

IN THE MATTER OF THE ARBITRATION

WASHINGTON PUBLIC EMPLOYEES
ASSOCIATION

and

AAA 75 390 00454 09
Discharge

STATE OF WASHINGTON
DEPARTMENT OF NATURAL RESOURCES

Appearances: For the Union: Lawrence Schwerin, Esq.
 Schwerin, Campbell, et. al

 For the Employer: Kari Hanson, Esq.
 Asst. Attorney General

DECISION AND AWARD

The undersigned was selected by the parties through the procedures of the American Arbitration Association. Hearings were held in the above matter April 27-30, 2010 in Tumwater, Washington. The parties were given the full opportunity to present testimony and evidence. At the close of the hearing, the parties elected to file briefs. The Arbitrator has considered the testimony, exhibits and arguments in reaching his decision.

ISSUE

The parties agreed on the following issues:

Did the Employer have just cause to discharge the Grievants? If not, what is the appropriate remedy?

BACKGROUND

The State of Washington Department of Natural Resources, hereinafter referred to as the Employer, has a facility located in Tumwater, Washington. It is known as the Compound. The employees in the Compound maintain the equipment fleet of the Department of Natural Resources for certain areas of the State. The Washington Public Employees Association, hereinafter referred to as the Union, represents many of the employees at the Compound. The Collective Bargaining Agreement in effect at the time of the grievance commenced on July 1, 2007.

The Employer moved the employees into the Compound in approximately 2006. Prior to that time they worked at facility in Lacey. Some of the mechanics and other employees' job were to service the vehicles in the fleet. There were other employees whose duty it was to fabricate parts for particular use in vehicles, such as those used to fight fires. The fabrication unit in Lacey was located in a separate area from the area where the servicing of vehicles occurred. Each of those units had one employee who ordered parts for their particular unit. They were each located in their respective areas. When the employees were moved to the Compound, the two employees in charge of ordering parts were moved into the same area that was designated the parts room. They each had a desk in the parts room. While for the most part, each continued to order parts for their respective areas, there was some overlap now that they worked adjacent to each other. Mel Lobe was primarily in charge of

ordering parts for those doing fabrication and Grievant S¹ ordered the parts for the mechanics who serviced vehicles.

Brad Littlefield was responsible for the overall management of the equipment fleet, as the Assistant Division Manager. He assumed that position in November of 2006. His office was not located at the Compound. Phil Moller was employed as the Fleet Service Manager and was located at the Compound. He reported to Mr. Littlefield and prior to that he reported to Mr. Garcia. Grievant W was the first line supervisor of the mechanics and the employees in the parts room. He filled out the evaluations for those employees and he was the one who approved leave. He is also a mechanic and performed work as a mechanic as part of his duties. He was required to travel to different areas covered by the Compound employees, as needed.

The State of Washington has promulgated a Purchasing Manual that sets forth requirements on those individuals involved in purchasing goods for the State. It has entered into certain agreements with various Companies to provide merchandise to the State. It is able to negotiate a better rate given the volume of purchases. Some of the contracts are called mandatory contracts. That means that anyone purchasing the type of product covered by the contract must purchase from the contractor who has the contract. There is an exception. If it is found that the same product can be purchased cheaper from some other vendor, then the purchasing agent can use that cheaper vendor provided the contract vendor is given an opportunity to first meet that price. This is known as the Best Buy Program. There should be documentation

¹ The first initial of each Grievant's name will be used instead of their full names.

showing the steps that were taken when opting for this program. In addition to mandatory contracts, there are contracts of convenience. A purchasing agent can buy the product from the vendor who has a contract of convenience without seeking bids or getting prices from other vendors.

There is an exception to the above requirements for purchases that are under \$3300.² No bids are required for such small purchases, although splitting purchases to avoid reaching \$3300 is prohibited. A purchasing agent could not make two purchases of \$2000 each of the same types of item so as to avoid the necessity of getting bids. Any purchases over \$3300 needed to be approved by Lori Johnson, the Purchasing Manager.³ In addition to the \$3300 limitation, there is one additional limitation. Any purchases over \$10,000 have to be approved by General Administration. It is expected that the purchasing agent when making individual purchases that are under the limits anticipate future needs so that repetitive purchases of the same product over a short period of time be subject to the limits. According to the Manual, both Lobe and Grievant S were considered purchasing agents

Grievant S was hired in 1983. He was not initially hired to work in the parts room. He did not move to a job ordering parts until 1990. He held the position of Equipment Parts Specialist I when he took over that assignment. He held this job until his termination. He received positive evaluations during the time he was supervised by Grievant W. Grievant W was hired in 1994 and was promoted to supervisor in 2000. He was Grievant S's Supervisor from that time

² Prior to 2007 the maximum was \$3100.

³ The Department of Natural Resources also has a manual that further delineates the requirements for making purchases on its behalf. Ms Johnson is listed in that manual as the only person who can authorize purchases in excess of \$3300.

until they were both discharged. There was no evidence that either Grievant had disciplinary action taken against them prior to their discharge.

In 2000, an employee raised an issue with his superiors. He believed that some parts were “walking out the back door.” An audit was conducted and certain recommendations were made to better keep track of items purchased, but there was no evidence items purchased had been stolen by any employee. One of the changes that were implemented as a result of the audit was to require there be three different signatures for each purchase. The individual purchasing the item must indicate he was the one that prepared the invoice. When the item arrived, a different person had to sign a receipt for the purchase. The final signature indicated to accounting that the invoice was authorized for payment. This policy was put in place in 2001 or 2002. The Employer indicated that it believed the policy ceased to be followed after 2003.

William Frare was hired in 2006. He was placed in charge of the Engineering Division, which included the Compound along with several other facilities in the State. He was concerned about the inventory controls for the purchases being made by the Department. He hired Brad Littlefield to among other tasks develop better procedures for tracking inventory. He helped implement a computer system known as FASTER. A purchase order was required for all goods purchased. The purchase order would indicate the part being purchased and the vehicle number for the vehicle receiving the part. This information would be entered into the FASTER system. He also reinstated the requirement that the person receiving the good not be the person who ordered it and the person authorizing payment be someone different from the other two.

A training session was held in January of 2007 on several different topics. One of the topics discussed was the FASTER System. The training documents list both Grievants as trainers on this topic. Grievant W testified he was listed as a last minute replacement for Moller who could not be present, and that he felt he was not sufficiently knowledgeable about the topic to discuss it. He said Grievant S gave the training, not him.

Mr. Littlefield as part of his duties reviewed the various invoices for the items purchased at the Compound. He discovered there were numerous purchases from the same vendors. Absorbent pads, also known as dimple pads were purchased from Industrial Specialties. He found that 38,000 pads had been purchased in one year. He believed this was too many and contacted the various locations that use the pads to ascertain how many they used. He concluded only about 9,000 were used in a year and that he could not account for 29,000. There was no mandatory or convenience contract covering this item. He also looked at the number of purchases made from Industrial Specialties for different products, including the pads. He became concerned there were purchases of similar products that together exceeded the \$3100 and later \$3300 limit.

Mr. Littlefield also questioned purchases from Affordable Autoglass for windshield replacements. The State had a contract of convenience with Safelite and he felt the prices Affordable charged were greater than the prices listed in the contract with Safelite. He stated he found no documentation as to why the choice had been made to use Affordable rather than Safelite. Both Grievants testified they felt there had been questions about the service being provided by

Safelite and that the Affordable's service was better. They also indicated that Mr. Garcia approved the change and they had filed a complaint against Safelite with the State.

Will Broadbent, who was in charge of the fleet approached Mr. Littlefield about a windshield that was supposed to have been installed on one of the vehicles in his charge. He examined the vehicle and concluded no new windshield had been installed. All of the emission and other stickers were still on the windshield and they would not have been there had it been replaced. Grievant S was questioned about the purchase and stated he believed the wrong vehicle number had been placed on the invoice and it was a different vehicle that had the new windshield installed. Mr. Littlefield examined the other vehicle and questioned whether this information was accurate. He concluded Grievant S was unable to account for the windshield that had allegedly been purchased.

Mr. Littlefield also had concerns regarding Grievant W. As Supervisor of Grievant S, he questioned the degree of oversight that Grievant W was providing. In addition, a mechanic, Jerry Biscay, had complained to him. Mr. Biscay had applied for leave to go on his honeymoon. He was marrying the former wife of Grievant W. He contended that he had put in a leave slip seven days in advance, as required by Grievant W, but that the leave was denied. He had already left for his honeymoon when he discovered it was denied. Instead of being paid for the leave, he was placed on leave without pay. Grievant W denied getting the slip on time, but Littlefield questioned whether that was so.

Given all of these questions, the Department hired an investigator, Ken Wilson to help interview employees to determine whether there were violations of the Manual and Department procedures. Mr. Wilson and Mr. Littlefield interviewed 22 individuals, including the Grievants. Mr. Littlefield was the one who primarily questioned the employees and Mr. Wilson took notes. Following the interviews both Grievants were sent a letter signed by Mr. Frare informing them that he was contemplating disciplining them. The charges were listed and the Grievants were given an opportunity to respond. They both hired Attorneys who filed responses to the charges on their behalf.

Following receipt of the letters from Legal Counsel, Mr. Frare sent a letter to both Grievants informing them they were being discharged. The letters included separate allegations against each Grievant. Specific examples were given to provide specificity for each allegation. There were five separate allegations against Grievant S, but one was dropped during the hearing. The letter to Grievant W initially included 9 charges, but two were dropped during the hearing.⁴ Both Grievants were discharged in April of 2009 and the Union grieved both discharges.⁵

POSITION OF THE EMPLOYER

Grievant in his defense has argued that he did not understand the requirements of the job. This defense has no merit. Contrary to his assertion,

⁴ The Arbitrator rather than reciting the allegations and the facts surrounding that allegation here will discuss them during the Discussion portion of this decision.

⁵ Phil Moller was also discharged and several employees were given written reprimands. Mr. Moller's matter went to arbitration. The Union submitted to the Arbitrator the decision reinstating Mr. Moeller. A conference call was held regarding the submission as it was received after the briefs were received. The Arbitrator accepted the decision, but noted that each case had to be decided on its own facts.

he had a Purchasing Manual at his desk. Witnesses confirmed this fact. Grievant W when writing evaluations for Grievant S stated that he “follows appropriate rules.” He also had on the job training as he had been performing the job for years. There is no evidence he was ever denied additional training despite his claim to the contrary.

Grievant S violated the public trust. His conduct was egregious, yet he took no responsibility for his conduct. Given these facts, discharge was the appropriate penalty for the acts of Grievant S.

Grievant W denied that he supervised Grievant S. His job description stated he did and he was the one doing evaluations. His denial is contrary to the other evidence. He failed as supervisor to provide “oversight” to those employees under his supervision. He should have known what was occurring and prevented it. He did not. The penalty imposed was appropriate.

POSITION OF THE UNION

The Daugherty seven tests should be utilized by the Arbitrator. If he finds any of the tests have not been met, then the discharges should be overturned. Many arbitrators have done so. An employer must inform the employee of the nature of the charges and give the employee an opportunity to respond. This requirement was not met here.

The Employer must show by clear and convincing evidence there was just cause for the decision to discharge the Grievants. A violation of ethics laws has been alleged. It has implied goods were purchased that were taken home by some employees. These allegations must be proven beyond a reasonable doubt.

The Employer did not do a fair investigation. It did not inform Grievants that an investigation was occurring until the end and it failed to interview individuals suggested by the Grievants. No prior management officials were interviewed to confirm the statements of Grievants. By the time the Employer interviewed Grievants, it had already determined that they were guilty. The Employer also denied Grievants Union representation. No Union representative was present during the interviews of the Grievants. The Employer was obligated to inform the Grievants of their right to Union representation and failed to do so.

DISCUSSION

There are numerous allegations against both Grievants. The Employer contends that the allegations when taken together justify the decision it made to discharge the Grievants. The Arbitrator in order to evaluate that decision must examine each allegation. Since some of the allegations are inter-related they will be taken together rather than discussed separately. The Arbitrator shall indicate the position of the Parties as to each allegation and then examine the facts that relate to that allegation. He shall then reach a conclusion regarding the specific allegation(s). After that analysis is completed, the other arguments raised by the Union concerning the investigation and Union representation will be discussed.

Allegations against Grievant S

1. Failed to abide by the requirements of the Washington Purchasing Manual as it pertains to the use of State contracts and vendor competition.
 - a. Industrial Specialties- Dimple Pads, Motor Oil
 - b. Affordable Autoglass

4. Have knowingly exceeded purchasing authority as outlined in the Purchasing Manual and the DNR Purchasing Standards.
 - a. Jasper Engine
 - b. Barnett Implement
 - c. Costal Marine

Position of the Employer

The evidence clearly proved that Grievant S did not abide by the State purchasing rules set forth in the State Purchasing Manual. He failed to utilize mandatory contracts or contracts of convenience. This occurred when Grievant made purchases of motor oil for which there was a mandatory contract, and when he purchased windshields, where there was a contract of convenience. Grievant S made purchases in excess of the limits set forth in the Manual without the required approval. Some of the purchases individually exceeded his authority. Grievant also made purchases at prices well above the price he should have paid for the product. For example, he paid too much for dimple pads and the purchases exceeded the \$3300 limit. This was a prime example of invoice splitting.

Grievant bought parts repeatedly from Industrial Specialties. He argued that the prices paid for the parts were competitive and that he regularly does price comparisons, but provided no evidence to substantiate this claim. Similarly, he bought windshields from Affordable Autoglass at prices in excess of the prices he would have paid had he used Safelite under its contract of convenience. There is no evidence that any research was done to show that these purchases fell within the Best Buy exception or any other exception. His argument that Affordable provided better service was refuted by other evidence.

Position of the Union

Grievant S properly made purchases from Affordable Auto Glass. The decision to buy from them was made years earlier. There had been dissatisfaction with Safelite. A complaint form was filled out by both Grievants. Grievant S believed he was getting the same discounts that Safelite was giving. The evidence offered in an attempt to show more was being paid to Affordable was suspect and irrelevant as Grievant S was never asked to do a comparison. In addition, he was never shown how to do one. Grievant S was never informed of what was expected of him and thus cannot be faulted for not doing the task. Many Arbitrators have so found.

The choice to use Industrial Specialties for the purchase of dimple pads was researched before the decision was made. The decision was approved by his superiors. There was no contract covering their purchase. No one ever directed Grievant S to get the pads somewhere else. Grievant was simply doing what he was directed to do by Mr. Garcia and Mr. Moller, his superiors. Grievant S was told he need not account for dimple pad usage. He cannot be charged with failing to account for pads he had been instructed he need not account. The claim that too much was paid is also without merit since the purchases were in accordance with instructions he had been given when told to make the purchases from Industrial Specialties. The oil was purchased from Industrial Specialties at the time the employees were being moved to the Compound.

Industrial Specialties is the only one that would deliver the small amount needed at the time of the move. The purchase was authorized.⁶

Discussion

Grievant S contends he was unaware he needed to obtain bids, unaware of the requirements in the Washington Purchasing Manual and that he did not even have a copy of the Manual at his work station. There was testimony from several witnesses that contrary to the assertion of Grievant S that there was a Manual in his work area. It was also available on the internet. He was obligated to familiarize himself with it. As the Employer points out Grievant's Performance and Development Plan (evaluation) and his job description both require him to "follow appropriate guidelines" and to "secure bids" on "non-contract items."

Grievant S was not new to the job. He had held the position since 1990. He had been in the position long enough to familiarize himself with the State's requirements. Purchases have been made from Industrial Specialties since the year 2000. Purchases for similar goods were made that cumulatively exceeded both the \$3300 and \$10,000 limit. He admitted he knew of the \$3300 limit. He knew or should have known that invoice splitting was improper. The Employer contacted the manufacturer of the dimple pads and learned that the pads could have been purchased directly from them at a much cheaper price. It was the same Company from whom Industrial Specialties obtained the pads. While Grievant might not have known this fact, it is clear that he did not go anywhere else to ascertain the price for the pads. Even if the change of pads was

⁶ The Union also made these arguments with regard to Grievant W. Rather than repeat them, these arguments shall be applied to both Grievants.

necessitated by the need for better quality pads, that does not excuse him from attempting to find the best price for these better pads. Even if he was unable to research prices on the internet, as he contends, he was still obligated to see who else may sell the same pads. If he knew the manufacturer, calling them to see who distributes them would not be out of line. He would have learned what was later learned.

Grievant was in charge of buying parts. He contends he was just doing what he had been directed to do by his superiors. That he may have been instructed to get a better pad is a valid defense. That Industrial Specialties had the kind of pad that they wanted is true. The trouble lies in the decision to go no further than Industrial Specialties in making the purchase. He was in charge of purchasing. It was his responsibility to adhere to the requirements of the Purchasing Manual as the Purchasing Agent. The purchases clearly exceeded the limits set forth in the Manual. There is no evidence he made any effort to comply or at the very least to raise the issue with his superiors.⁷ If he had done all he could to ensure compliance with the Manual and was overruled that might be a defense, but he did not do that. The Arbitrator finds on this issue Grievant did not follow the rules he was required to follow or even make an attempt to follow them.⁸ To lay the responsibility at the feet of others is to shirk the responsibility that he had as Purchasing Agent to be in compliance with the Manual.

⁷ Mr. Moller in his statement denies that he directed that dimple pads be purchased from Industrial Specialties. While the statements were not accepted for the truth contained within them, given the fact that Moller was also discharged and then reinstated his statement must be given some weight. He did not testify presumably because his hearing was to follow shortly.

⁸ Grievant testified that he “does price comparisons to keep everyone honest.” Unfortunately, there is no documentation that would support that. In reality, it looks like he did nothing to try to get the lowest price.

The Employer also contends Grievant could not account for the number of pads that were purchased. He testified that he was told he need not keep track of their use. Mr. Littlefield in his testimony concurred that Grievant S need not account for the pads. The conclusion he reached regarding missing pads was based on a survey he undertook to see how many pads each person used. That information is highly speculative. The implication is clearly that pads were ordered and listed as received that never arrived. That is a serious charge and one for which this Arbitrator finds insufficient evidence to support. That he bought pads without seeking bids is one thing. To assert that in essence fraud was occurring is another matter. The Arbitrator is not prepared to go that far.

Grievant is also charged with buying oil from a vendor when there was a Mandatory State contract covering oil purchases. Grievant maintains the purchases were made at a time when the Compound was not fully completed and there was no place to store all the oil needed. He contends the State Contractor did not want to deliver the small quantity that could be held at the compound pending completion of the tanks. This testimony was not contradicted. Though some of the purchases in 2006 did occur after the move to the compound, there was no evidence the tanks were, in fact, completed at the time the deliveries were made. This does account for the 2006 purchases. There were also purchases made in 2007. However, the amount was small and did not exceed the \$3300 limit. There is an invoice in April of 2007 that was prepared by Grievant S, but it is only for \$1379 before taxes. There were other purchases that were made, but Grievant S did not prepare the invoices for

them. He simply signed as receiving them. Based on all the above, the Arbitrator does not find merit to the allegations surrounding these purchases.

Safelite had a contract of convenience. This means that a Purchasing Agent can buy from them without the need to obtain bids. The Purchasing Agent need not use that contractor, but the agent is required to get bids if going elsewhere. Grievant testified he was told that the discount given by Affordable was equal to the discount given by Safelite. The Safelite contract states exactly how much of a discount is given. For replacement windows, it is 33% or 35% off the NAGS price. The actual price paid to Affordable was higher than that. Grievant did no research to substantiate the statement made to him. He could not simply rely on others to make the determination on the propriety of the price paid to a vendor. It was his job to get bids and check prices. While he may have filed a complaint against Safeguard in the year 2000, this was not sufficient justification for him to stop making purchases from them and it was definitely not sufficient justification to simply choose Affordable with no verification that the price was fair or that there were others who could beat that price.

Grievant argues that the service provided by Safelite was inferior to the service it received from Affordable. Even if that was so, a fact disputed by others, that did not relieve Grievant of the requirement to get bids before using Affordable. This was not done. Affordable was paid over \$29,000. This was \$8400 more than Safelite would have been paid under its contract of convenience. For all these reasons, the Arbitrator must find fault with Grievant. He was negligent in his duties.

Grievant is also charged with making several purchases that individually exceeded the \$3330 limit without getting bids. Several purchases were cited and in the examples there was one exception noted. On the exception, bids were received, but there no record of authorization from Ms. Johnson. Grievant maintains he was instructed by his supervisors to make the purchase of the Jasper Engine. The Employer contends that does not relieve him of his responsibility to get bids. To some degree they are correct. Grievant testified he assumed his superiors had done the leg work first. What he did not do, as was noted earlier, was ask them if they had done that or whether this fit within some exception. Like with the discussion above, it was his responsibility to ensure compliance with the Manual and not simply assume it was done.

The Barnett Engine was ordered by Mr. Lobe, not Grievant. The Employer wants to place blame on Grievant as he received the item. Signing a receipt for the item is not the same thing as preparing the order for the purchase. It is unfair to Grievant to blame him for this purchase when he was not the one who made it.

The last item is the Coastal Marine Engine. Grievant contends it was an emergency. Emergency purchases are permitted and are an exception. Accepting the argument this was an emergency, Grievant cannot be faulted for by-passing the bidding procedures. He may not have filed the form required by Section 6.1J, but that is not an allegation against him and thus of no consideration.

2. Keeping poor records and not able to account for a windshield supposedly installed.

Position of the Employer

Grievant S was unable to account for one windshield. The exhibits clearly show that the contention of Grievant S that the missing windshield was placed on a different vehicle has no validity. There is a separate invoice for a new windshield on the vehicle he claims was the one that received the windshield in question. Grievant S was also unable to account for a substantial number of pads. The Department could not have used the number allegedly purchased.

Position of the Union

Grievant S acknowledged that he miscoded the windshield on the vehicle in question. He was subsequently able to account for it. The Supervisor for the Motor Pool, Mr. Smith, met with Grievant S and they were both able to locate where the windshield was installed. The possibility that a second windshield was later installed on the same vehicle was discounted by the Employer despite its concession that during fire season it is possible for a vehicle to need two replacement windshields. The people Grievant S said could corroborate his position were never interviewed. An adverse inference should be drawn from this failure.

Discussion

Mr. Broadbent brought the issue of the missing windshield to the attention of Mr. Littlefield. There is no doubt that there is a history between Mr. Broadbent and both Grievants which might have precipitated the inquiry. Nevertheless, the inquiry was valid. Mr. Littlefield pointed out that on the original invoice no Purchase Order Number had been placed. If it had, it would

have shown which vehicle was receiving the windshield. The Employer is correct in that a Purchase Order was not entered on the invoice until later and it was handwritten. Had that been done in the beginning Mr. Littlefield is correct that this whole issue might never have arose. The exact vehicle would have been known from the beginning. Grievant was filling the order and had the responsibility to code it and to do it correctly. He did not. He bears fault for that.

The essence of the claim, however, goes beyond simply failing to code the invoice properly. Instead, it is similar to the inference the Employer wanted the Arbitrator to infer regarding the dimple pads purchase. The inference is that payment was made for a good never received. Grievant contends the issue was resolved. Witnesses testified that Mr. Frare stated at a meeting held subsequent to the discharge of Grievants that the missing windshield was found. Grievant maintains the Supervisor in the area and he did find the windshield. The Supervisor was not called by the Employer to dispute the point.⁹ The Arbitrator cannot be certain whether it was found or not. However, as was said regarding the dimple pads, the burden to show what amounts to fraud is a heavy one. While Grievant can be faulted for his record keeping which directly caused the furor over this issue, the Arbitrator is not prepared to say that any other impropriety occurred regarding this issue.

⁹ The Union cited Margaret Management Central 125 LA 1478 (Goldstein, 2008) where the Arbitrator agreed with the Employer argument that: "An adverse inference must be drawn from the failure to call this particular witness."

3. Purchasing from Industrial Specialties was a conflict of interest and a violation of the State Ethics Law and the State Purchasing Manual.

Position of the Employer

Grievant S's purchases from Industrial Specialties amounted to a conflict of interest. He personally knew and was friends with the owner. Grievant S denied he went hunting with him, but the testimony from numerous witnesses showed that not to be true. Furthermore, he admitted during the investigation he went hunting with the owner, despite his subsequent denial during the hearing. The purchases were a violation of the State Ethics Law. "The personal interests of a contractor (were) at odds with the best interests of the State."

Position of the Union

Grievant S's relationship with the owner of Industrial Specialties was professional. It is proper for personnel to have relationships with vendors. He discussed personal interests with numerous vendors. The allegation that Grievant S hunted with the owner is false. The fact that they may have coincidentally been at the same campground at the same time does not mean they hunted together.

Discussion

The Arbitrator finds this charge the most troubling. A Purchasing Agent must avoid a conflict of interest or the perception of a conflict of interest. While maintaining good relations with vendors is encouraged and even desirable, there is a line that cannot be crossed. Grievant maintains that he discussed hunting and fishing with the owner of Industrial Specialties, but he has never hunted with him. Several witnesses testified they overheard conversations

between the two of them about hunting. Mr. Lobe testified that it sounded like they were discussing hunting together, but he was not sure. Debes, Broadbent and Vaughn were clearer on the issue. They all testified they heard them discuss hunting or fishing together. The Arbitrator finds that Grievant S and the owner were friends, and probably did hunt together.

Industrial Specialties received substantial sums from purchases made by the Employer through Grievant S. No bids were obtained before the purchases were made. While there is no evidence or even any inference that Grievant received any benefit from these purchases, his friend did. As noted in the termination letter, the State Purchasing Manual in Section 6.15 defines a conflict of interest:

A situation where the personal interests of the contractor, public official or employee, are, or appear to be, at odds with the best interests of the State.

Given Grievant's relationship with the owner of Industrial Specialties, and his failure to get any competitive bids that would justify the purchases, the personal interests of the Contractor is or appears to be at odds with the needs of the Department and the State. The same can also be said about the relationship between Grievant and the owner of Affordable. According to Ms Debes, Grievant attended the owner's wedding.¹⁰ They too had a relationship. The perception among some was that Grievant S only gave business to those he knew and who were his friends. That he gave them the business without checking on prices or getting bids makes this perception seem even more like reality. The fact is everything he had done or not done gave the clear

¹⁰ Tr: 331.

“appearance” that the best interests of the State was not the driving force behind the purchases. This is exactly what the Manual seeks to avoid. That Grievant failed to do anything to diminish that perception makes the situation even worse. As noted, at the outset of this Discussion, the Arbitrator of all the charges against Grievant S, finds this one the most difficult to excuse.

Allegations against Grievant W

1. Failed to apply principles of purchasing, specifically ethical behavior, open and effective competition and value for money and failing to insure staff apply the same principles.
2. Keeping poor records and being unable to account for a windshield that had been installed or a large number of dimple pads.
3. Allowed Staff to make purchases from Industrial Specialties, Affordable Auto Glass and Wagonmaster in violation of State Ethics Law and State Purchasing Manual.
4. Regularly sign for the receipt of items for which he authorized the order and allowed staff to do the same.
7. Knowingly exceeded purchasing authority and allowed staff to exceed their authority.

Position of the Employer

Grievant W was the supervisor of Grievant S. He allowed and participated in the acts of Grievant S. Grievant W failed to follow the Purchasing Manual and failed to ensure that Grievant S followed it. Like Grievant S, he was unable to account for either the missing windshield or the missing dimple pads. He failed to monitor the purchases from Industrial Specialties or to alert Grievant S about violations of the Purchasing Manual. He also allowed invoice splitting to occur and did nothing to curtail this from happening.

Position of the Union

The Employer acknowledged that Grievant W cannot be faulted for not keeping records as to how dimple pads were used and where they were used. Grievant W, like Grievant S, was merely following instructions on purchasing the dimple pads. They were told to get them from Industrial Specialties and that was what they did. In addition, Grievant W did not have sufficient computer access or training on the internet to research the price of dimple pads from other suppliers.

Discussion

It is important to start this discussion quoting from the job description for Grievant W's position. His duties included:

Plans, organizes, schedules and directs the day to day operations, maintenance and repair activities of the automotive and heavy equipment shops as well as the parts department. Responsible for the maintenance of the department's automotive and heavy equipment within the geographical area set. Responsible for the record keeping in these areas of responsibility. Maintains records according to agency retention schedule. Develop, implement, and monitor training for staff.

Grievant W was a mechanic. In addition to directing the work of the mechanics he performed manual labor himself. He testified that he was:

The main contact for all the regions, so I spent time out, you know talking with people and dealing with vehicle maintenance issues, projects. And I processed all the new vehicles that came through ... prepped them for the customers and put them into inventory.¹¹

Thus, he had a considerable range of duties. He also stated that Mr. Moller and a second supervisor, John Petit, who was located in the parts room area when he worked for the Employer, "pretty much oversaw that Section."

¹¹ Tr: 547-8

Grievant W's job description did put the parts room under his supervision. He did do the evaluations for the two employees in the parts room. However, it was apparent the parts room was not the main focus of his attention, nor was it a large part of his duties. His knowledge of the procedures for the parts room was limited. He relied on the expertise of Grievant Sweet and Loebe and others to monitor what was occurring. He testified that all he did regarding the parts room purchases was to make certain that invoices were coded correctly and thus eligible for payment. He did not ever check on purchases to ascertain if there was a mandatory or convenience contract or any contract at all. He did not monitor purchases to see if they exceeded the limit or if there were split purchases. Grievant W acknowledged as much.

There are other facts that are also not in dispute. Part of the allegation against Grievant W was his not being able to account for the missing windshield. The Employer implies that Grievant W should have checked the vehicle to see if it was installed before authorizing payment. He had never done that previously. Similarly, he knew parts, including dimple pads were being purchased from Industrial Specialties for years. Rightly or wrongly he assumed that this was done properly. In the same vein, he knew that Affordable Autoglass was providing windshield replacements and not Safelite. He indicated, as did Grievant S, that Safelite's service was not as good and that they sometimes required the vehicle be brought to them rather than Safelite coming to them. He was told the price was equivalent and took the word of those telling him this. Finally, it is not in dispute that this had been how Grievant W was operating long before Mr. Frare and Mr. Littlefield were hired.

That is basically how he had been handling this aspect of his duties since he became a Supervisor in 1999.¹²

It was not until Mr. Frare and Mr. Littlefield arrived that a question as to the amount of supervision Grievant W was providing in the parts room came into question. While unquestionably, Grievant was only providing at best minimal supervision over the parts room, this was the first time the degree of supervision he was providing was questioned. This occurred during the investigation leading to his discharge. He had no prior warning there was a problem nor was he given a chance to correct the deficiency and exert oversight over the employees in the parts room prior to the decision to discharge him. The bottom line is that while Grievant W can be faulted for his lack of supervision, the fact that it occurred for so many years without anyone questioning it mitigates the severity of his failure.¹³ It is simply unfair to allow this to go unchecked for years and then discharge him with no prior warning.

Charge 3 alleges that Grievant W allowed staff to make purchases in violation of State Ethics Laws. The Employer argues that Grievant W was aware of the possible conflict of interest between Grievant S and Industrial Specialties and failed to address the issue. He testified he did not perceive any impropriety in the relationship between either of the employees in the parts room and the vendors with whom they dealt. Like with the finding on this issue regarding

¹² The Employer introduced an agenda for a training program in 2007 involving FASTER. It listed both Grievants as instructors. Grievant W testified that Mr. Moller and Grievant Sweet were to do the training and Moller was called away. Grievant W left the training to Grievant S as he felt unqualified to discuss the topic. There is no evidence that this was not so. This would seem to affirm his contention that his knowledge of how the parts room worked was limited.

¹³ The Union cited Monterey County 115 LA 909 (Pool, 2001). Arbitrator Pool noted that the Employer in that case: "did not communicate to him its expectations. He was not given notice of unacceptable behavior." Other than the one item in the job description, that holds true here as well.

Grievant S, if Grievant W knew of a violation of State Ethics Laws and was complicit in it, the charge would be extremely serious.

This charge starts from the premise that Grievant W was aware that the prices being paid for goods from Industrial Specialties and Affordable was higher than the prices that could have been obtained elsewhere. As noted above, Grievant W had never tracked pricing and relied on others to do that. While he acknowledged that concerns had been raised about Grievant S and his relationship with vendors at the time of the audit, there was no finding of wrong doing. There is no question that had Grievant W been more vigilant he would have discovered the problem. However, the charge is he intentionally allowed a conflict of interest to exist. The reality was that this was not an issue he even considered. As he testified, he felt Moller and Petit when he was there were watching the situation. As it turns out, nobody was. None of this excuses his failure to supervise or see the problem, but his failure was due his negligence not a willful intent to allow it to occur. While it could be that his involvement might have been more than what is detailed here, the evidence simply does not sufficiently prove that he knew and ignored rather than simply failed to see an ethical violation. The lack of motive for him to be involved in this conflict is also significant. Whereas Grievant S had a motive, there is no evidence Grievant W did. What did he gain from these purchases? There is no evidence he was friends with these vendors. The Arbitrator finds the State has not met the heavy burden on this point that it faced.

- 5 On December 16, 2006 authorized purchase of \$161.50 worth of paper plates and plastic from utensils from Industrial Specialties for personal use.

Position of the Employer

Grievant W approved the purchase of paper goods for employees. He knew purchases for personal use of these paper products was not approved. He contends the purchases were made for a meeting at the Compound, but provided no evidence to support the claim and this testimony was contrary to the response he made to the initial charges.

Position of the Union

Grievant W was not questioned about the paper plates before he was disciplined. He testified that the paper goods purchased was not for the break room, but to host a training and that he was required to get them for that training. He noted it was purchased from Industrial Specialties because they had an account and he had no way of paying for them if bought directly from a store. He did what his Supervisor directed him to do and cannot be faulted.

Discussion

The purchase that is being questioned occurred almost two years before the investigation. In reviewing the notes from the interview of Grievant W, this issue is not mentioned. Grievant W testified that he knew personal purchases for the break room were not permitted. He testified, without contradiction, that the purchase was for a training to be held at the Compound. Refreshments were going to be served. Industrial Specialties was able to provide the paper products needed. The total purchase price was small and well under the limits. The Arbitrator can find no basis for sustaining this charge.

- 9 Disapproval Leave of an employee for his honeymoon trip was arbitrary and based on personal reasons rather than business reasons

Position of the Employer

Grievant W arbitrarily denied leave to Mr. Biscay. He argues that he did not see the leave slip the day Biscay submitted it. His denial is not credible. The testimony of Biscay was far more credible on this point and it showed the denial of the leave was arbitrary.

Position of the Union

Grievant W's account regarding the leave slip is more plausible than the employee's. Grievant W assigned a multi-day task to the employee and clearly would not have done so had he known he was going to take leave the next day.

Discussion

Jerry Biscay requested leave. Grievant W denied the request and the subsequent leave was listed as leave without pay. The Employer contends that it was because of a personality conflict between Grievant and the employee and the fact that Biscay was going on a honeymoon with Grievant's former wife that the leave request was denied. Grievant W maintains that he did not see the leave slip submitted by the employee until the day the leave started and he realized the employee was not there. He stated it was then that he questioned Mr. Vaughn about Biscay's whereabouts and told he was on leave. At that point, he went to his office and he testified he found the slip in the bottom of his in-box. He noted requests are supposed to be placed in the top bin of the in-box and not the bottom. Biscay maintains the leave slip was submitted a

week before the leave as required and placed properly.¹⁴ Both individuals contend that Mr. Moller was a witness to when the leave slip was written and could support their position.

Mr. Vaughn testified at the hearing at the behest of the Employer. He was not questioned about this incident during his testimony.¹⁵ He did not deny that Grievant W came to him and asked the whereabouts of the employee. Grievant's questioning the absence at that juncture would lend support to his argument he lacked prior knowledge of the absence. Even if the employee put the slip in when he says he did, there is no evidence that Grievant saw it. The Arbitrator simply cannot infer from the evidence that Grievant W knowingly withheld approval for personal reasons. That is not to say it did not occur, only that the evidence is not sufficient to warrant that conclusion. The burden is on the Employer and raising a suspicion is not the same as proving a fact. Consequently, the Arbitrator cannot sustain this charge.

Sufficiency of the Investigation

The Union contends the investigation performed was insufficient. It maintains that Grievants were not interviewed until the end of the process and the Employer failed to interview critical witnesses. The critical witnesses it contends were former employees and employees of the involved contractors. It

¹⁴ The Employer initially questioned this unwritten 7-day policy. Mr. Littlefield testified that he thought it was a good policy. The Employer no longer disputes the requirement, although it does maintain that it was inconsistently enforced. An allegation denied by Grievant. Documents were offered to show others had put a written request less than 7 days in advance and they had been granted. Grievant W testified, again without contradiction, that the employees had verbally made the request on a timely basis and that was sufficient.

¹⁵ See Davidson Transit Organization 126 LA 481 (Luire, 2009) (failure to ask a pertinent question warranted an adverse inference).

also contends that the failure to record the interviews or have the witnesses sign the notes from the interview was improper.

The Employer did interview over 20 employees. The Grievants were interviewed at the end of the process. They were interviewed after all of the documentation was obtained. They were then given in March an opportunity to respond to the specific charges. This was prior to their discharge. The Arbitrator cannot fault the Employer for getting all of the information prior to talking to the Grievants. That is not unusual. The fact that they were then given a chance to respond to all allegations prior to the final decision being made also provided them the due process to which they were do. The Union argues the outcome was a foregone conclusion by the time they were interviewed and thus no real due process was provided. There was insufficient evidence to support the proposition that it was a done deal by the time the interviews occurred. There may be a suspicion that is so, but as was just noted above, suspicion is not fact. The Arbitrator rejects this argument.

The Employer hired an investigator. While recording the interviews would have been beneficial, the failure to record them is not a flaw in the investigation. Mr. Wilson was a private investigator and he could properly make notes as to what was said. Furthermore, this Arbitrator during the hearing indicated that the notes were only accepted to show the process followed, not for the truth of the statements. The Arbitrator cannot sustain this contention.

There is validity to the contention that the Employer should have interviewed its former employees, if possible. Mr. Garcia's name came up repeatedly and his understanding of what was done would have been

beneficial. Similarly, the owner of Industrial Specialties might have shed light on how he got the business and his relationship with Grievant S. On the other hand, both Grievants could have submitted a statement from these people when responding to the charges. They could have subpoenaed Garcia, especially since he was the one on whom they placed responsibility for much of what was done. They did not do that. Given the research that was done by the Employer and the number of interviews that were conducted the Arbitrator cannot find a sufficient flaw in the investigative process to utilize that as a reason to lessen the impact of the findings made here. While there might be some merit to these claims, any failure on the part of the Employer was not sufficiently glaring to warrant modification of the otherwise end result.

Right to Union Representation

The Union argues that the Grievants were denied the right to Union representation. It maintains that by the time the Grievants were interviewed it was clear that the Employer "had already concluded that (Grievants) were culpable." It believes they should have been told that discipline was possible and told they were entitled to Union representation prior to being interviewed. The Grievants must have known by the time they were interviewed that questions had been raised about their practices. They did not ask for Union representation when interviewed. Had they asked and been told no there would be merit to the argument. The Employer certainly could have told them of their right when it interviewed them, but the obligation was on the Grievants to request it and they did not do so. They were given the opportunity for

representation in the March letter, which preceded the discharge. They chose to hire private attorneys as their representatives, but they had representation.

Conclusion

Grievant S

There was no question that Grievant S was derelict in his duties. He never checked prices and ignored the manual. His attempt to defend himself by arguing he simply did what he was told only goes so far. He was the Purchasing Agent and it was his responsibility to follow the Manual. On the other side of the coin, he was a long-term employee and had no prior discipline or warnings about his shortcomings. Under those circumstance, if this was all there was, the Arbitrator would not sustain the discharge. To discharge an employee who has been doing what he had doing for so long without any prior warning would be grossly unfair.

The problem is that this failure is coupled with the more difficult issue to reconcile. The beneficiaries of his failure to perform his duties were people he knew well. The relationship between him and the owner of Industrial Supplies has been discussed extensively above. A Purchasing Agent must avoid not only an impropriety, but the appearance of impropriety. Grievant's relationship with the owner and the absence of any research as to the prices being paid for the products being purchased rightly caused concern with the Employer. It cost the State thousands of dollars. For this violation, advance warning is not a prerequisite for discharge. Grievant's denial of any responsibility for his actions and his denial of his relationship with the vendor in question makes his acts even more egregious. The Arbitrator when considering this violation coupled

with the other issues raised and when taken with Grievant's inability to recognize there was a problem with his actions finds that he must uphold this discharge. The acts are too serious for one in his position of responsibility for this Arbitrator to rule otherwise.

Grievant W

The Arbitrator has not found the ethical issues that were the cornerstone of the above finding present here. That Grievant W totally failed in his obligation to supervise the parts room is beyond question. That his inattentiveness to this duty enabled many of the problems in the parts room to go unchecked is also undeniable. He cannot go unpunished for these failures.

Grievant W is a long-term employee with no prior discipline. Equally as important, he never received any counseling or warnings that there was a problem with what he was doing and had been doing for so many years. Mr. Garcia never raised an issue with him. Mr. Littlefield did not raise the issue until the investigation that led to his termination. The Employer failed to give him notice and an opportunity to correct his behavior. There is nothing to indicate Grievant W is incapable of correcting his behavior now that he is on notice. That is prime factor considered by arbitrators when considering reinstatement. Discharge for a first offense should only occur when the acts are egregious. That was true for Grievant S, because of his ethical shortcomings. That is not true for Grievant W. He was negligent without a doubt, but negligence, even gross negligence alone in this instance under these facts is not enough to sustain the discharge. The Arbitrator shall set aside the discharge and replace it with a 120 calendar day suspension.

AWARD

1. The grievances are sustained in part and denied in part.
2. The grievance of Grievant S is denied.
3. The grievance of Grievant W is sustained in part and denied in part.
4. The Discharge of Grievant W is set aside and replaced with a 120 calendar day suspension.
5. Grievant W shall immediately be reinstated and made whole from the date of his discharge until reinstated less the period covered by his suspension.
6. The Arbitrator shall retain jurisdiction for no less than 90 days to resolve any issues regarding the implementation of this Award.

Dated: August 25, 2010

A handwritten signature in cursive script, appearing to read "Fredric R. Dichter", is written over a horizontal line.

Fredric R. Dichter,
Arbitrator