

IN THE MATTER OF ARBITRATION)
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 BETWEEN)
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 THE WASHINGTON FEDERATION)
 OF STATE EMPLOYEES,)
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 Union,)
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 and)
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 STATE OF WASHINGTON,)
 EMPLOYMENT SECURITY DEPARTMENT,)
)
 Employer.)

AAA CASE NO.
75 390 00277 08
ARBITRATOR'S OPINION
AND AWARD
GRIEVANCE OF
LARRY COLBERT

HEARING SITE:

AGO Tumwater Building
Olympia, Washington

HEARING DATE:

April 9, 2009

POST-HEARING BRIEFS DUE:

Postmarked June 12, 2009

RECORD CLOSED ON RECEIPT OF BRIEFS:

June 16, 2009

REPRESENTING THE UNION:

Julie L. Kamerrer
Younglove & Coker, PLLC
Attorneys at Law
Westhills II Office Park - Building 16
1800 Cooper Point Road, SW
P.O. Box 7846
Olympia, WA 98507-7846

REPRESENTING THE EMPLOYER:

David J. Slown
Assistant Attorney General
Labor and Personnel Division
7141 Cleanwater Dr., SW
P.O. Box 40145
Olympia, WA 98504-0145

ARBITRATOR:

Gary L. Axon
P.O. Box 190
Ashland, OR 97520

I. INTRODUCTION

This case arises out of a grievance filed by the Washington Federation of State Employees (Union) on behalf of Larry Colbert (Grievant) challenging the Washington State Department of Employment Security Division's (Employer or ESD) decision to demote Colbert from the position of Information Technology Specialist (ITS) 6, a supervisory position, to ITS 5, a non-supervisory position. The Employer denied the grievance and the Union moved the case to arbitration.

II. STATEMENT OF THE ISSUE

Did the Employer have just cause to demote Larry Colbert on February 1, 2008? If not, what shall be the remedy?

III. RELEVANT CONTRACTUAL PROVISIONS

**ARTICLE 27
DISCIPLINE**

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

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

Jt. Ex. 1.

IV. STATEMENT OF FACTS

On November 7, 2007, Colbert had a verbal exchange with his subordinate, Tony Negrón. Both parties directed profanities at each other. The conflict

occurred on the loading dock of the Employer's Maple Park office building. Negrón and Colbert had conflicts earlier in the day over getting the work done. The confrontation between the two employees was sufficiently loud and abusive as to attract the attention of others. As Negrón was walking out of the building, Colbert told him he would be fired if he left the worksite.

ESD employee Tim McBride's wife was waiting in the parking lot to pick up her husband at the conclusion of his shift. McBride testified that he saw Colbert exit the building "hollering at Tony, like I said, he was going to be fired if he left." Tr., p. 56. McBride specifically remembers Colbert saying, "If you leave, you are fucking done here. You are fucking fired." Tr., p. 55; Er. Ex. 2. McBride also testified he heard Negrón reply loudly, using the same language, and Colbert replied in kind. Because McBride's young daughter was present, he yelled at the two men to knock it off. Colbert returned to the building and Negrón went home.

ESD employee Mary Aulds was sitting at her desk near the loading dock when she heard "a bunch of commotion." Tr., p. 62. Aulds testified she got up and looked out her window and saw Negrón yelling at Colbert using "the F word." Tr., p. 62. She then saw Colbert walk over and yell at Negrón using the same profane words back. Tr., p. 63. Aulds explained the commotion continued for about a minute and one-half.

Following an investigation, Michael McVicker, Assistant Commissioner of ESD, provided Colbert with a pre-disciplinary letter dated December 12, 2007. McVicker cited the November 7, 2007 incident with Negrón where Colbert was observed using inappropriate language and verbally yelling at a subordinate on the loading dock. Er. Ex. 4.

In a letter dated February 1, 2008, McVicker notified Colbert that he was being demoted from his position of an ITS 6 to an ITS 5. Er. Ex. 6. The notice of discipline was based on the November 7, 2007 conflict with Negron where Colbert was heard to be yelling profanities at Negron. The letter also faulted Grievant for not being truthful in the investigation about the words he had directed at Negron. McVicker concluded "the evidence clearly shows you acted unprofessionally and did not use sound judgment on the loading dock when speaking to a subordinate." McVicker cited Employee Conduct Policy 1016(1), Courtesy and Positive Work Attitude, as a violation committed by Colbert. Regarding the level of discipline imposed, McVicker wrote:

... The unprofessional actions you displayed to a subordinate ESD employee in public, in front of at least two other agency employees, are an extremely serious offense. Therefore, a demotion is the appropriate level of discipline.

Er. Ex. 6.

Negron was also demoted for his role in the November 7, 2007, conflict. Negron filed a grievance challenging his demotion from ITS 5 to ITS 4. As a result of settlement negotiations with the Union, Negron was restored to his non-supervisory ITS 5 position after one month.

The Union filed a grievance challenging the demotion of Colbert as a violation of the just cause provision of Article 27.1. The Union alleged in the grievance that the level of discipline was too severe for the offense and that progressive discipline did not take place. When the dispute was not resolved in the lower levels of the grievance procedure, the Union moved the case to arbitration. A hearing was held at which time both parties were accorded the full and complete opportunity to present evidence and argument in support of their respective positions. Post-hearing briefs

were timely filed. The grievance is now properly before the Arbitrator for a final and binding decision.

V. POSITIONS OF THE PARTIES

A. The Employer

The Employer takes the position the clear evidence supports a finding of misconduct by Larry Colbert on November 7, 2007. ESD policy has placed employees on notice they should be "courteous and helpful" in their communication, cooperation, tact, and sound judgment in hostile situations. Employees are expected to maintain self-control. The Employer does not tolerate inappropriate behavior or abusive language.

By any standard, the confrontation between Colbert and Negrón was loud, hostile, and disruptive. The testimony of McBride and Aulds supported the Employer's contention that Grievant was, in fact, loud and confrontational using "the F word." Colbert's actions constitute a violation of ESD Policy 1016.

The Employer next argues that the demotion from an ITS 6 to an ITS 5 was justified by the misconduct committed. According to the Employer, the unique responsibilities of a supervisor and Colbert's own testimony demonstrated that he was unrepentant and a completely ineffective supervisor.

At the pre-disciplinary meeting, Grievant denied wrongdoing, resorting to almost childish explanations. McVicker characterized Colbert's response to the charges as follows:

Larry's reply back was that, I didn't say those words. My behavior wasn't inappropriate. I didn't do anything wrong.

So for me the failure of judgment and credibility was even more significant in that these are -- the ITS 6 is the core group of people that we have to trust and depend upon for virtually all the technology issues in the agency.

Tr., pp. 72, 73.

The credibility issue revolves around Colbert's contention at the pre-disciplinary meeting that he had not said, "fucking" but rather "fracking." Colbert's claim that he used "fracking" instead of "fucking" negates blame, and shows that Colbert does not get it.

McVicker contrasted the attitude of denial of Colbert with the attitude of Negron who acknowledged his mistake, and said he accepted the consequences. Negron, long before the pre-disciplinary meeting, telephoned McBride to apologize for his rude behavior. While Colbert claims to have done the same, McBride does not remember that Colbert ever apologized for his behavior of November 7, 2007.

Moreover, Colbert's conduct shows he just does not understand is further evidenced by his unique interpretation of his personal development plan. Un. Ex. 1. When told he needs to learn to communicate with subordinates without creating confrontational situations, Colbert interprets this as meaning that management realized that his problems are caused by his subordinates. The evidence is clear that Colbert simply does not understand that his conduct toward Negron was wrong and seriously wrong. As recognized by McVicker, to leave such a person in a critical supervisory ITS 6 position is simply unacceptable.

At the arbitration hearing, Grievant further demonstrated that he has not learned any lessons since being demoted. To the contrary, he has the same attitude today which he showed to McVicker over a year ago--he did nothing wrong, and all

difficulties are the fault of others. The Arbitrator should not return Colbert to the critical high-pressure supervisory job of ITS 6 because it would show callous indifference to the individuals he supervises. The Arbitrator should deny the grievance and uphold the demotion.

B. The Union

The Union takes the position the Employer did not have just cause to demote Colbert. According to the Union, the evidence showed that Colbert had a single, isolated lapse of judgment when he was under an incredible amount of pressure that had been building in his department for months before November 7, 2007. The relationship between Negron and Colbert was complicated because Negron demonstrated that he would not trust Colbert's decisions. The Union does not contest that Colbert and Negron had a loud verbal exchange where one or both of the two employees used profanity. In the view of the Union, the Employer did not believe Colbert's action was so detrimental to the workplace that it warranted immediate correction. The Employer waited over two months before Colbert's demotion was official. The act of demoting Grievant did not fit even the most egregious behavior Colbert was accused of doing on November 7, 2007.

Colbert is a 25-year employee with no prior discipline. Colbert acknowledges that his emotions were running high on November 7, 2007. Colbert regrets that he followed Negron out onto the loading dock on November 7, 2007. Colbert explained that he was trying to keep Negron from making the mistake of walking off the job. Colbert tried to explain that he might have used the "F" word because he was trying to engage Negron on his level, to capture his attention by paraphrasing back

to him what Negron was saying to Colbert. The Employer refused to consider the possibility of mitigating factors and took action that was disproportionate to Grievant's conduct on November 7, 2007.

The Union concluded in its post-hearing brief as follows:

The Employer failed to meet its burden in showing just cause for permanently demoting Mr. Colbert. While Mr. Colbert and Mr. Negron did have an inappropriate verbal exchange on the loading dock at the Maple Park ESD building in Olympia, Washington on November 7, 2007, given the multitude of mitigating factors and Mr. Colbert's 25-year record of good service to the Employer, the Union respectfully requests that the Arbitrator find that the Employer violated the Collective Bargaining Agreement between the parties, reinstate Mr. Colbert to his ITS/AS 6 position and order that the Employer pay Mr. Colbert the difference in between his two salaries for the time period he was demoted. Brief, p. 9.

VI. DISCUSSION

The Arbitrator holds the Employer proved by clear and convincing evidence there was just cause under Article 27 to demote Grievant Colbert for violating Employee Conduct Policy 1016. The evidence demonstrated Grievant acted unprofessionally and did not use sound judgment when speaking to a subordinate on November 7, 2007. The Arbitrator will enter an Award sustaining the demotion of Grievant Colbert from an ITS 6, a supervisory position, to an ITS 5, a non-supervisory position. Accordingly, the grievance will be denied in its entirety. The reasoning of the Arbitrator is set forth in the discussion that follows.

In this case, the Employer bears the burden of proving by a preponderance of the evidence (1) Larry Colbert engaged in the conduct alleged in the

notice of demotion; and (2) the conduct was such as to provide just cause for demotion from an ITS 6 to an ITS 5 position.

The evidence shows the confrontation between Colbert and Negron was loud, hostile, and disruptive. The testimony adduced at the arbitration hearing established Colbert used words to the effect that "If you leave, you are fucking done here. You are fucking fired." The words used by Colbert were directed at Negron and uttered repeatedly during the course of the confrontation. Colbert's denial that he did not say "fucking", but rather "fracking" is unworthy of belief. The testimonies of McBride, Aulds, and Negron all support the conclusion that Grievant did, in fact, yell at Negron using words to the effect, "If you leave you are fucking done here, you are fucking fired" during the course of the conversation.

Witness McBride did not have a personal relationship with either Negron or Colbert. I found McBride's testimony to be clear and concise and totally objective as to what he heard on November 7, 2007. Witness Aulds confirmed that Colbert used "the F word." Thus, I credit their testimonies as to what was said by Colbert.

The crux of this case is whether the level of punishment imposed was appropriate under the Collective Bargaining Agreement and the circumstances of this case. The starting point for review of whether the demotion of Grievant Colbert was for just cause is found in the Collective Bargaining Agreement. Article 27.2 expressly provides that "demotions" are an authorized form of discipline available for management to utilize. A disciplinary demotion must be carefully applied because the demotion not only punishes the employee for the current violation, but a demotion extends the discipline throughout the employee's career.

Grievant Colbert was Negron's immediate supervisor. The profanities directed at Negron by his supervisor were totally unprofessional and inappropriate. In the first paragraph of the discussion section of this Award I held Grievant's conduct violated ESD Policy 1016. Grievant's testimony at the arbitration hearing that he was attempting to protect Negron and was simply paraphrasing back to him what Negron was saying to Grievant is not worthy of belief. Tr., p. 110.

The Union argued that the language used by Grievant on November 7, 2007, were words that are commonly spoken by employees in the workplace. There is no evidence to support this contention. The words used by Grievant were directed at a subordinate employee in a loud and hostile manner. I hold the words used by Colbert, in the context they were made on November 7, 2007, do not fall into the category of "shop talk."

The most compelling reason for upholding the demotion was Grievant's statements made prior to the disciplinary action being taken and his testimony at the arbitration hearing. Grievant testified he told his manager, Gary Mortonson, "I never swore at Jose (Negron)." Tr., p. 107. At the pre-disciplinary hearing, Grievant denied to McVicker yelling and swearing at Negron.

Shortly after the November 7, 2007 incident, Grievant told Manager Brian Kerr the following:

A He approached me and said -- he called me into his office. He said, Larry, there's an HR action against you. I said, for what? And he said, You were heard swearing at Jose. And I told him, Well, I didn't swear at Jose. Because I had no recollection of swearing at Jose. I knew I was using the fricking word, but I had no recollection of using the F word. And I told him that. I told him, I wasn't swearing at him.

Tr., pp, 106, 107; emphasis added.

Grievant testified at the arbitration hearing as follows:

I started with the fricking word. I said, you are acting like a fricking baby. And if you fricking don't -- and I think I went to fracking, which Mr. McVicker says is a Star Trek term, blah-blah-blah -- I used the word fricking, fracking, and then I said if you don't get back in the room, you are fucking done.

Tr., p. 104; emphasis added.

At the arbitration hearing Grievant responded to a question by counsel on how he would conduct himself in the future by offered the following:

A I would -- I would have not used any F word. I was trying to paraphrase back to him what he was saying to me. That's another key point. I was trying to paraphrase back to him what he was saying to me, and I was trying to -- it was more or less an effort to prevent him from committing career suicide.

That's the relationship that I had with -- I tried to -- I was trying to protect him. I wasn't directing the F word at him. I was in open communication, a private conversation. I was trying to protect him so he wouldn't lose his position, in a sense.

Tr., p. 109; emphases added.

Grievant further testified that he called McBride to apologize for the language he used on November 7, 2007. McBride testified that Grievant called him to find out "what was going on" and not to apologize. I credit the testimony of McBride. In my judgment, Grievant was calling McBride to collect information in order to develop an excuse for his conduct in a misguided attempt to protect himself against future discipline.

Grievant continued to deny the statements he was accused of making to Negrón on November 7, 2007. I agree with the contention of the Employer that Grievant does not understand his conduct toward Negrón was wrong. Unlike Negrón

who accepted responsibility for his conduct and apologized for his rude behavior, Colbert remained unrepentant.

Grievant's loud, profane, and disruptive behavior on November 7, 2007, was compounded because it was done in the presence of coworkers. In my judgment, Grievant's use of profanities, directed at a subordinate in the presence of coworkers, undercuts his ability to manage and direct the workforce. Employers cannot be expected to tolerate a supervisor who directs profane statements at a subordinate.

In sum, I hold Grievant's testimony was that of a supervisor who attempted to deflect responsibility for his own actions onto others in a misguided attempt to evade personal accountability for his conduct. Further, I hold that Colbert's explanations for what occurred on November 7, 2007 are not credible. Specifically, his explanation that he started out the exchange using the word "fricking" and then went to "fracking" and finally, "fucking." Grievant's less than candid answers to basis and simple questions at arbitration argues against overturning the discipline meted out by the Employer. I concur with the Employer that to return Grievant Colbert to a supervisory ITS 6 position would be unacceptable. Absent a showing that the Employer's demotion of Colbert was arbitrary, discriminatory, or unreasonable under the circumstances, I have no basis to overturn the Employer's selection of the punishment of demotion.

AWARD

Having reviewed all of the evidence and argument, and having observed the demeanor of the witnesses during their testimony, I hold the Employer's decision to demote Larry Colbert was for just cause under Article 27 of the Collective Bargaining Agreement. The grievance is denied and dismissed in its entirety.

Pursuant to Article 29, Grievance Procedure, the fees and expenses of the Arbitrator are payable equally by the parties.

Respectfully submitted,

Gary L. Axon
Arbitrator
Dated: July 20, 2009