

BEFORE ARBITRATOR ROSS RUNKEL

In the Matter of the Arbitration)
)
 between)
)
WASHINGTON STATE PATROL)
TROOPERS ASSOCIATION)
)
 and)
)
WASHINGTON STATE PATROL) March 24, 2011

Consolidation of Cases grievance

ARBITRATOR'S OPINION
AND AWARD

HEARING: December 15, 2010
 Tacoma, Washington

HEARING CLOSED: February 28, 2011

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INTRODUCTION

This matter came before me as arbitrator selected by the Parties to resolve a dispute arising under their collective bargaining agreement. A hearing was held on December 15, 2010 in Tacoma, Washington. Each Party presented witness, testimony, and arguments. The Parties submitted post-hearing briefs, and the hearing closed February 28, 2011 upon receipt of the briefs.

OPINION AND AWARD

1. ISSUES

The first issue was raised by the Employer:

1. Whether this case is arbitrable.

The second issue was raised in the grievance:

2. Whether the Employer violated the Preamble and Articles 20.1, 20.4, and 21.1 of the Parties' collective bargaining agreement by refusing the Association's request that eight disciplinary appeals be consolidated for a single hearing before a single Disciplinary Review Board, and, if so, what is the appropriate remedy.

2. COLLECTIVE BARGAINING AGREEMENT

The Collective Bargaining Agreement contained the following relevant provisions:

PREAMBLE

Pursuant to RCW 41.56, this Agreement is entered into by the State of Washington and the Washington State Patrol (WSP or "Agency") as the authorized representative of the State, hereinafter referred to as the "Employer," and the Washington State Patrol Troopers Association, referred to as the "Association."

This Agreement is made and entered into for the purpose of setting forth the mutual understanding of the parties on mandatory subjects of bargaining as specifically addressed in this Agreement. Furthermore, both the Employer and the Association are committed to equitable, efficient, fair, appropriate, and proper operation of the Washington State Patrol in order to enhance the health, safety, and welfare of all bargaining unit members, while fulfilling the mission of the Agency in its service to the citizens of the State of Washington.

ARTICLE 20 DISCIPLINE AND DISCHARGE

20.1 Discipline

- A. The parties are committed to resolving disciplinary matters involving bargaining unit employees in a manner that is expeditious, fair, reduces the amount of formal process and is designed to resolve issues at the lowest possible level. The Employer will continue to use the Non-Investigative Matters (NIM) and Settlement Agreement Process as mechanisms for accomplishing this goal.
- B. With the exception of the suspension or demotion of probationary employees pursuant to RCW 43.43.060, the Employer will not discipline any employee without just cause.
- C. Discipline includes suspensions, demotions, and discharges. Written reprimands and transfers as a result of a disciplinary sanction are not considered discipline for purposes of appeal to a Disciplinary Review Board (DRB) or Trial Board. Written reprimands may be appealed only through Step 2 of the grievance procedure; however employees may provide a written response in accordance with Article 17.4 B. An employee who does so will not be prohibited from challenging the content of the reprimand in a future disciplinary appeal. Transfers as a result of a disciplinary sanction may be appealed through the grievance procedure. Corrective actions including counseling and oral reprimands are not subject to appeal through this Article or the grievance procedure; however employees may provide a written response in accordance with Article 17.4 B.
- D. Except as set forth in this Agreement, the Employer has the authority to determine the method of conducting investigations, including the procedures contained in the

Administrative Investigation Manual; however, prior to implementation of changes to any term or provision of the Regulation Manual or the Administrative Investigation Manual concerning internal investigations, the Employer will send copies of the proposed changes to the President of the Association. The Employer will consider any comments or concerns of the Association before finalizing and publishing the changes. This Section shall not be interpreted to restrict the Association's right, under state law, to bargain the decision and/or impact of changes in subjects of bargaining where the Employer is compelled to negotiate over the matter by state law.

- E. Upon completion of an investigation, the appointing authority shall review the relevant documents and make a finding as to whether sufficient facts exist to prove or disprove the allegation(s). If the appointing authority finds that the allegation(s) are proven, he/she shall consult with the Commander of the Office of Professional Standards (OPS). In determining the appropriate discipline, the seriousness of the offense, the individual employee's history, and the range of sanctions for similar violations will be considered. The disposition of charges shall fall in one (1) of the following categories: proven, undetermined, unfounded, exonerated, policy error, or unintentional error.
- F. If, at any time, the OPS Commander and the employee's appointing authority cannot resolve any matters concerning the finding(s) or the proper level of discipline, they shall meet with the appropriate bureau chief/director. The bureau chief/director shall facilitate a resolution.
- G. The Employer shall not institute numeric standards of performance without discharging its obligations to bargain under RCW 41.56.
- H. Range of Sanctions
The following matrix will determine the possible range of sanctions for proven allegations.

Level	First offense	Second offense	Third offense
Minor	Counseling - written reprimand	Counseling - written reprimand	Written reprimand
Moderate	Written reprimand - Two (2) working day suspension	One (1) working day suspension - Five (5) working day suspension	Three (3) working day suspension - Ten (10) working day suspension
Major	Three (3) working day suspension - termination	Six (6) working day suspension - termination	Eleven (11) working day suspension - termination

1. New information discovered in the investigative process could alter the final sanction or result in an employee being served with new charges.
2. Depending upon the employee's disciplinary history, the appointing authority has the option of pre-determining that the new allegation(s) would fall within the first offense of the next higher level if there has been like or similar misconduct within the prior twelve (12) months. For example, if an allegation would normally be within second or third offense but prior sanctions warrant, it can be placed under the first offense at the next higher level (minor to moderate or moderate to major).
3. More than three (3) violations within a severity level will automatically move any subsequent violations to the first offense category in the next higher level.
4. Multiple violations involving the same incident will each receive a determination, but only one (1) sanction will be issued for the incident.
5. The OPS Commander and appointing authorities have the latitude and are encouraged to explore negotiated settlements such as last chance agreements, suspended sentences, or other innovative approaches. The Employer and the Association may agree to a sanction outside the range on the matrix as a part of a non-precedential settlement agreement.

- I. The Employer has the authority to impose discipline, which is then subject to the appeal process set out in Sections 20.3 and 20.4 below; except that suspension or demotion of a probationary employee is at the sole discretion of the Employer and may not be appealed through the processes in this Article or the grievance procedure of this Agreement.
- J. In lieu of serving a suspension, employees may either:
 - 1. Substitute accrued vacation and/or compensatory time for any or all of the suspension on an hour for hour basis up to the amount of fifteen (15) days in a three (3) year period. An employee who so chooses shall continue to work, but the amount of time being substituted for the suspension shall be deducted from the appropriate leave balance. Upon substitution the discipline shall be final and no appeal shall be filed; or
 - 2. Substitute a reduction in pay for the suspension. The amount of the total pay reduction will be calculated by multiplying the number of hours the employee would be suspended by the applicable pay rate. The portion of such total amount by which the employee's pay will be reduced during each pay period will be mutually agreed to by the employee and the Employer.

20.4 Disciplinary Review Board (DRB)

- A. The Association may not appeal a discipline to the DRB unless the employee subjected to discipline has executed a waiver of rights to elect a Trial Board.
- B. If the Association elects to appeal to the DRB, the notice shall be filed and served with the Chief's office within ten (10) business days of receipt of the notice of disciplinary charges.
- C. If the Association elects the DRB, the discipline will be imposed immediately after the time limit in Subsection 20.4 B has expired.
- D. DRB Members
Within thirty (30) calendar days after this Agreement is executed, the parties shall submit to each other, at the same time, a list of two (2) names for the DRB. The two (2) names submitted by the Association will consist of members of the

bargaining unit. The two (2) names submitted by the Employer will consist of employees with the rank of RCW lieutenant and above. The names submitted must be current members of the Washington State Patrol who will be willing to serve and who will act fairly and impartially on the DRB. Each party will promptly notify the other of any changes in their named members of the DRB.

E. Chair

The Chair of the DRB shall be a neutral third party jointly selected by the Employer and the Association. The selection of the neutral third party shall occur whenever a case is referred to the DRB. The Chair shall be chosen from the following list: (1) Thomas Levak, (2) Joseph Duffy, (3) Eric Lindauer, (4) Michael Beck, (5) Janet Gaunt, (6) Shelly Shapiro, and (7) Ross Runkel. If the Employer and the Association are unable to agree on a neutral third party, one (1) shall be selected by the alternate-strike method from the list of seven (7) neutrals in the following manner: Five (5) names will be selected by representatives of the parties from a Washington State Patrol campaign hat. Each party will have two (2) strike offs from the five (5) names selected. The remaining name shall be the neutral chair. The employee will then be notified of the names of the panel members. The Chair shall conduct the hearing. Scheduling of hearings and decisions on continuances shall be made by the entire DRB. The Chair shall observe but not participate in DRB deliberations until a tie vote is indicated. All hearings must be completed within six (6) months of the selection of the Chair.

F. Exclusions

No member of the DRB shall have been involved in any previous or current disciplinary action concerning the appealing employee. Any DRB member may excuse himself or herself because of bias, prejudice, or other reason, and is subject to challenge for cause. The Chair of the DRB shall resolve all challenges for cause. In the event that a member is unable to participate, either party can elect to proceed with the remaining members or choose a replacement member. If the replacement member is necessary, the party needing the replacement member shall name the replacement DRB member.

- G. Record
The record before the DRB shall be developed pursuant to Chapter 13.00.080 and 13.00.150 of the Regulation Manual, except as provided herein. Discovery shall be pursuant to Chapter 13.00.160 of the Regulation Manual. Charges shall be proven by a preponderance of the evidence. The proceedings before the DRB shall be tape-recorded.
- H. Hearings
The Chair of the DRB shall act as the presiding officer and shall make rulings on evidence. All DRB members may ask questions of witnesses. Evidence shall be admitted as to whether written regulations of the Employer contained in the Regulation Manual were violated; but the DRB is not the forum to contest the wisdom or efficacy of such regulations. The parties shall be encouraged to stipulate to facts.
- I. Work Record
The work record of the employee may be admitted only to assist the DRB in fixing sanctions.
- J. Other Discipline
Discipline in similar cases shall be relevant to the fixing of sanctions.
- K. Costs
The parties will split the fees for the services of the Chair of the DRB, the costs of the hearing facility, and any related costs. Witnesses shall be compensated in accordance with state law. Each party will pay its own attorney fees and any other expenses of its representatives.
- L. Finality
The decision of the DRB, which shall be rendered in writing no later than thirty (30) calendar days after the close of the hearing, shall be final and binding on the parties, subject to reversal only if the DRB has made an error of law under RCW 34.05.
- M. Jurisdiction
The DRB shall not have the authority to interpret violations of constitutional or statutory provisions.

- N. Association's Duties
Consistent with its duty of fair representation, the Association may elect to represent a member before the DRB.

ARTICLE 21 GRIEVANCE PROCEDURE

21.1 Purpose

The purpose of this grievance procedure is to establish effective procedures for the fair, expeditious, and orderly resolution of grievances at the lowest possible level. Within this spirit, the following procedure is not to substitute or in any way inhibit open communications between the employee and supervisor. In addition, nothing in this Article shall prevent the Association President from informally discussing matters of concern to the Association with the Chief.

* * *

21.3 Definition

A grievance is an allegation by an employee, or by a group of employees (with respect to a single common issue), or by the Association, involving the meaning, interpretation, or application of the express provisions of this Agreement.

* * *

21.6 Procedure

Step 1

- A. * * * The grievance shall state the facts of the grievance, the date on which the incident occurred, the Article and Section of the Agreement alleged to be violated, and the remedy sought. * * *

Step 2

If the grievance is not resolved at Step 1 the grievant and/or Association may present it in writing to the Chief within twenty (20) calendar days after the response specified in Step 1 is received. The Chief or the Chief's designee shall schedule a hearing with the Association and the grievant to discuss the grievance. The

grievant's participation shall not be mandatory but shall be strongly encouraged. The WSP Labor and Policy Advisor, in consultation with the Chief, shall attempt to resolve the grievance after considering the information provided by the grievant and Association. The Chief or designee shall respond in writing within twenty (20) calendar days after the hearing.

Step 3

* * *

- B. * * * The arbitrator shall only consider and make a decision with respect to the specific issue submitted and shall have no authority to make a decision on any other issue not so submitted to the arbitrator. In the event the arbitrator finds a violation of the terms of this Agreement, the arbitrator shall fashion an appropriate remedy. * * * The decision shall be based solely upon the arbitrator's interpretation of the meaning or application of the express terms of this Agreement to the facts of the grievance presented.
- C. More than one (1) grievance may be submitted to the same arbitrator if both parties mutually agree in writing.

* * *

21.10 Group Grievances

The Association may file a group grievance without mutual agreement at Step 3 of the grievance procedure within fifteen (15) calendar days after the grievants become aware, or should have become aware, of its occurrence. Such grievance shall identify the class of employees covered by the grievance, the date on which the incident occurred, the Article and Section of the Agreement alleged to be violated, the facts of the grievance, and the remedy sought. The Employer's obligation to respond to the grievance shall not begin to run until the Association submits to the Employer a list of the employees covered by the grievance. If the Association does not submit this information within sixty (60) calendar days of the filing of the grievance, the grievance is deemed to be withdrawn. The Employer's potential liability extends only to the named class. Failure to identify the facts of an employee's grievance constitutes withdrawal from the group grievance of that employee. A group shall be defined as five (5) or more employees. The Employer and the Association shall fully cooperate on the identification of the individual members of the class. Only one (1) employee from the group may attend in paid status in accordance with Section 21.9,

Release Time, unless more than one (1) employee is necessary in order to completely present the facts through the group grievance process, and then only long enough to present the testimony.

3. SUMMARY OF FACTS

This case arises because the Employer refused the Association's request that eight disciplinary appeals be consolidated for a single hearing before a single Disciplinary Review Board.

The Association represents all fully commissioned employees of the Washington State Patrol through the rank of Sergeant. On October 13 and 14, 2008 the Employer served Internal Incident Reports upon eight Troopers and Sergeants, notifying them that they were under investigation for allegedly obtaining fraudulent college degrees and using those to qualify for enhanced pay. The Employer also notified these eight employees that they were subjects of criminal investigations involving the same allegations, and notified each of these eight employees that they had been administratively reassigned pending the outcome of the investigations. The administrative investigations were placed on hold pending the outcome of the criminal investigations, and on February 2, 2009 the Thurston County Prosecutor announced that he would not file criminal charges in these cases, and the Employer began its administrative investigation. On July 31, 2009 the Employer issued Administrative Insights (preliminary findings and recommended discipline) regarding each of the eight employees, finding misconduct and recommending discharge. Each employee requested a *Loudermill* hearing, and these were scheduled and then rescheduled, and held

during the last half of September 2009. The Employer took each employee off administrative reassignment on November 2 and assigned them to refresher training on November 3-5.

The Employer issued final determinations to three employees (all Sergeants) on November 13, 2009 and to five employees (all Troopers) on December 4, 2009. In each of these the Employer found that two allegations (Rules of Conduct and Employee Conduct) were proven and one allegation (Code of Ethics-Officers (F) Integrity) was undetermined. Penalties were all suspensions, ranging from three to ten days.

Following the procedures in Article 20, the Association advanced all eight cases to be appealed to a Disciplinary Review Board (DRB). The Association requested that all eight cases be heard by a single DRB, and the Employer refused the request. The Association filed a grievance under Article 21 claiming that the Employer was in breach of the collective bargaining agreement by refusing the consolidation request. The grievance went through the Article 21 steps and now is before this arbitrator for decision.

4. SUMMARY OF THE PARTIES' POSITIONS

A. Position of the Association.

The Association's position is that the dispute is arbitrable, the arbitrator has the authority to compel consolidation, and the plain language of the collective bargaining agreement compels consolidation.

B. Position of the Employer.

The Employer's position is that the dispute is not arbitrable, and that nothing in the collective bargaining agreement compels consolidation.

5. ARBITRABILITY

A. Introduction.

The Employer's position is that this case is not arbitrable due to the Association's refusal to engage in the grievance process, specifically, that during the Step 2 meeting the Association refused to explain how there was a violation of the collective bargaining agreement. The Employer argues that the Association failed to provide necessary information so the Parties could resolve their dispute at the lowest possible level, and that this was a failure to participate in good faith which has prejudiced the Employer. The Association's position is that the Association did "discuss the grievance," that there is no contractual requirement to explain how the collective bargaining agreement was violated, that the collective bargaining agreement does not contain a penalty for failure to discuss, and that the Employer waived its right to insist on strict compliance by waiting until the arbitration hearing to raise the question of arbitrability.

B. Discussion.

The collective bargaining agreement provides for a Step 2 meeting, which was held on February 16, 2010. The meeting was attended by Trooper Pillow (the Association's President) and Ms. Nicpon (the Employer's Labor and Policy Advisor). It is clear that Ms. Nicpon asked how the Employer's position violated or

was a misinterpretation of the contract and which express provisions of the contract Pillow perceived were violated. Trooper Pillow made it clear that the Association would not provide the requested explanation because that would only assist the Employer in preparing for arbitration.

The Employer objects to what it calls the litigious approach of the Association, as illustrated by the Association's earlier request to skip the initial grievance steps and proceed directly to arbitration and by withholding any explanation of exactly how the Employer violated the collective agreement. The Employer points out that Section 20.1 itself has over 17 separate paragraphs covering a large number of topics. What the Employer wanted was a more detailed explanation of the Association's legal position, such as the exact words being relied upon.

Section 21.1 says the purpose of the grievance procedure is "resolution of grievances at the lowest possible level." Section 21.6 Step 1 of the grievance procedure requires that a written grievance state the facts, the date, "the Article and Section of the Agreement alleged to have been violated," and the remedy sought. There is no claim that this information was not provided.

Step 2 requires the Chief to "schedule a hearing with the Association and the grievant to discuss the grievance," and requires the Labor and Policy Advisor to "attempt to resolve the grievance after considering the information provided by the grievant and the Association." Nothing in Step 2 expressly mandates that the Association do anything. At the most, there is an implied duty for the Association to "discuss the grievance." It is clear that the Association did discuss the grievance at the Step 2 meeting and had provided the Employer with information

prior to the meeting. The Employer was fully aware of what the Association wanted, the non-legal reasons for the Association's position, and "the Article and Section of the Agreement alleged to have been violated."

What the Employer seeks is a requirement that the Association explain in greater detail its analysis of legal position, as by taking the citation to Section 20.1 and narrowing it down. However, as regards the Association's duty to specify how it believes the Employer has violated the Agreement, Step 1 simply requires "the Article and Section." There is no express requirement that the Association be more specific about its legal argument. It is in the nature of grievance discussions that one side will want the other to be more specific, but a failure to provide greater detail of one's legal analysis - particularly in an informal meeting without lawyers - cannot be considered a failure to "discuss the grievance."

The Employer relies on general statements from authorities on arbitration relating to the importance of dealing in good faith and the importance of making full disclosure. Certainly good faith and full disclosure should be encouraged, as this leads to harmonious relationships and often helps the goal of resolving grievances at lower levels. However, these authorities do not suggest that a union's conduct of the type involved in this case constitutes bad faith, and do not suggest that such conduct should result in a grievance being nonarbitrable. Further, nothing in the collective bargaining agreement suggests that such conduct should result in forfeiture of the right to proceed to arbitration.

The Employer relies on authorities that have interpreted the National Labor Relations Act's requirement that parties bargain in good faith, and it can be assumed that Washington law has a similar requirement. None of these authorities suggests that a union's conduct of the type involved in this case constitutes bad faith. If it did, then the remedy would be found in an unfair labor practice proceeding which might lead to an order to make the desired disclosure but would not lead to a conclusion that the Association is barred from proceeding to arbitration.

C. Conclusion.

This case is arbitrable.

6. CONSOLIDATION

A. Introduction.

This arbitration has to do with the question of consolidation of eight disciplinary cases that are pending resolution under Article 20. Although it is necessary to discuss these eight cases, nothing in this Opinion should be taken as implying any view on the merits of the underlying cases.

A great deal of the arbitration hearing and the Parties' post-hearing briefs dealt with an exploration of the similarities (emphasized by the Association) and differences (emphasized by the Employer) between the eight cases.

Procedurally, the eight cases have followed approximately the same time line. Each case alleges essentially the same core facts - that the employee obtained an online degree and used that to obtain enhanced education pay - and the

same violation of regulations. The case files indicate that many individual witness' statements were used in several cases, and that a significant amount of documentation was used for all or nearly all of the cases. At the eight *Loudermill* hearings each employee took essentially the same position as to the facts. The initial recommended discipline for all eight was discharge, and for all eight that discipline was reduced to a suspension. As described by the Association, all of the cases "(a) involve similar issues, (b) were initiated at the same time, (c) were investigated both criminally and administratively together, (d) will require a substantial number of the same witnesses to be called in two or more of the cases, (e) were decided by only two decision-makers, and (f) reached the hearing stage at the same time." The Association intends to present a defense on the merits that will essentially be the same in each case.

The degrees were acquired at different times, spanning a period of ten years. Seven degrees were acquired from one institution and one from another institution, and these institutions claim different accreditation bodies. The individuals acted individually and not as part of a common plan. The discipline imposed varied: 3 days, 5 days, 7 days, 10 days. Three cases involve Sergeants (who the Employer wishes to hold to higher standards), and five involve Troopers. The individuals have different lengths of service, job duties, experiences, levels of prior formal education, and levels of training. The facts surrounding the employees' obtaining and submitting their degrees appear to be quite various. For example, the Employer will be arguing that one Trooper had previously been told by his Sergeant that the degree would not be recognized,

two Troopers thought they did not need to determine the validity of their degrees because a Sergeant had already successfully submitted his degree, one Trooper did not know the degree needed to be from an accredited university, the Employer's previous practice of cross-checking institutions against a Peterson's guide was abandoned in 2004.

There are about 12,000 pages of documentation for all eight cases, ranging from under 1,000 to about 1,600 each. Some unspecified number of pages are duplicative from one case to the next. According to Employer Exhibit 35, there are about 53 witnesses total. Nine of these witnesses are relevant in all eight cases, ten others are relevant in five or more cases, and 21 are relevant in only one case each.

Evidence dealing with dollar cost indicates that a one day grievance arbitration in 2010 cost the Association over \$3,700 with an equal cost to the Employer.

From this summary it can be seen that there are fair arguments for and against consolidation. The Association stresses the similarities in the eight cases and the time and cost savings of having a single DRB. The Employer stresses the different circumstances involved in the eight cases and the risk that a single DRB would have difficulty keeping the facts from becoming muddled and confused.

B. Discussion - Discretionary Consolidation.

The Association correctly points out that there are many arbitration decisions in which the arbitrator has ordered the consolidation of multiple grievances. As one arbitrator put it,

The true rule reflected in the decisions is that where the issue or issues in two or more grievances are so nearly alike that separate proceedings would be repetitious or wasteful, the arbitrator should grant the motion of either party to combine the grievances for purposes of a single arbitration. The burden of showing that the combination of grievances would promote efficiency and economy in the arbitral process, or conversely, that the failure to combine would cause a waste of time or money, lies with the party seeking the combination of grievances.

Air Force Logistics Command, 92 LA 60 (Wren, 1988). It has been stated that an arbitrator can consolidate multiple grievances unless the collective bargaining agreement clearly and unambiguously states otherwise. *Elkouri & Elkouri*. It likewise has been held that an arbitrator need not bifurcate a single grievance that alleges two related contract violations. *Ben Franklin Transit*, 91 LA 880 (Boedecker, 1988).

The core reasoning of the arbitrators dealing with consolidation and bifurcation of grievances is that it is a matter that is within the arbitrator's discretion. Of course, the arbitrators consider the various factors advanced by the Association (e.g., similarity of facts, similarity of contract provisions, similarity of arguments, overlapping witnesses, repetitive testimony, dollar cost, and the like). Yet in each case (assuming no compelling guidance from the contract) the question of whether to consolidate or bifurcate is a discretionary decision to be made by the arbitrator hearing the case.

One difficulty with the Association's approach is that the Association is asking this arbitrator to issue an order that dictates how the DRB will handle these eight cases. Since the question of consolidation is a matter of the arbitrator's discretion, the question is whether that discretion should be exercised by this arbitrator or by the DRB. In all the reported cases the discretion has been exercised by the arbitrator who is actually hearing the underlying grievance(s) (which in this case would be the underlying appeals to a DRB), and this arbitrator has not been asked to hear those cases. In the reported cases, one arbitrator has not exercised the discretion that is vested in another arbitrator. My view is that if the question of consolidation of these eight cases is a discretionary matter, then that discretion should be exercised by the forum that is charged with deciding the underlying appeals - the DRB. As it would be improper for one arbitrator to exercise another arbitrator's discretion, it would be improper for this arbitrator to exercise the DRB's discretion.

A more formidable difficulty with the Association's approach is the language of the collective bargaining agreement, which imposes restrictions on the authority of a grievance arbitrator. The present grievance arises under Article 21, the Grievance Procedure. Several provisions make it clear that the arbitrator's authority is limited to determining whether there has been a violation of the collective agreement and, if so, fashioning an appropriate remedy. Section 21.3 defines a "grievance" as an allegation "involving the meaning, interpretation, or application of the express provisions of this Agreement." Section 21.6 Step 3B provides:

The arbitrator shall only consider and make a decision with respect to the specific issue submitted and shall have no authority to make a decision on any other issue not so submitted to the arbitrator. In the event the arbitrator finds a violation of the terms of this Agreement, the arbitrator shall fashion an appropriate remedy. * * * The decision shall be based solely upon the arbitrator's interpretation of the meaning or application of the express terms of this Agreement to the facts of the grievance presented.

It is clear from this language that in order to fashion a remedy a grievance arbitrator must first find that there has been a violation of the collective agreement. The Association is asking this arbitrator to order consolidation of the eight cases as a matter of discretion. Although such discretion may properly be exercised by the DRB that hears the underlying appeals under Article 20, this arbitrator's authority under Article 21 is limited to interpreting the collective bargaining agreement. There is no warrant under Article 21 for this arbitrator to issue a discretionary award without first finding that the Employer has violated the collective bargaining agreement.

For the foregoing reasons, I will not order consolidation of the eight grievances as a matter of discretion. If there is to be a consolidation order it must be because the Parties' collective bargaining agreement requires consolidation.

C. Discussion - Contract Provisions.

The Association argues that the Employer's failure to consolidate violates the clear and unambiguous language of the collective bargaining agreement. The Employer's argument is that there is nothing in the collective agreement that requires consolidation.

Prior to the filing of the grievance in this case, the eight discipline cases have proceeded as eight separate cases and have not been consolidated. The

ultimate question is whether the collective bargaining agreement requires consolidation.

At the outset it must be emphasized that there is no language in the collective bargaining agreement that speaks directly to the consolidation of disciplinary appeals under Section 20. On its face, Article 20 appears to follow the traditional approach of providing individualized hearings for individual employees. Although the plural "employees" is sometimes used, the singular is usually used, and there are references that can apply only to individuals. The individual must waive a Trial Board in order to get to a DRB (Section 20.4A), a DRB member must not have been involved in any previous or current discipline involving the appealing employee (Section 20.4F), discipline in similar cases shall be relevant to the fixing of sanctions (Section 20.4J). However, these would not be insurmountable barriers to consolidation.

There are three parts of the collective agreement that the Association relies upon: the Preamble, Section 20.1A, and Section 21.1. The heart of the Association's argument is that consolidation is "***the most*** efficient, expeditious, economical, and fair way to resolve the eight disciplinary cases . . ." [Emphasis added.]

Section 21.1, which is part of the Grievance Procedure, simply does not apply to disciplinary cases that are appealed to a DRB. This is clear from the structure of Article 20 and Article 21. Section 21.5 captures the idea in clear and unmistakable language: "The established statutory disciplinary process of the Trial Board and/or Superior Court, or the Disciplinary Review Board, shall be the

sole remedies for an employee who is suspended, demoted, or discharged."

Therefore, the Employer cannot have violated Section 21.1 by refusing the Association's request that eight disciplinary appeals be consolidated for a single hearing before a single Disciplinary Review Board.

Article 20 deals with Discipline and Discharge, and contains the procedures relating to Disciplinary Review Boards. Section 20.1A, upon which the Association relies, states:

The parties are committed to resolving disciplinary matters involving bargaining unit employees in a manner that is expeditious, fair, reduces the amount of formal process and is designed to resolve issues at the lowest possible level.

This quoted sentence states a commitment by both Parties to resolving disciplinary matters in a manner that is expeditious, fair, reduces the amount of formal process, and is designed to resolve issues at the lowest possible level.

One way to read this quoted sentence is that it is a declaration of a commitment to a series of principles, and that the rest of Article 20 spells out in detail how that commitment is to be carried out. This would mean that the Parties have already decided that the remainder of Article 20 *is* expeditious, fair, reduces the amount of formal process, and is designed to resolve issues at the lowest possible level. Read this way, the quoted sentence is no more than a statement of commitment to specified principles, and is not an independent source of rights to have any specific procedure (such as consolidation in this case, or bifurcation in another case) be adopted.

Assuming that the language of Section 20.1A is independently enforceable, the question is whether the Association's reading of it is reasonable. What the

Association bases its argument on is the proposition that consolidation is "**the most** efficient, expeditious, economical, and fair way to resolve the eight disciplinary cases" [Emphasis added.] However, that is not what the contract language requires. The contract does not require that the Parties use a procedure that is **the most** efficient, and does not require that the Parties use one procedure that is **more** efficient than another procedure. For this arbitrator to adopt the Association's interpretation would be to change the meaning of the language agreed to by the Parties - by adding the word "most" or adding the word "more." Where the contract says "expeditious," the Association would have it say "the most expeditious." There is an extraordinary difference between "expeditious" and "the most expeditious," and between "fair" and "the most fair." The collective agreement specifies expeditious and fair, but it does not go further and require the most expeditious and fair.

This leaves the question of whether having more than one DRB (and possibly eight DRBs) for the eight cases is in fact "a manner that is expeditious, fair, reduces the amount of formal process and is designed to resolve issues at the lowest possible level." My finding is that it is. "Expeditious" means acting with prompt efficiency. The factor of promptness has been specifically dealt with in the collective bargaining agreement's procedure for convening a DRB and conducting a hearing. Selecting the Chair and getting a case scheduled can be time-consuming, but the Parties have already built that into their process. The Chair can be selected in a matter of hours; a hearing must be completed within six months (Section 20.4E); and a decision must be rendered within 30 days of

the close of the hearing (Section 20.4L). That is the timing agreed to by the Parties, and there is nothing inherent in having eight cases that would necessarily result in delay beyond these stipulated time periods. The factor of efficiency is closely related to "reduces the amount of formal process." The question then is not whether one DRB is better than eight DRBs, as discussed above. Instead, the question is whether the amount of formal process on a per-case basis is reduced and whether the efficiency on a per-case basis is increased, and the answer to that question is "yes." Because of overlapping legal and factual issues, and overlapping evidence, there should be less effort going into preparation and briefing of each individual case. If there will be eight briefs, and if the cases are as similar as the Association believes they are, then the briefs will overlap greatly and will need individualization only to the extent that each case actually is different. The collective bargaining agreement also says "The parties shall be encouraged to stipulate to the facts" (Section 20.4H), and there should be a number of stipulations that could apply in most or all of the eight cases. The dollar cost, which is part of an efficiency analysis, is unlikely to be eight times the cost of a single DRB case. As for the requirement that the manner be "fair," the Association has not seriously argued that eight DRBs would not be fair.

Other language in the collective bargaining agreement strongly suggests that the Parties did not contemplate consolidation of cases under Article 20. In the Grievance Procedure (Article 21, Section 21.10) there is specific language which permits group grievances and specifies how such group grievances are to be

processed. The Grievance Procedure in Article 21 is not applicable to disciplinary appeals under Article 20. Because Article 21 does provide for a type of consolidation of grievances and Article 20 is silent on that point, it appears that the Parties knew that grouping several disputes together was an option and that they deliberately left that option out of Article 20. Article 21 also provides (Section 21.6 Step 3C) that "More than one (1) grievance may be submitted to the same arbitrator if both parties mutually agree in writing." This language appears to be specifically directed to the consolidation of separate cases, which is different from a group grievance. It is noteworthy that Section 21.6 Step 3C does not give one of the Parties a right to compel the other to submit multiple grievances to a single arbitrator, but instead allows this procedure if both Parties mutually agree. It would be anomalous to read into Article 20 a *right* to consolidation when Article 20 has no specific consolidation language, while Article 21 has consolidation language that operates if the Parties agree to consolidate.

The Preamble speaks to "equitable, efficient, fair, appropriate, and proper operation of the Washington State Patrol in order to enhance the health, safety, and welfare of all bargaining unit members, while fulfilling the mission of the Agency in its service to the citizens of the State of Washington." Although this wording is different from Section 20.1A, there is no reason to conclude that the Preamble would have more force in this case than Section 20.1A has, and the Association does not argue otherwise.

C. Summary.

As an Article 21 arbitrator, this arbitrator lacks authority to order consolidation of Article 20 DRB cases as a matter of arbitrator discretion, absent a finding that the Employer has violated the collective bargaining agreement. The Preamble, Section 20.1A, and Section 21.1 do not compel the Employer to consolidate the eight disciplinary appeals into a single DRB proceeding.

7. CONCLUSION

1. This case is arbitrable.

2. The Employer did not violate the Preamble and Articles 20.1, 20.4, and 21.1 the Parties' collective bargaining agreement by refusing the Association's request that eight disciplinary appeals be consolidated for a single hearing before a single Disciplinary Review Board. Therefore, the grievance must be denied.

8. AWARD

The grievance is denied.

Dated: March 24, 2011

Respectfully submitted,

Ross Runkel