

In the Matter of the Arbitration)
)
 between)
)
 WASHINGTON FEDERATION OF)
 STATE EMPLOYEES)
 (Union))
)
 And)
)
 WASHINGTON STATE DEPARTMENT)
 OF LABOR AND INDUSTRIES)
 (Employer))

OPINION AND AWARD
CAROLYN SUE SLUSHER
GRIEVANCE
AAA No. 75 390 00350 11

BEFORE: Kathryn T. Whalen, Arbitrator

APPEARANCES:

For the Union:

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HEARING: June 13, 2012

RECORD CLOSED: July 27, 2012

AWARD ISSUED: August 21, 2012

I. INTRODUCTION

Washington State Department of Labor and Industries (Employer or Department) revoked a settlement agreement entered into pursuant to the provisions of the Collective Bargaining Agreement (CBA) between the Employer and Washington Federation of State Employees (Union or WFSE). Specifically, the Employer refused to modify a demotion and disciplinary letter issued to Carolyn Sue Slusher (Grievant). On April 25, 2011, the Union filed a grievance alleging that the Employer violated the parties' settlement agreement. The Union requested that the Employer abide by the terms of the settlement agreement and return Grievant to the position identified in it.

The parties could not resolve their dispute and submitted it to arbitration. The American Arbitration Association administered this case. The Arbitrator was selected pursuant to AAA procedures.

A hearing in this case was held on June 13, 2012, in Olympia, Washington. It was reported and transcribed by Rebecca Lindauer, certified court reporter of Dixie Cattell & Associates, Olympia, Washington. The parties were accorded a full opportunity to present evidence and argument in support of their respective positions.

The parties agreed that should the Arbitrator sustain the grievance, she could retain jurisdiction for 60 days to resolve disputes, if any, concerning the remedy awarded. The parties elected to file post-hearing briefs. The Arbitrator closed the record upon receipt of those briefs.

II. ARBITRABILITY

Prior to hearing, the Employer filed a motion to dismiss the Union's grievance for lack of arbitrability. The Union opposed the Employer's motion. The parties submitted briefs, their CBA and documents relevant to the issue of arbitrability.

After reviewing and considering the parties' submissions, on June 6, 2012, I issued a ruling that denied the Employer's Motion to Dismiss. I concluded that the Employer did not overcome the presumption of arbitrability.

I found that the Union's April 25 grievance, on its face, alleged violations of Articles 27.1, 28.3 and 29 of the CBA and breach of the settlement agreement. I concluded the grievance was arbitrable since the settlement agreement arose out of and was entered into pursuant to Article 29 (Grievance Procedure) of the parties' CBA. See Elkouri & Elkouri, *How Arbitration Works*, 269 n. 369 (6th Ed. 2003).

In my ruling, I limited the scope of the arbitration hearing. I advised the parties I would not consider the underlying merits of the original grievance over Grievant's demotion which resulted in the settlement agreement.¹ In addition, I advised them I would not consider the merits of an oral reprimand issued to Grievant which resulted in the Employer's revocation of the settlement agreement. The Union filed a separate grievance, and exhausted the contractual grievance procedure, concerning that oral reprimand.²

¹ Article 29.21 of the CBA provides: "If terminated, resolved or withdrawn, a grievance cannot be resubmitted." Joint Ex. 1.

² Article 27.9 of the CBA provides: "The Employer has the authority to impose discipline, which is then subject to the grievance procedure set forth in Article 29. Oral reprimands, however, may be

I advised the parties that my focus in this proceeding would be to interpret the relevant terms of the settlement agreement as identified on the Union's April 25 grievance and its corresponding requested remedy.

III. ISSUES

The parties agreed to the following statement of the issues:

Did the Department of Labor and Industries violate the 2009 to 2011 CBA by its interpretation and application of the terms of the October 28, 2010, settlement agreement entered into between the Grievant, Ms. Sue Slusher, and the Department? If so, what is the appropriate remedy? Transcript (Tr.) 5.

IV. CONTRACT 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.

ARTICLE 29 GRIEVANCE PROCEDURE

29.3 Filing and Processing * * *

Step 5 – Arbitration

- D. Authority of the Arbitrator
1. The arbitrator will:
 - a. Have no authority to rule contrary to, add to, subtract from, or modify any provisions of this Agreement;

processed only through the agency head step of the grievance procedure or, for DSHS and DOC grievances sent to the Grievance Resolution Panel, through the grievance panel only." Joint Ex. 1.

b. Be limited in his or her decision to the grievance issue(s) set forth in the original grievance unless the parties agree to modify it.

* * *

SETTLEMENT AGREEMENT

* * *

B. L&I AGREES to items B1 through B3 providing there is no pending disciplinary action or Ms. Slusher is under investigation for allegations of misconduct:

1. That the disciplinary letter dated March 30, 2010 will be modified to reflect a demotion to an Office Assistant 3 effective April 16, 2010 to April 15, 2011 (Salary Range 31). The demotion will be modified to a Workers Compensation Adjudicator 1 effective April 16, 2011 (Salary Range 44). The first paragraph will read as follows:

This is official notification of your demotion from your position as a Workers Compensation Adjudicator 2 with the Department of Labor and Industries. You will be demoted to the classification of Office Assistant 3 effective April 16, 2010 to April 15, 2011, salary range 31. Effective April 16, 2011, the level of demotion will be modified to the classification of Workers Compensation Adjudicator 1, salary range 44. This disciplinary action is being taken pursuant to Article 27 of the Collective Bargaining Agreement by and between the State of Washington and the Washington Federation of State Employees (WFSE).

2. That the disciplinary letter dated March 30, 2010 will be modified on April 16, 2011 to remove all mention of untruthfulness of the employment application, including attachments.

3. That the disciplinary letter dated March 30, 2010 will be removed from Ms. SLUSHER's personnel file and placed into a legal defense file on April 16, 2013.

* * *

Joint Ex. 2.

V. FACTUAL SUMMARY

On March 30, 2010 the Employer demoted Grievant from Workers Compensation Adjudicator 2 to Office Assistant 3 effective from April 16, 2010 to April 15, 2011. The Union filed a grievance protesting Grievant's demotion. The parties mediated that grievance on October 28, 2010. As a result of mediation, the parties executed the settlement agreement at issue here. The settlement agreement was signed by representatives of the Employer and the Union, as well as the Grievant, on October 28, 2010. The relevant terms of the settlement agreement are set forth above and will be discussed later in the Analysis Section of this decision.

During the mediation process, the parties were in separate rooms. A PERC³ mediator shuttled between rooms providing information and proposals to the parties. The Employer drafted the settlement agreement that ultimately was signed by all involved. Grievant read the settlement agreement before she signed it and had some discussion with her labor representative.

At hearing, Grievant said that she remembered reviewing Section B of the settlement agreement. She reported that she was a little confused, or had questions about, the reference to pending allegations of misconduct; but they did not talk a lot about it. She understood, or expected, that she would return to the Workers Compensation Adjudicator position (series) if she was not demoted or fired; that is, as long as she did not get into serious trouble. Tr. 17-18. On cross examination, Grievant said that when she signed the settlement agreement she

³ Washington Public Employment Relations Commission.

understood that she needed to not engage in any misconduct for six months. Tr. 30-31.

By memorandum dated February 23, 2011, the Employer issued an oral reprimand to Grievant for parking in the visitor parking lot in violation of an Employer policy. According to the February 23 memorandum, Grievant previously had been told about the policy and that she was not to park there. Joint Ex. 3.

By grievance dated March 15, 2011, the Union grieved the oral reprimand claiming that the Employer's written documentation contained references to events that had no connection to the alleged incident that purported to justify the oral reprimand; and that the action was taken without just cause in violation of Article 27.1 of the CBA. Joint Ex. 7. The Union advanced the March 15 grievance through the grievance steps provided in the CBA for oral reprimands—up to and including the agency head step. Joint Ex. 7. The Employer denied the grievance. Joint Ex. 7.

Due to the oral reprimand and events identified in the Employer's February 23 memorandum, the Employer notified the Union on April 4, 2011, that it was revoking the settlement agreement and would not take the actions listed in paragraphs B.1-B.3 of that agreement. Specifically, the Employer would not modify the demotion and disciplinary letter. Grievant would remain in the Office Assistant 3 classification. Employer Ex 4.

On April 25, 2011, the Union filed the instant grievance which in part provides:

On March 30, 2010, the grievant was notified that she was being demoted from a Worker's Compensation Adjudicator 2 to an Office Assistant 3, effective April 16, 2010. This action is a violation, misapplication of [sic] misinterpretation of Articles 27.1, 28.3 and 29 of the Collective Bargaining Agreement.

The appointing authority cites an incident that occurred on October 3, 2009 in the LNI parking lot take [sic] leave without approval and not being truthful on an employment application as the basis for this discipline.

The grievant, union representative, appointing authority and HRC met on April 29, 2010 in an attempt to informally resolve this grievance. On October 28, 2010, the union, grievant, agency and OFM/LRO executed a settlement agreement to return the grievant to a Workers Compensation Adjudicator 1 on April 16, 2011.

On April 4, 2011, the agency revoked the agreement citing an investigation of misconduct which resulted in an oral reprimand on 2/23/2011. The Union is pursuing a separate grievance on that discipline.

On April 16, 2011, Ms. Slusher was not under investigation and had no pending discipline.

* * *

Specific Remedy Requested

1. Abide by the terms of the settlement agreement to return Ms. Slusher to a Worker's Compensation Adjudicator 1 on April 16, 2011.

Joint Ex. 5.

The Employer denied the grievance. Joint Ex. 6. This dispute is now properly before the Arbitrator for resolution.

VI. ANALYSIS

A. Parties' Positions

The Union argues the Employer's failure to implement the terms of the October 28, 2010 settlement agreement is an error. The Union contends the settlement agreement does not define "pending disciplinary action" or "under

investigation for allegations of misconduct”. Grievant testified credibly that she believed an oral reprimand would not violate the settlement agreement.

The Union relies upon the implied covenant of good faith and fair dealing that is an inherent part of every contract. The Union argues the Employer’s interpretation would mean that any matter—no matter how trivial—could be defined as an oral reprimand and deemed sufficient to violate the settlement agreement. Since oral reprimands are processed only through the agency head step of the CBA grievance procedure, the Employer becomes the judge, jury and executioner; an absurd result that violates the concept of good faith and fair dealing.

The Union further argues that looking at Article B of the settlement agreement there is no date on which Grievant must have no pending disciplinary action or on which she may not be under investigation for misconduct. And, on April 16, 2011, there is no evidence Grievant was subject to disciplinary action or under investigation for any allegation of misconduct.

The Employer argues that there is nothing ambiguous or uncertain about the settlement language—it includes the requirement that Grievant have no pending discipline. According to the Employer, Grievant acknowledged that nothing in the settlement agreement limits the definition of disciplinary action to demotions or dismissals (serious discipline) and Grievant admitted that she understood she was not to engage in any misconduct for six months after signing the settlement agreement. Tr. 28; 30-31.

Further, argues the Employer, Article 27.2 of the CBA defines discipline to include oral reprimands and the Union filed a separate grievance over the one received by Grievant.

B. Discussion and Findings

I find the Employer did not violate the parties' 2009-2011 CBA by its interpretation and application of the terms of the October 28, 2010, settlement agreement. The following is my reasoning.

The basic goal of contract interpretation is to determine and give effect to the intent of the parties as expressed in the written contract. Arbitrators first look to the contract language; then to other relevant, extrinsic evidence as necessary if the contract language is ambiguous. Elkouri & Elkouri, *How Arbitration Works*, 447- 448 (6th Ed. 2003).

Section B of the parties' October 28 settlement agreement provides in relevant part:

L&I AGREES to items B1 through B3 providing there is no *pending disciplinary action* or Ms. Slusher is under investigation for allegations of misconduct: * * * (Emphasis added.)

There are two primary questions for me to decide in order to resolve this dispute about the interpretation of the settlement agreement: (1) whether "disciplinary action" was intended to include oral reprimands and (2) the intended meaning of "pending" disciplinary action.⁴

With respect to "disciplinary action", on its face, the settlement agreement contains no qualification or limitation to these terms. There is no express

⁴ At hearing, the Employer admitted that Grievant was not under investigation on April 15, 2011. Tr. 53. (Testimony of Robert Bouffard).

reference to “serious” discipline or to demotions/dismissals as believed by Grievant.

The Union urges that the Employer, itself, is not entirely sure of the intended meaning as demonstrated by two Employer witnesses at hearing who had somewhat different interpretations—former Labor Relations Manager Robert Bouffard and Appointing Authority Janet Morris. According to the Union, their testimony together with Grievant’s understanding shows that, at best, there was only a limited meeting of the minds on the meaning of disciplinary action.

I am not persuaded by the Union’s arguments. As explained above, the plain language of the settlement agreement does not qualify “disciplinary action” as Grievant suggested at hearing. Minor interpretive differences at hearing between the testimony of Bouffard and Morris (who did not attend the mediation) also are not persuasive evidence in the face of the plain language.

In addition, and importantly, the express language of the parties’ CBA—Article 27.2—includes oral reprimands in the definition of discipline. The Union’s interpretation of the settlement agreement is inconsistent with this express CBA language. The Union urges an interpretation that is not within my authority as it would add to and/or modify the language of both the settlement agreement and CBA. See Joint Ex. 1, Article 29.3 [Step 5].

Because of the express language of CBA Articles 27.2 and 27.9, I also am not convinced by Union arguments that the Employer acted inconsistent with its duty of good faith and fair dealing. The Employer and the Union have expressly agreed that oral reprimands are discipline and they agreed to the

specific grievance steps available to challenge an oral reprimand. The Union exhausted those steps here. I find nothing in the record to indicate that the Employer's actions lacked good faith or fair dealing in this contractual context.

To summarize: Neither the language of the CBA nor the settlement agreement support the Union's interpretation, which would qualify "disciplinary action". Limited evidence elicited at hearing of a qualified or uncertain meaning of "disciplinary action" is insufficient to overcome express contract language. I find that "disciplinary action" as referred to in the settlement agreement was intended to include oral reprimands.

In terms of the meaning of "pending", I am convinced by the plain language of the settlement agreement along with Grievant's testimony that "pending" disciplinary action was intended to encompass the period from October 28, 2010 through April 15, 2011.

In interpreting the settlement agreement, it must be read as a whole and its terms read together in order to determine its meaning. Elkouri & Elkouri at 462-463. That agreement states expressly that Grievant's demotion was to be effective from April 16, 2010 to April 15, 2011. If the terms of Section B were met, her demotion would be modified effective April 16, 2011. It was signed by all parties on October 28, 2010.

Further, Grievant admitted that at the time she signed the agreement she reviewed it (including Section B) and understood she was not to engage in misconduct for six months (April 2011). She received the oral reprimand on February 23, 2011—well within that designated period.

C. Conclusion

For all the foregoing reasons, I conclude that the Employer did not violate the 2009 to 2011 CBA by its interpretation and application of the terms of the October 28, 2010, settlement agreement entered into between the Grievant and the Employer. In arriving at this decision, I have considered all of the evidence, authorities and arguments submitted by the parties even if not specifically mentioned in this decision. My decision is based upon the grounds set forth above.

In light of my findings and conclusions, I will enter an award dismissing the Union's grievance. Pursuant to Article 29.3E of the parties' CBA, my fees and expenses will be shared equally by the parties.

