker's final evaluation of Bergener included the following eight indented sections of text.

The parties' dispute involves whether Kirker met the requirements of Article 5.1:

[1] Performance issues will be brought to the attention of the employee [2] to give the employee the opportunity to receive any needed additional training and to correct the problem before it is mentioned in an evaluation.

Accordingly, after each section I state the facts the parties presented at hearing regarding whether Kirker: (1) brought the respective performance issues "to the attention of" Bergener, and (2) did so at a time that gave Bergener "the opportunity to receive additional needed training and to correct the problem before it [was] mentioned in an evaluation." In the "Discussion" section of my opinion, to

the extent necessary, I resolve conflicts in the testimony.

[Section 1] I would also like Jacki to research and take classes or read material that would aid her in behavior modification in the workplace. Jacki periodically is loud and disruptive in the workplace and this creates an inappropriate atmosphere in the office (i.e. Several staff and I witnessed Jacki take a large exercise ball out of one of her staff's cubicle, straddle it, bounce and ride it down the hallway, making loud noises while she did it. I immediately counseled her that it was inappropriate and unprofessional behavior in the workplace).

On August 18, 2006—the last day Bergener reported to work in the unit—Kirker sent a memo to her supervisor (without sending a copy to Bergener) stating that on August 17 Kirker observed Bergener, from 8:00 to 8:15 a.m., having a loud, non-business conversation with other employees. (Exhibit R-5(a).) At hearing, Kirker testified that she spoke with Bergener about riding an exercise ball down a hallway. Bergener testified that she did not ride an exercise ball down a hallway but did sit on an exercise ball in another employee's cubicle and demonstrated how to use the ball for stretching exercises.

[Section 2] Jacki has been personally challenged this evaluation period about working the required hours of her position. She has been counseled on several occasions why she is required to work 8 am to 5 pm, Monday through Friday. I have observed on a number of occasions she is late to work, takes long breaks and lunch periods and leaves work before the end of her scheduled workday. During these periods of times, no request for leave has been sought. After discussions with Jacki, attendance and work hours improve for a short period of time and then the poor pattern returns. Jacki needs to work on being ready to work at her desk by 8 am, keep her breaks to 15 minutes, her lunch hour to one hour and not leave the office before 5 pm without prior approval.

During the evaluation period, Kirker wrote an undated supervisory note stating, in part: "I talked to Jacki multiple times about all the issues that are addressed in her evaluation. I sat at her desk and in my office [and we talked] about attendance . . . I did not document every conversation as I anticipated that the [unacceptable] behavior would change or desist." (Exhibit R-5 (b).) Kirker did not give Bergener a copy of the note.

Kirker wrote a supervisory note dated August 21, 2006 (three days after Bergener stopped reporting to work in the unit) that stated: (a) on August 9 (nine days before Bergener stopped

reporting to work in the unit) Kirker and Bergener met to discuss Kirker's observations that Bergener had been out of the office on a break longer than usual that morning and, on a number of times, had left work before 5 p.m.; (b) later that day, Bergener left work without telling Kirker but left a leave slip stating a family emergency existed and she would not be back to work until August 11; and (c) Bergener did not return to work on August 11. (Exhibit R-6(b).)

Bergener testified that she always turned off her computer and left work at 5 p.m. and that Kirker never came to Bergener's cubicle shortly before the end of the work day.

Bergener testified that on one break she went on a walk; returned 16 minutes later; was confronted by Kirker who angrily said that Bergener had been away from the office for 45 minutes; and Bergener broke down into tears and went to a restroom.

[Section 3] Jacki had been successful until recently in completing evaluations. The most recent one of one of her staff appeared to have had no input from the employee, no mention of significant communication and behavior issues and no information on this individual's performance feedback, which is a required part of the Performance Development Plan. Jacki included in this person's evaluation some of her own position responsibilities, not his.

On July 3, 2006, Kirker directed Bergener to include in an employee's evaluation a description of his inappropriate conduct in a particular incident. Bergener testified that she attended Kirker's August 6 training regarding the preparation of performance evaluations. Bergener's last day of reporting to work in the unit office was August 18, 2006. Sometime after that date, she transferred to work in another unit.

On August 24, 2006, Bergener signed her August 26, 2005 to August 25, 2006 performance evaluation for one of the unit employees. On August 30, the employee wrote on the evaluation: "There were no discussions before this day of this evaluation by my supervisor." Bergener testified that she had discussed the evaluation *outline* with the employee. After August 30, Kirker reviewed the evaluation and added several documents that she determined should have been included in it. (Exhibit R-7.)

[Section 4] One of Jacki's performance measures is to review and close out staff casework in a timely manner. She has two weeks or less to review a case and close it out, once a staff person has signed off on the case. This is an internal and DOL measure. This was discussed with Jacki on July 3, of which she was also given written documentation. I checked this measure on August 1 and the backlog was up to 21 cases that should have already been closed out. I checked the database again on August 10, and it had risen to 34 cases. I checked a third time on August 16 and the backlog was at 26. From the initial conversation the number of cases overdue has increased, not decreased. The work performance has continued to deteriorate over a six week period of time. No additional rationale was ever provided regarding the continual deterioration of performance.

On July 3, 2006, Kirker gave Bergener a memo about work timelines that stated: "I advised Jacki that she would have a new performance measure added to her upcoming performance evaluation. . . . What will be added is that for any case her staff closes out, she will have reviewed and closed out the case herself within 2 weeks of the investigator closing date." (Exhibit R-8(b).) Bergener was on vacation leave (and therefore not in a position to work on the work backlog) during the last two weeks of July.

On August 1, the day Bergener returned from that vacation, Kirker gave Bergener a case aging report that indicated Bergener had a backlog of cases to review. As of their August 10 and 16 reviews, Kirker determined that a significant proportion of cases had been closed by investigators for more than two weeks but had not yet been reviewed by Bergener.

Bergener established that Kirker assigned Bergener, in July, to complete a special project. Bergener testified that work on that project kept her from completing some parts of her regular job.

[Section 5] As the BAM Supervisor, Jacki is expected to participate in the DOL sponsored Regional conference calls [about changes and operational issues] held quarterly. The first one Jacki attended. The second one on August 15, she did not participate. She was notified in writing as was her manager by DOL, of the date and time. No reason has ever been given as to why she chose not to participate. I personally observed Jacki outside walking away from the building minutes before the scheduled meeting (1:30 to 2:30 pm)

On August 10, an administrator informed Kirker and Bergener that one of the periodic interstate agency conference calls would occur on August 15. Kirker established that Bergener was at work that day but did not participate in the meeting. On August 15, Kirker sent an email to

Bergener noting that Bergener had not participated and asking Bergener to participate in future meetings.

Bergener testified that she understood that she was not to participate in the conference calls, unless specifically directed by Kirker to do so, because both Bergener and Kirker worked in the same unit Kirker herself participated in the conference calls.

[Section 6] I have observed that Jacki spends an inordinate amount of time with two of her staff, while virtually ignoring the rest of her unit, including her Manager. Initially Jacki came to her Manager for assistance as I was her trainer and she had been directed to do so. I did encourage her to seek technical assistance as she learned her position, from the most senior staff in the office if I were not available. Jacki did this for a period of time, but changed who she went to for assistance; the two least knowledgeable staff. One of these two staff personally has difficulty following established procedures and protocol, so Jacki has been given incorrect advice or information (i.e., UCFE Base Year Wage Verification Process)

Kirker told Bergener to confer with the most senior staff about technical issues. Kirker also established that Bergener knew or reasonably should have known the content of her classification description, job description, and State rules which require good business and personnel practices. Bergener established that Kirker had told her in October 2005, and on several other occasions, not to spend time with a particular subordinate.

[Section 7] Periodically when issues arose, Jacki would become defensive, argumentative and unwilling to listen. I have discussed with her the agency policy regarding employee conduct, that employees are expected to be able to react objectively to information they receive from supervisors

Kirker testified that Bergener occasionally raised her voice (was “argumentative”) and walked out of meetings with Kirker (was “unwilling to listen”). Bergener testified that she is not defensive or argumentative.

Kirker’s undated supervisory note, written after June 2, 2006, stated in part: “I talked to Jacki multiple times about all the issues that are addressed in her evaluation. . . . On several occasions when we met in my office, she would get angry, get up and leave. She would stomp around the office the rest of the day, frequently calling in sick the next day.” (Exhibit R-5(b).)

[Section 8] Jacki has been in the unit for over a one year period. She needs to spend more time focused on the UI Program and BAM in order to improve her technical competency. Per the last Regional review, there were a number of errors identified by the other states that Jacki should have identified and had her staff correct at the time she reviewed the case work

Kirker testified that she and Bergener together reviewed a report of Bergener's July 2005 to April 2006 work and need for improvement. (Exhibit R-11(c).) In April 2006 and June 2006, Bergener attended two multi-day training sessions entitled "UI Performance Audit/Quality Control," a subject directly related to her job responsibilities. (Exhibit R-11 (a) and (b).)

Response to evaluation. On August 18, Kirker notified Bergener of their August 28 performance evaluation meeting; On August 24, Kirker asked Bergener to bring to that meeting the completed employee portion of the evaluation document. As of the August 28 meeting date, Bergener had not completed it.

They met again on August 29. Bergener signed the evaluation then and added: "I greatly disagree with the whole content of this evaluation. I will be writing a rebuttal of all!" As of the July 17, 2007 hearing date, she had not submitted her rebuttal.

The Federation and Bergener filed a grievance challenging the evaluation, alleging violation of Article 5.1 and 5.2. The grievance alleged, in part, that "the contents of the evaluation were a surprise to Jackie and had not been discussed with her previous to the evaluation meeting." The State denied the grievance.

Positions of the Parties

Federation. Kirker did not bring to Bergener's attention certain issues raised in the performance evaluation before the problems were mentioned in the 2005-06 evaluation; Kirker therefore did not give Bergener an opportunity to correct problems. Bergener did correct certain identified performance problems. The State did not give Bergener the opportunity to respond fully to the performance evaluation.

State. Regarding some of the sections of the evaluation, Bergener did not meet the expectations established for her classification and position. Regarding other sections, Kirker informed Bergener of performance issues before the issues were mentioned in the 2005-06 evaluation.

Discussion

In Article 5.1, the parties agreed: “[1] Performance issues will be brought to the attention of the employee [2] to give the employee the opportunity to receive any needed additional training and to correct the problem before it is mentioned in an evaluation.” Therefore, the specific questions for decision in this case are:

First: Did Kirker bring particular performance issues to Bergener’s attention?

Second: If so, did Kirker bring those issues to Bergener’s attention at a time when Bergener would have had an opportunity to receive any needed additional training and to correct the problem before it was mentioned in the 2005-06 evaluation?

The Federation has the burden of proving its claim that the State’s actions violated the parties’ collective bargaining agreement. To meet that burden, the Federation must identify particular contract language and present evidence that supports a finding that the State violated that provision. If the Federation provides sufficient evidence, the burden is on the State to prove any affirmative defense it asserts.

Section 1—“Loud and disruptive” behavior. Kirker observed Bergener being loud in the workplace on August 17, 2006—*one day* before Bergener stopped reporting to work in the unit—and that she had counseled Bergener that such conduct was inappropriate and unprofessional. At hearing, Bergener denied engaging in inappropriate behavior. While one of Kirker’s supervisory notes stated: “I talked to Jacki multiple times about all the issues that are addressed in her evaluation,” that *general* statement is not persuasive regarding the *specific* performance issues addressed in Bergener’s performance evaluation. Although at some time in the 2005-06 performance period Kirker may have told Bergener that being loud and disruptive was unacceptable and was to stop, the evidence in the record does not indicate that Kirker actually communicated that performance issue and expectation to Bergener at a time when Bergener had a reasonable opportunity to correct it before the 2005-06 evaluation. As a result, the State violated Article 5.1 by including this section in Bergener’s evaluation.

Section 2—“Working the required hours.” Kirker talked to Bergener, during the evaluation period, about too-long work breaks and leaving work early. In doing so, Kirker brought that performance issue to Bergener’s attention at a time when Bergener had a reasonable opportunity to correct it before the 2005-06 evaluation. Bergener conceded that Kirker confronted her at least

once about taking a work break of more than 15 minutes. From the record, I find that it is more likely than not that Bergener thereafter again took one or more too-long work breaks and on one or more occasions left work early. The State did not violate Article 5.1 by including this section in Bergener's evaluation.

Section 3—“Completing evaluations.” Bergener's last day of work in the unit office was August 18, 2006. She was responsible for preparing the August 26, 2005 to August 25, 2006 performance evaluation for one of the seven employees who reported to her. Bergener finished the employee's evaluation and transferred out of the unit at about the same time. Kirker reviewed the evaluation and thought that Bergener, in preparing the employee's evaluation, did not comply with all aspects of the performance evaluation process; Kirker added several documents that she decided should have been included in the employee's evaluation.

The Federation established the existence of Article 5.1 and the chronology of events. In response, the State did not show that Bergener, *after* completing that evaluation and *before* leaving the unit, had prepared an evaluation of any of the six *other* employees who reported to her. In other words, Kirker did not bring this performance issue to Bergener's attention at a time when Bergener had an opportunity to correct it before the 2005-06 evaluation. As a result, the State violated Article 5.1 by including this section in Bergener's evaluation.

Section 4—“Review and close out staff casework in a timely manner.” After announcing a new performance measure on July 3, Kirker informed Bergener on August 1, 10, and 16 that Bergener had failed to meet the standard. Bergener was on vacation during two weeks of the six and one-half week period between July 3 and August 18, and she stopped reporting to work in the unit as of August 18.

Again, Article 5.1 provides: “Performance issues will be brought to the attention of the employee *to give the employee the opportunity . . . to correct the problem* before it is mentioned in an evaluation.” Given the subject matter and context of that contract language, and the contract as a whole, I interpret Article 5.1 to provide that the State will provide an employee with a *reasonable* opportunity, under all the circumstances, to correct a performance issue.

Again, the Federation established the existence of Article 5.1 and the chronology of events. In response, for the State to prove its defense that its performance expectation was reasonable, it had to provide evidence that Bergener had a reasonable opportunity (or transition period) to eliminate the existing backlog and meet the new standard. Stated differently, the State was required to show

that a competent employee in Bergener's classification, working the same number of days that Bergener did during that period, reasonably could have eliminated the existing backlog and performed satisfactorily under the new performance measure. The State did not produce that evidence.

I conclude that Kirker did not bring this performance issue to Bergener's attention at a time when Bergener had a reasonable opportunity to correct it before the 2005-06 evaluation. As a result, the State violated Article 5.1 by including this section in Bergener's evaluation.

Section 5—"Participate in the DOL sponsored Regional conference calls." As of August 10, Bergener knew or reasonably should have known that she was required to participate in a periodic interstate agency conference call that was scheduled for August 15. She did not participate, and later that day—three days before Bergener transferred out of the unit—Kirker notified her of that performance issue and directed her to participate in conference calls scheduled in the future. The State did not show that Bergener was scheduled to participate in any conference call between August 15 and August 18. Because Bergener no longer reported to work in the unit as of August 18, she was not in a position to participate in later conference calls. Due to that change in circumstances, Bergener did not have—in the words of Article 5.1—"the opportunity to correct the problem . . . before it is mentioned in an evaluation." In other words, Kirker did not bring this performance issue to Bergener's attention at a time when Bergener had an opportunity to correct it by properly participating in conference calls that occurred *after* Kirker's August 15 notice that Bergener was to participate in future conference calls and *before* the August 18 end of Bergener's performance evaluation period. As a result, the State violated Article 5.1 by including this section in Bergener's evaluation.

Section 6—"Spends an inordinate amount of time with two of her staff." Bergener established that Kirker had told her in October 2005, and on several other occasions, not to spend time with a particular subordinate. Kirker therefore brought this performance issue to Bergener's attention at a time when Bergener had a reasonable opportunity to correct it before the 2005-06 evaluation. The State did not violate Article 5.1 by including this section in Bergener's evaluation.

Section 7—"Defensive, argumentative and unwilling to listen." Bergener denies that she is defensive, argumentative, and unwilling to listen. Kirker established that Bergener sometimes got angry at Kirker and left Kirker's office before Kirker otherwise would have ended a conversation; however, Kirker did not identify, in testimony at hearing, any date on which (or incident after which) she informed Bergener of that performance issue. While one of Kirker's supervisory notes stated:

“I talked to Jacki multiple times about all the issues that are addressed in her evaluation,” that *general* statement is not persuasive regarding this *specific* performance issue, as addressed in Bergener’s performance evaluation. While Kirker may have told Bergener at some time in 2005-06, that such behavior was unacceptable and was to stop, the evidence in the record does not indicate that Kirker actually communicated that performance issue and expectation to Bergener. As a result, the State violated Article 5.1 by including this section in Bergener’s evaluation.

Section 8—“Technical competency.” Kirker told Bergener, in the spring of 2006, that Bergener needed to improve her technical skills. In April and June 2006, Bergener attended several days of training in the area. Later, Kirker believed that Bergener’s technical skills still did not meet standards. Kirker therefore brought this performance issue to Bergener’s attention at a time when Bergener had the opportunity to receive additional training and to attempt to correct the problem before it was mentioned in her 2005-06 evaluation. The State did not violate Article 5.1 by including this section in Bergener’s evaluation.

Conclusion

The Employer violated Article 5.1 by including in Bergener’s August 2006 performance evaluation comments regarding: “loud and disruptive” behavior (Section 1); “completing evaluations” (Section 3); “review and close out staff casework in a timely manner” (Section 4); “participate in the DOL sponsored Regional conference calls” (Section 5); and “defensive, argumentative and unwilling to listen” (Section 7).

I order the State, by 45 days from the date of this opinion and award: (a) to present to Bergener for signature a revised performance evaluation that excludes those comments and; (b) to destroy Bergener’s August 2006 performance evaluation and not retain a copy of it in her personnel file or in any other State records.

Respectfully submitted,

William Greer
Arbitrator

September 26, 2007

In the Matter of the Arbitration
between
State of Washington Employment Security Department
and
Washington Federation of State Employees

Bergener Evaluation Grievance

AAA Case No. 75 390 00102 07

Award

Arbitrator William Greer
P.O. Box 80847
Portland, Oregon 97280

I have carefully reviewed all of the parties' evidence and arguments. The Employer violated Article 5.1 by including in Bergener's August 2006 performance evaluation comments regarding: "loud and disruptive" behavior (Section 1); "completing evaluations" (Section 3); "review and close out staff casework in a timely manner" (Section 4); "participate in the DOL sponsored Regional conference calls" (Section 5); and "defensive, argumentative and unwilling to listen" (Section 7).

I order the State, by 45 days from the date of this award: (a) to present to Bergener for signature a revised performance evaluation that excludes those comments and; (b) to destroy Bergener's August 2006 performance evaluation and not retain a copy of it in her personnel file or in any other State records.

I retain jurisdiction for 60 days from the date of this award.

Respectfully submitted,

William Greer
Arbitrator

September 26, 2007