

ARBITRATION AWARD

 In the Matter of the Arbitration)
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 between)
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)
 WASHINGTON FEDERATION OF)
 STATE EMPLOYEES)
 (Union))
)
 and)
)
)
 DEPARTMENT OF SOCIAL)
 HEATH SERVICES)
 (Employer))
)

Eugene Whitehead
 (Grievant)
 AAA No. 75-390-000281-11

BEFORE: Eduardo Escamilla, Arbitrator

APPEARANCES:

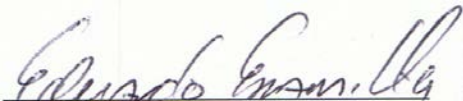
For the Employer:	Alicia Young, Attorney
For the Grievant:	Gregory Rhodes, Attorney

Date of Hearing: December 24 and 25, 2012

Place of Hearing: Vancouver and Tumwater, Washington

Date of Briefs: March 16, 2012

Date of Award: April 16, 2012



Eduardo Escamilla
 Arbitrator

ISSUE

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

STATEMENT OF FACTS

DEPARTMENT OF SOCIAL HEALTH SERVICES, State of Washington, (Employer) and WASHINGTON FEDERATION OF STATE EMPLOYEES (Union) share a collective bargaining with the most recent contract effective dates of July 1, 2009, through June 30, 2011. The contract contains a grievance/arbitration procedure that requires the parties to resolve their contract disputes through this process.

Rainier School is a Washington State institution in Buckley, Washington, that provides residential services to persons with developmental disabilities. Rainier School employs professional staff, including psychologist, habitation plan administrators, and psychiatric social workers who coordinate the care and services for the residents (also referred to as clients). The social workers are also responsible for communicating with families regarding the welfare of the residents. As of August 2009, Rainier School laid off all its psychiatric social workers at Rainier School.

Grievance process

On October 5, 2010, the Union filed a grievance in behalf of the Grievant alleging violations of Articles 27.1 and 31.6. Specifically, the Grievant alleges that the Employer violated the above-referenced articles when they terminated his employment as a Psychiatric Social Worker 3 from Rainier School on September 15, 2010. The Grievant requests reinstatement to his position at a different facility and payment of all back wages, vacation leave accrual, sick leave accrual, retirement contributions with unbroken service date with the State of Washington as well as removal of all documentation stemming from these accusations.

On February 4, 2011, the Rainier School superintendent, Neil Crowley, responded in writing to the grievance after meeting with the Union and Grievant on January 24, 2011. At the meeting, the superintendent alleged that the Union asserted that the Grievant only had one prior disciplinary action and requested that the investigation be reopened and that the Grievant and Bessie (sometimes referred to as Betsy) Clark be re-interviewed. The Grievant asserted at the meeting that he provided statements to Washington State Patrol Detective Penney, and DDD Statewide Investigation Unit (SIU) investigator McLaughlin. He maintains that his interview statements were consistent with each other. Furthermore he asserts that the accusations made against him by the Mother (Twila) and Sister (Bernice) of the Resident are fabrications. He stated that he would continue to rely on the information in his prior statements given to the two different investigators and anything else said at the meeting would be redundant.

With respect to the allegation that the Employer failed to comply with Article 31.6, (Removal of Documents), the Grievant admits that he had met with the human resource manager and inquired about the removal of the prior disciplinary action. Grievant was advised to make a written request as per Article 31.6.B.1 and 3 and Article 31.6.C.1 and 3. The Grievant did not make a written request to remove prior disciplinary actions until August 17, 2010, after he had received the notice of intent to discipline authored by the superintendent, who subsequently concluded that because there was a pending action he believed that, as per the contract provisions, special circumstances warrant a longer retention of the prior disciplinary action. Therefore the Grievant's request for removal of prior disciplinary actions was denied.

After reviewing the evidence presented to him, the superintendent felt there was just cause to terminate the Grievant. He stated in his Step 1 decision that in August 2009, he received a complaint from the Washington State Patrol generated through Washington State Senator Zarelli's office. The complaint alleged that a Rainier School resident was being abused by professional staff and was no longer safe. The Resident's Sister reported that she had received this information from the Grievant. The Sister had expressed her concerns with the Senator's office on August 12, 2009, via an email that she sent to the Senator's wife. The email was sent the day after her conversation with the Grievant. The Resident was subsequently moved to a different community because of the family's concern for his safety

After an investigation of various allegations by the Washington State Patrol and the SIU, the superintendent considered their reports and also the evidence submitted by the Grievant. He specifically took into consideration the credibility issues raised by the Grievant concerning the Sister's statement. However he concluded that the Sister had provided documentation that had great details that proved that someone in the system had provided her with specific information.

Additionally, the superintendent states that the Grievant was offered and attended a pre-disciplinary meeting on August 20, 2010, and was provided another opportunity to provide additional information before he made his final decision. The Grievant failed to provide any information at that meeting that would convince him that the accusations by the Sister were false. Furthermore, the superintendent took into account the Grievant's prior disciplinary action for unprofessional behavior before denying the grievance.

By letter dated February 17, 2011, the Union appealed the Step 1 denial to Step 2 and requested a meeting.

By letter dated June 15, 2011, the Employer denied the Step 2 grievance appeal. The denial letter was authored by Kelly Rupert, a Labor Relations specialist for DSHS. The letter recounts that a meeting was held on May 31, 2011, to discuss the Step 2 appeal. The Step 2 issues raised by the Union and by the Grievant included the termination without just cause issue as well as the unauthorized removal of documents by the Grievant. The letter asserts that even though the parties met at Step 2, the Union and the Grievant declined to talk to the Step 2 designee about their concerns and also failed to identify, correct or clarify statements made in the Step 1 meeting letter by superintendent Crowley. The letter recounts that the Union made short bullet-type point presentation and that the Grievant asked the Union not to elaborate further on these points. The Grievant stated that he did not want to elaborate nor discuss his perspectives and repeatedly referred to his statements submitted during the investigation for whatever information they sought. The Step 2 designee concluded that she had taken the Union's concerns into consideration but after further discussions with the Rainier School managers and thoroughly reviewing the dismissal letter and the investigation documents, she concluded that the grievance did not warrant reversal. Specifically she found that all the just

cause standards as elaborated in the collective bargaining agreement were met. She further found that there was no substantiation that the record retention of prior disciplinary actions violated the collective bargaining agreement because the Grievant did not request the removal of prior disciplinary action as per the contract, until the new allegations against him had been raised. Therefore, the superintendent properly denied the Grievant's request.

Thereafter, the parties went through a mediation process without success. The matter was appealed to arbitration which resulted in the instant hearing being held on January 24 and 25, 2012, in Vancouver and Tumwater, Washington, respectively.

Background information

By letter dated August 5, 2009, superintendent Crowley notified the Grievant that he was being laid off effective on August 19, 2009. All social workers were laid off at Rainier School. Thereafter by letter dated August 19, 2009, the previous letter was amended by extending the effective date of layoff to August 24, 2009. The underlying reason for the extension was the investigation of the Sister's email complaint.

The Rainier School system completed an incident report on August 14 of a possible sexual abuse of a client. According to their procedures, Rainier School completed a Central Office Incident Report on the same date describing an anonymous report of possible sex abuse of a resident. The incident report inferred from the information provided in the complaint the identity of the resident. The Resident was immediately assigned one-on-one supervision until further investigation was conducted. The matter was referred to SIU to investigate the matter.

Thereafter, Rainier School received a copy of the e-mail from the Resident's Sister sent to her friend, and who is also her minister and the spouse of Senator Zarelli. The e-mail goes into specific details concerning the conversation the Sister had with the Grievant wherein the Grievant asserted that the Resident had been used for sex for a very long time. The email specifically referred to a named psychologist, who supposedly brought his sleeping back to the office and used the Resident for sexual gratification. In exchange for the sexual gratification favors, the Resident received an extra cup of coffee in the morning. Furthermore, the Grievant

informed her that the Resident had performed sexual acts upon himself and this behavior was typical of one who had been sexually abused. The Grievant said that the Resident had been subjected to sexual torture on a regular basis.

The Grievant informed the Sister that he had reported this information to authority several times. The Grievant informed the Resident's appointed co-guardian but no actions have been taken. He accused the advocate as being a "pimp" for those in the school who committed these acts. The guardian is extremely close with the staff and there are no controls to maintain the evil that is systematically done in Rainier School. The e-mail also stated the Grievant said that numerous residents have died in the past years. According to the Grievant, the number of residents who died is telling because the residents received the wrong medication, sent to the wrong hospitals, and received the wrong treatment. The Grievant stated that these incidents were quite frequent. The Grievant stated that his attempts to protect the Resident have been to no avail and supposedly the last time he confronted a supervisor concerning the Resident, the supervisor yelled at him. The e-mail states that the Grievant informed her that all the social workers at Rainier School were being laid off and once he is gone there will be no one to protect the Resident. In response to her question, the Grievant stated that the Resident's life was in danger and that the Resident had been marked. The Grievant told her that she had to ensure the Resident's safety and that he had badgered everyone in an attempt to free the Resident from sexual slavery. The Grievant also claimed that there had been a media undercover investigation of Rainier School the prior year, where supposedly there was media coverage of the abuse. However, the Grievant said nothing became of the media exposure and that it was mysteriously ignored.

The e-mail also stated that the Grievant instructed the Mother and then the Sister to contact a volunteer advocacy group and specifically contact a person named Bessie Clark who was fully aware of what was going on in Rainier School. The Grievant provided the family with Clark's phone number.

The Grievant informed the Sister to remove the funds held in behalf of the Resident at the school because those funds would soon be gone or disappear. The Grievant supposedly told the Sister that the in-house physician was also involved and provided her with the doctor's

name. Because the doctor controls the medical records, the truth was being hidden by the doctor.

The e-mail stated that the Sister did in fact call Clark on August 12, 2009, who informed her that she had to contact the US Department of Justice in Washington DC concerning the Resident's abuse. Supposedly the Sister said that as soon as they hung up Clark would call Washington DC. Clark supposedly gave her the name of Terry Dean at the Department of Justice with whom she spoke.

Both the Grievant and Clark supposedly told the Sister that the Resident's medical condition had been ignored for a long time which eventually resulted in bowel surgery. Previously the Mother had called the Rainier School physician who informed her that the Resident did no longer have working bowel muscles. Clark supposedly stated that this condition is due to years of sodomy which is the sexual torture that the Grievant spoke about. She also recalls that Clark told her that the Resident had been rushed to the Good Sam Hospital because his condition had been ignored. Clark supposedly stated that she had reported sexual abuse to the hospital staff and demanded a physical exam but nothing was done. Clark also accuses the surrounding hospitals as being involved in the cover up. The Sister asked Clark for help because she needed proof. Clark responded that she would help but the Sister had to file some serious charges immediately. Clark supposedly told her not to be afraid because accusing persons of sexual abuse is very serious and can ruin reputations and careers. The Sister informed Clark that she wanted to remove the Resident from the facility immediately and Clark stated that she would help. Clark supposedly claimed that she would get the Resident out that same day.

However, the Sister felt that Clark lied to her because later that day Clark called the Sister and told the Sister, herself, had to take action because the Sister was aware of the Resident's sexual abuse and since she had been informed of this abuse, the Sister was a "mandatory reporter" and could be criminally charged if she did not act in behalf of her brother. Clark advised her to obtain legal custody of the Resident. Once she was successfully appointed legal guardian, Clark would be able to help her. Clark recommended that they remove the current legal co-guardian. She also warned the Sister that the Resident would not make it if she

did not take any actions. The e-mail further stated that the Sister was unclear what mandatory reporter meant until a friend explained that implication of that term. She stated that she was frightened for her brother and was horrified about what she had been told. She asked for help in the e-mail because she did not want to do anything to jeopardize the Resident's life.

By letter dated August 27, 2009, the Grievant was notified that his layoff had been suspended pending the investigations into the allegations of misconduct and that his new position at Western State Hospital would be held open. Additionally, through a separate letter to the Grievant, he was reassigned to the work from his residence with full pay entitlement as of August 31, 2009, pending the investigation of the allegations.

On November 9, 2009, the Washington State Patrol investigation report was submitted to the superintendent of Rainier School. The investigation was conducted by Detective Penney. The report revealed the following information.

On September 3, Detective Penney interviewed the Mother and Sister who confirmed their statements contained in the Sister's email of sexual abuse. The Mother and Sister estimated that the telephone conversation with the Grievant lasted about 45 minutes. Their statements to Detective Penney were consistent with the details of the e-mail.

On September 10, Detective Penney conducted an interview with the Grievant. The Grievant stated that his conversation with the family members was short, lasting about 10 minutes. Grievant stated that he called the family to advise them that he would no longer be employed at Rainier School because of his position was being eliminated due to lack of funding. The Grievant adamantly denied any references to sexual abuse during this conversation. He states he is unaware where the family obtained all the information and details that they presented in the e-mail and subsequent statements. The Grievant did admit that he told the Sister about the Resident masturbating in the hallway. He reported this behavior at a team meeting.

On September 14, Detective Penney conducted an interview of Bessie Clark, who is associated with an advocacy group known as, Change Reaction. Clark denies that she spoke to

the Grievant about the Resident's abuse. She recalls that approximately half a year ago, Clark had conversations with staff at Rainier School where they expressed concern about the Resident's medical treatment or lack of treatment. Clark was aware of the masturbation incident. She stated that she had received training about this behavior that linked the client's sexual behavior with sexual abuse. She refused to provide any specific names of the staff at Rainier School who provided her with the information.

On September 14, Detective Penney conducted an interview of Rainier School supervisor Tim Gullick, who had been the Grievant's supervisor since February 2009. In Gullick's opinion, the Grievant was not a good employee because he would disappear for hours and supervisors could not rely on him to follow up on instructions. Gullick stated that the Grievant was known for misquoting the staff and giving wrong information to the guardians. The supervisor provided telephone records for the day in question that showed calls from the Grievant's office phone to the family's home that lasted approximately 10 to 15 minutes.

The Detective also interviewed several other supervisors and/or staff that worked with the Grievant. Their comments range from the Grievant being a decent guy that butted heads, to a person who was difficult to work with and was difficult to keep track.

The Detective on September 29 also interviewed the primary care physician at Rainier School. According to the physician she did not witness any physical or behavioral signs of possible sex abuse of the Resident. She also stated that the Grievant had a pattern of inappropriate comments to family members.

The criminal investigation conducted by Detective Penney found no evidence that the Resident was sexually abused by the psychologist. The criminal investigation about sexual abuse was closed. However, she continued with the administrative investigation concerning the contents of the Sister's e-mail. Rainier School referred a second incident report to the Washington State Patrol on August 31, whereby the scope of the investigation was whether the Grievant was the source of the alleged information provided to the family members.

On September 30, Detective Penney interviewed the accused psychologist. He has been employed at Rainier School for approximately 10 years. He recalls that while treating the Resident, he used the Resident's affinity for coffee to work on the Resident's fears. He recalls the Resident was seen in the hallway sexually aroused and had fondled himself. When he witnessed this behavior, he redirected the inappropriate behavior and sent the Resident back to his room. According to the psychologist, the Resident's inappropriate sexual behavior was not frequent enough to require formal intervention to adjust the Resident's behavioral plan.

The psychologist also stated that his working relationship with the Grievant had changed over time. The psychologist had several issues with the Grievant and the only communications between the two were work related communications. The psychologist believes that the Grievant has a history of using the system designed to protect the clients to his own advantage. He believes that the Grievant was angry and sought retributions because his work had been marginalized. He also believed that the Grievant was a gossip who felt wronged and maintained resentment towards others.

On October 22, Detective Penney submitted her written criminal investigation summary regarding the allegation of criminal conduct by the psychologist and others at Rainier School. She concluded that there was no evidence of any sexual abuse of the Resident by the psychologist and that the matter would not be referred to the prosecutor and requested the closure of the case.

Detective Penney conducted a supplemental investigation requested by DSHS on November 12 concerning the Grievant's alleged conversation with the family members. The specific allegation was whether or not the Grievant was a source of information of sexual abuse allegation at Rainier School.

On November 18, Detective Penney re-interviewed the Sister. She again confirmed that the conversation lasted approximately 45 minutes and that the Grievant advised her to call Clark and gave her Clark's phone number. The Mother also confirmed to the Detective that she spoke with the Grievant for a short while, after which she handed the telephone to her Daughter (Sister). The Sister provided the Detective with hand written notes that she took while talking

with the Grievant. The Sister also provided her telephone records that showed that the conversation with the Grievant lasted 55 minutes.

On December 7, Detective Penney re-interviewed the Grievant. He maintained that on August 11 there was much confusion in his office as he was in the middle of cleaning out his office and staff and residents were walking in and out of his office talking to him. He states that the conversation seemed shorter than 55 minutes but he was not sure. The Grievant placed the family on hold on several occasions to handle other calls and talk to people who came to his office. The Grievant states that a good portion of the telephone conversation with the family involved just listening. The conversation centered on the Sister's religion, politics and personal beliefs.

As per protocol, on August 18, DSHS, Division of Developmental Disabilities, SIU investigator Nelline McLaughlin issued the mandatory five day investigation report following the report of the allegations of abuse. The questions that were answered during this initial investigation was whether the Resident was sexually victimized by the psychologist; whether the Resident's health and safety had been jeopardized; whether the Grievant disregarded his mandatory reporting requirements and confidentiality policies; and whether the Grievant failed to protect the Resident from harm.

The Resident's health care plan was summarized in the report as well as the statements obtained from various individuals. On August 19, McLaughlin interviewed several staff members responsible for the care of the Resident. They informed her that they had not seen any signs or symptoms of harmed and had not noticed any noticeable changes of his health or safety within the past 3 to 6 months. Additionally another staff person stated that the Resident had shown steady improvement in his overall behavior in the past year although during the recent observations, there had been a slight increase of his aggression and agitation. Still another staff member stated that they believe that the Resident remained at his best baseline within the prior year; however the baseline would vary as the Resident became uncooperative at times.

The investigator contacted the court appointed guardian of the Resident. She testified that she has been the Resident's co-guardian for approximately 2 to 3 years and shared the

guardianship with the Resident's Mother. She had not observed any changes or had been given reports about the Resident's changes in behaviors, health, and safety. She does not believe that the allegations of sexual abuse occurred. She believes that the Resident is very defensive and it would be difficult to believe that someone would be able to touch him unless he wanted. Additionally the guardian also testified that she was aware that the Mother had expressed concerns about the Resident's well-being. Additionally, she was aware that the Sister, who apparently had not the Resident for approximately 40 years, had voiced her desire to move the Resident out of Rainier School.

The SIU investigator noted that the Washington State Patrol was also investigating the incident and therefore her investigation was limited to the evidence she developed by August 18. In as much as a Washington State Patrol detective would be conducting a full investigation, further investigation by her would continue after the Washington State Patrol investigation was completed.

The investigator reviewed the Resident's healthcare records, medical profession determination, and contacts she made during the investigation, and concluded that no indication existed that the Resident had been negatively harmed, including any sexual abuse. With respect to the remaining questions whether the Grievant disregarded his mandatory reporting duties and failed to protect the Resident, the investigator concluded that these questions would not be answered at this time.

Thereafter, the investigator attached an addendum to her five day investigation report dated December 10 wherein she restated the Washington State Patrol Detective Penney's conclusion that there was no evidence of any sexual abuse of the Resident by the psychologist and it was recommended that the matter be closed. The investigator also concluded that there was no evidence the psychologist had in fact harmed the Resident.

On November 10, 2009, the investigator continued the administrative investigation and conducted a telephone interview with Clark. She characterized Clark as being upset and frustrated with the system and referred to the related agencies as corrupt, including the Washington State Patrol, the state government, and Rainier School. She recalls that an attorney

in August contacted her. (No names were provided.) She informed the attorney that she had been repeatedly contacted by numerous Rainier School staff members but would not provide the names because Rainier School would fire, ignore, or get rid of any key witnesses. Clark also denied having any conversations with the Grievant and maintains that most of the staff was aware what was happening but they ignored the situation. She also expressed her opinion that the Resident's incident of masturbation was indicative of him being sexually abused or groomed for molestation.

The investigator also interviewed the Mother on November 10. The Mother told her that she spoke to the Grievant for a short while. She recalls that the Grievant called her in August and informed her that her son was doing okay. However the Grievant also informed her that he was leaving Rainier School. The Grievant told her that if that she had any concerns, she should contact Clark as she was a client advocate. Subsequently, the Mother handed the phone over to her Daughter (Sister) to continue the conversation with the Grievant.

The Sister stated that the Grievant complained that the co-guardian was not doing her job and was exploiting the Resident's funds for her own good. The Grievant informed her that he was leaving Rainier School. He referred her to Clark if she had concerns. She specifically asked the Grievant whether the Resident was okay. The Grievant responded there were sexual things going on and it had been going on for a long time. The Grievant named the psychologist as the person responsible. The Sister questioned the fact if these allegations had been going on for a while, why nothing had been done. The Grievant stated that there were people in Rainier School who knew about the information and had turned in reports. However, the reports did not go anywhere. The Grievant also informed her that the primary care physician at Rainier School also knew of the abuse but had ignored his reports.

The Sister informed the investigator that she contacted Clark and that Clark was aware of the allegations of sexual abuse because she had talked to the Grievant and other people about it. Clark also gave her the Department of Justice telephone number.

The investigator interviewed Rainier School staff regarding the Resident. A staff employee recalled that there had been a house team discussion in May 2007 about the Resident removing his clothing in public.

On January 25, 2010, SIU investigator McLachlan interviewed the Grievant. She recalls that the majority of the questions asked of the Grievant were replied by "I don't recall". The Grievant stated that without his phone logs and notes he could not respond appropriately. However, he emphatically said that he had not provided any names to the Resident's family.

The Grievant informed the investigator that as a psychiatric social worker, his main responsibility was to communicate with the guardians and parents regarding the residents' care. He stated that a guardian is the primary contact for information and does not release that information to family members. Because there was a co-guardianship in the instant situation, the Mother as co-guardian was kept informed. The Grievant was shown an incident database report concerning the Resident and stated that he could not remember any of the incidents without his notes and did not recall talking to the guardian regarding the Resident's public sexual behavior. He does recall that this issue was brought up at a team meeting. He believes that the Resident's behavior in question occurred within the year. He stated that no one else at the team meeting had concerns and therefore no incident report was generated. The Grievant did not inform the Resident's guardians of the incident.

The Grievant informed the investigator that he maintained a working file of notes and phone logs in the social worker's file cabinet. He used these notes to complete the annual social work assessment. The Grievant stated that he shredded the information rather than giving it to the person who assumed care of the Resident. However he did share with them his phone log.

The Grievant stated that his phone scan number, which allowed him to make long-distance phone calls from his office, was terminated on August 11. However he was shown scan reports that indicated he made phone calls to the Resident's family home from his office on the date in question but does not specifically recall making the call. The Grievant maintains that on date of question he was busy cleaning his office. The Grievant said without his notes he could not recall whether he mentioned Clark. The Grievant explained that he knew Clark

because he had seen her a couple times at Rainier School but had not had any direct contact with her regarding the Resident.

The Grievant informed the investigator that the Mother handed the telephone to the Sister and he basically listen to the Sister because that was part of his job as a social worker. He stated that the conversation revolved around religion and politics and just general conversation.

Investigator McLaughlin also reviewed the digitally recorded interviews of the Grievant by the Washington State Patrol Detective. In those interviews, the Grievant stated on August 11 the Grievant did not have scan access to his phones. The Grievant recalls talking to the family members on several occasions and reassured them that the entitlement (health and welfare) for the Resident would continue even though there might be a new president (President Obama). He denies that he discussed any specific concerns about the Resident. He accused the Sister of being concerned that the state was putting people to sleep and that she had some premonition about it.

The investigator concluded that there was a discrepancy between the interviews of professionals at Rainier School conducted by Washington State Patrol Detective and the Grievant's actual performance evaluations. According to the staff, they indicated that the Grievant's work was unprofessional and failed to complete his work responsibilities. However his annual evaluations do not mention these concerns.

The investigator found that the Grievant did in fact share the phone log to the new staff member responsible for the Resident, but the phone log was a blank phone log. The other notes, phone logs and paperwork maintained by the Grievant were shredded by him. The Grievant maintains he was unaware of any record retention requirements. The investigator concluded that the Grievant was not familiar with the release of information policy and guidelines that relates to legal guardians and family members. He was unfamiliar with the actual guardianship court order. The investigator concluded that from the evidence obtained during the investigation, it was highly probable that the Grievant had shared information with the family and

that the family may have not clearly understood the information which may have led to some embellishment of information.

The investigator concluded that the Grievant did not follow protocol to inform the appropriate guardian of incidents or information regarding residents. The investigator also concluded that it appears that the Grievant did not implement the court order for guardianship because he decided himself to converse with the family members and not the appropriate guardian. The report also found that the Grievant had failed to make an incident report regarding the Resident's masturbation in public even though he termed this as "odd behavior".

The investigator cited several standard operating procedures as well as DSHS Administrative Policy No. 5.04 which intends to preserve "any document or recorded information regardless of physical form or characteristics created, sent, organized, received by the agency in the course of public business including paper documents, drawings, graphs, charts, videotapes, photographs, phone records, data compilations, minors, client calendars, diaries and draft documents..." The investigator concluded there did not appear to be any documentation of the Grievant's training regarding the expectations and responsibilities of the psychiatric social workers.

On March 1, 2010, investigator McLaughlin issued an additional supplemental report wherein the documentary evidence (records) disclosed that the Grievant signed an "oath of confidentiality". Additionally, further review of documents showed that the Grievant had notice of and was aware of the record retention policies.

On July 14, 2010, the Employer issued a Notice of Intent to take Disciplinary Action to the Grievant on the basis of the alleged conversation the Grievant had with the Resident's family. It noted that when interviewed by the Washington State Patrol Detective, he portrayed his conversation with the Sister as very brief as the purpose of the call was only to notify the family that his position was eliminated and he would no longer be the point of contact. However, review of the Grievant's telephone scan report shows that four calls were made to the family's home number lasting approximately 15 minutes. The record also showed that he talk to the Sister on her cell phone for about 55 minutes.

Furthermore the letter stated that there was no documentation to rebut the information that he allegedly shared with family that the Resident had been sexually abused or was unsafe at Rainier School. The Notice states that if the Grievant was aware of such information he had an obligation as a mandatory reporter to report it to Rainier School management as required by operating procedures and administrative policies. But because the Washington State Patrol investigation concluded that there was no basis to support those, the letter stated that it was believed that the Grievant had fabricated the statements to the family for his own purpose that resulted in the family's fears for the Resident's safety and well-being.

Additionally, the Notice stated that the Grievant had made reference on January 25, 2010, that he maintained client documentation for his convenience. The Grievant admitted to shredding the documentation when his position was being eliminated rather than handling the file over to the subsequent caregivers. This action was found to be a failure to document the Resident behavior concerns. The Notice concluded that as a psychiatric social worker, he was responsible for documenting client information and communicating with the residents' families and guardians. He is also responsible to represent himself and Rainier School in a professional manner. The Notice informed the Grievant that if he had any concerns regarding the safety and welfare of a client he was obligated to report it through appropriate channels. The Notice concluded that the Grievant had completely disregarded his professional responsibility and had jeopardized the integrity and ability of Rainier School to care for individuals.

The Notice also informed the Grievant that prior to making a final decision, Grievant was being offered an opportunity to discuss this matter with the superintendent or provide in writing any additional information that he wanted the superintendent to consider.

The superintendent considered a March 14, 2002, disciplinary action resulting in Grievant's suspension without pay as a psychiatric social worker at the Morgan Center (another similar state facility) for two weeks. Part of the accusations dealt with the Grievant's unprofessional conduct towards the Morgan Center superintendent resulting in the Grievant yelling at the superintendent that he was going to get her. Additionally, the disciplinary action

also noted that his performance evaluation indicated a need to improve accepting directions from supervisors without reacting emotionally or defensively.

The Grievant appealed the suspension to the Personnel Appeals Board of the State of Washington. The Board reduced the suspension to one week because it found only the accusations of insubordination, inappropriate and professional conduct was proven by the Employer. However the Employer failed to prove that the Grievant behavior also constituted neglect of duty or gross misconduct and therefore, one week suspension without pay would be sufficient to impress upon the Grievant importance of modifying his behavior.

Additionally, on April 16, 2001, the Grievant was issued a letter of reprimand concerning his inappropriate behavior to the human resource manager. The letter stated that the main issue involved the continuation of the Grievant's pattern of emotional and angry reactions to others and raising his voice and constant interruptions and arguing.

On November 8, 2000, the Grievant also received a letter of counseling regarding his unprofessional communication with a Morgan Center resident's family. The Grievant in his testimony denied the accusations raised by the primary care physician that the Grievant had made statements to family members that the resident was not safe at Morgan Center. He maintained that he had never heard of that allegation or investigation.

On September 14, 2010, the superintendent issued the official letter to the Grievant discharging him from his employment as a psychiatric social worker. The discharge was based on the Grievant's inappropriate and unprofessional conversations with the Resident's family; failure to maintain client records; and dishonesty during the investigation of the allegations.

The record evidence accumulated during the investigation included the Sister's contemporaneous notes of her conversation with the Grievant and Clark, as well as the Mother's written notation on an envelope regarding the US Department of Justice's and Clark's phone numbers provided by the Grievant.

ANALYSIS

Employer's position

The Employer submits that it had just cause to terminate the Grievant. It asked the arbitrator to consider three questions:

1. Did the Employer follow proper procedures?
2. Did the Employer prove its charges against the employee?
3. Is the penalty of the termination reasonably related to the seriousness of the proven charges, the employee's disciplinary record and any mitigating or extenuating circumstances?
Smurfit-Stone Container Corp., 113 LA 870, 876 (Greer, 1999)

Additionally, the Employer maintains that it is the Employer's burden to establish just cause however, the Union bears the burden of showing any procedural irregularities which they claim. *Angelus Sanitary Can Mach. Co.*, 68 LA 973, 975 (Ash, 1977); *Bi-State Dev. Agency*, 84 LA for 27 (Heinz, 1985) The Employer also submits that most arbitrators in disciplinary cases apply the preponderance of the evidence standard unless the discipline is for allegations of criminal conduct in which case, some arbitrators apply a higher standard of proof.

The Employer submits that a fair and thorough investigation was conducted before discipline was issued. Additionally, the type of misconduct was so egregious that it authorized the Employer to immediately discharge the Grievant. The Grievant was provided a prompt and detailed notice of the charges, satisfying all due process requirements.

The Employer argues that the evidence clearly showed that the Grievant made improper statements to family members regarding Resident's sexual abuse. The family's account of the Grievant's conversation is credible, documented and corroborated. The relationship between the family, especially the Mother and the Grievant, did not show any evidence of hostility between them even though they had regular conversations about the Resident.

With respect to the allegation that the family had a motive to disparage the Grievant because they wanted to move the Resident out of Rainier School, the Employer maintains that the allegation is groundless and not supported by the evidence. If the family wanted to move the resident out of Rainier School, the guardian could have removed the Resident at any time. Thus this motivation for accusing the Grievant is not supported by the evidence.

The Employer submits that the assertion that the Sister was "detached from reality" is not supported by any evidence. Her concern about politics and right to life issues do not indicate any personal flaws.

The Employer argues that the Grievant's credibility is seriously in doubt. The Grievant bore grudges against the School's doctor and psychologist as well as the department as a whole. When the Grievant was notified of his layoff, he used this opportunity to retaliate against the Employer.

Furthermore, the Employer submits that the Grievant's testimony and previous statements have many inconsistencies. Of primary importance is that the Grievant during the investigation stated that he did not bring up sexual behavior of the Resident to the family members. However at hearing the Grievant testified that he did in fact tell the Sister that he had observed the Resident masturbating outside an office.

The documentary evidence contradicts the Grievant's statements and testimony. Specifically the telephone logs of the Grievant contradicted his testimony about his contact with the family and length of conversation with the family. The Grievant's excuses for this inconsistency show his lack of credibility. An additional area of inconsistency deals with his contact with Clark which clearly shows that the Grievant had in fact contacted Clark at her home contrary to his specific denial. The Employer submits that the Grievant had made previous inappropriate communications with other family members as evidenced by his disciplinary history and was not a reliable person at the office as testified to by the Employer witnesses.

Additionally the Employer argues that the Grievant would have no reason to tell the family members about the Resident's sexual behavior that had occurred more than two years

prior to the current conversation. If that information had occurred, it should have been reported to the family at the time of the incident. The record does show that he notified the family members in 2007 of the Resident's behavior.

The Grievant's testimony concerning the shredding of his notes is inconsistent with the statement that he gave to Detective Penney to whom he offered to produce his notes. The Grievant admits that he did in fact shred his notes which the Employer maintains is contrary to the standard operating procedures of Rainier School.

Union's position

The Union maintains that the Employer failed to establish just cause to show that the Grievant violated the specific provision cited in his termination letter. The Grievant has consistently denied the accusation and it is simply "outlandish" that he would make the statements attributed to him. The Employer ignored this "inherent improbability" and also ignored ample evidence impeaching the Sister's credibility.

The Union maintains that the Employer was aware that the Resident's guardian believed that the Sister had made false accusations in the past. The Employer failed to take any further action or make further inquiries about the guardian's opinion.

The Union maintains it is the burden on the Employer to prove the allegations in order to establish just cause for termination. It maintains that the appropriate burden of proof should be "clear and convincing evidence". *General Telephone Co. of California*, 73 LA 531, 533 (Richmond, 1979)

Clark's testimony confirms the Grievant's version of events. There is no plausible reason for giving inaccurate accounts of her interactions with the relevant principles in this case.

The Grievant's inconsistent statements about the duration of the phone calls are minor and should not weigh heavily in on his credibility. With respect to the testimony of the Grievant and his statement to Detective Penney regarding his conversation with the family

members and providing them with Clark's phone number, the Union argues that the inconsistencies if any, were caused by the questions asked by the investigators rather than by the Grievant's answers.

The Grievant's alleged inconsistent statement whether he spoke to the family members about the Resident's sexual behavior stems directly from the interview that the SIU investigator conducted wherein he definitively stated that he did not discuss sexual behavior with family. However, the Grievant admits that he mentioned the incident of the Resident masturbation to the family and the investigative report so indicates.

The Grievant denied that he provided Clark's phone number to the family members and thus the documentary evidence that shows that he provided the phone number to them which they supposedly wrote down contemporaneously is incorrect.

The Union maintains that the past disciplinary actions do not support or are probative of the instant allegations. The Employer's witnesses' attack on the Grievant's character failed to add to any probative value on this issue.

The Union submits that there are two incidents of public masturbation. One was documented in 2007. There is no reason why the Grievant would share this information to the family in 2009. Thus, the Grievant maintains that the masturbation incident occurred with some proximity to the phone call he had with the family. He reported this incident to at a team meeting in the summer of 2009.

The Union also argues that the appointing authority failed to consider the guardian's statement that the family members had made prior false allegations. The Union points to the SIU investigators own estimation that "it is highly probable that Eugene shared information that may not have been clearly understood thereby [Bernice] embellished on the information". Thus, not only does the guardian doubt the Sister's version of the conversation, but so does the SIU investigator

Finally, the Union argues that the allegation concerning destruction of documents is unfounded. There are no official policies and mandates regarding the retention of telephone logs.

Conclusions

The parties presented numerous witnesses to support the documentary evidence and explain and/or rebut the evidence (witnesses' statements/interviews and investigation reports) gathered through the investigation of the sexual abuse complaint of the Resident, as well as the subsequent investigation of the Grievant's alleged misconduct. Generally, the respective witnesses confirmed their prior statements and comments made during the investigation. The Employer's two main witnesses, the family members, did not deviate from their prior statements and/or documentary evidence. Additionally, the Grievant's testimony also did not deviate from the information he provided during the investigation. This case is either sustained or denied based on the credibility of these witnesses.

As both parties have pointed out, the burden of proof falls on the Employer to show that it had just cause to terminate the Grievant. This is a universal standard that is commonly accepted, if not explicitly mandated by the contract, such as is the case herein. One of the key elements in determining just cause is whether the Employer has proven the allegations it alleges as a basis for removal. In the instant case, it is without question that the Employer had documentary evidence and witnesses' statements that prove the allegations that the Grievant engaged in misconduct in his communications with the family members. It also had uncontroverted evidence through the Grievant's admission that he shredded his notes and telephone logs. However, the real issue in this case is whether or not the *prima facie* evidence establishing just cause was from a reliable source. The Employer may indeed have concrete and solid evidence to prove the allegations against an employee, however if that evidence is from an unreliable source, the Employer must justify its reliance on the asserted unreliable source.

The issue of proving whether the circumstances demonstrated that the evidence was indeed from a reliable source and thus credible, ultimately lies with the Employer. This is part of

the due process obligation that an employer must meet in order to establish just cause. Part of just cause standards includes a fair, open and thorough investigation of the allegations and providing an opportunity for the Grievant to present evidence and arguments. When the Grievant raises arguments or present evidence that possibly casts doubt as to credibility of witnesses, it is the obligation of the Employer to investigate those allegations. However just because the allegations are raised, it does not necessarily mean that the Employer has to agree with the Grievant's arguments. So ultimately the Employer's obligation when such issues are raised is to investigate the issues and consider them before reaching its decision.

In the end, it is the Grievant's burden of persuasion to convince the Employer that the witnesses are not credible. The question that must be answered at the time of the decision of discipline is whether the Employer had a reasonable basis to credit or discredit the witnesses taking account all of the evidence and arguments.

In reviewing the documentary evidence, statements and reports, I find that the Employer had a reasonable basis to credit the testimony of the two main witnesses notwithstanding the Grievant's arguments. The Employer simply did not agree with the Grievant's assessment that the complaining witnesses were "detached from reality".

Nevertheless, the grievance/arbitration process provides for review of the Employer's decision to terminate an employee and also review of the decision to credit or discredit witnesses. The arbitration hearing provides the Grievant an opportunity to articulate its arguments and present evidence to support its arguments.

Arbitrators rely on numerous factors in determining credibility resolutions. Observation of the witness when testifying is indeed a factor that arbitrators will use to determine credibility. However arbitrators are not bestowed with some mystical power to determine whether a witnesses is being truthful or not. A witness' nervousness when testifying can be reasonably interpreted differently. Thus this particular trait of observation of a witness is not particular helpful. Observation is perhaps the least reliable source for making credibility resolutions. Although, the demeanor of the witness while testifying may provide some guidance for arbitrators. The witnesses' evasive, argumentative, and unresponsive answers to questions are

factors relied by arbitrators more so than just mere observation in determining credibility resolutions.

However perhaps the strongest and most persuasive evidence to consider in determining credibility resolutions are inconsistent statements, corroborative evidence and documentary evidence. Additionally, a witness' variance of his answer depending on the question asked as well as the evidence that has been presented before him is also indicative of a witness who is adjusting their testimony in order to meet the evidence.

In deciding the credibility of the family members' testimony, I have taken into consideration the Grievant's arguments that the family members fabricated these allegations in an effort to remove the Resident to another facility. I find that this alleged motivation is not supported by the evidence.

Firstly, the last time family members expressed a desire to move the Resident to a different facility occurred about 7 to 10 years ago. Secondly, the uncontroverted evidence established that if the family members wanted to move the Resident to a different facility, they could have done so at any time. The only thing that is clear from the evidence is that the family wanted to remove the Resident from Rainier School after the conversation with the Grievant. As the Grievant points out the Grievant and the Mother had a long working relationship that involved telephone discussions once every 7 to 10 days. The Grievant never identified conversations during this time in which the Mother expressed a desire to move the Resident to another facility.

It seems odd that the family would keep the Resident at the same facility for approximately 50 years and was motivated to move him out at this time, to the point of inventing serious fabrications and accusations. The only thing that occurred that could supply that motivation was the conversation between the Grievant and the family members.

Not only are the Employer's witnesses' credibility at issue, so is the Grievant's credibility. Although the Union considers that the Grievant's statements regarding the duration of the phone call to the family member is a minor inconsistency that was quickly corrected by the Grievant, I

do not believe that this inconsistency should be ignored. Firstly, the Grievant gave his statement to Detective Penney within a fairly reasonable time of the incident. His recollection should have been clearer at that time. It is important to note that the Grievant's statement changed only after he was confronted with the telephone logs of the Sister's cell phone. This is one of a series of inconsistencies of the Grievant's testimony and the Grievant's developing version of the facts when confronted by documentary evidence. Additionally, the Grievant's denial that he used his phone at his office to call the family members because his scan card had been terminated was clearly shown to be untrue. His scan card reflected numerous uses of his office phone to make long-distance phone calls even throughout the following week.

It is also reasonable to assume that the Grievant knew that the phone logs would indicate that he called the family for approximately 10 minutes. However, he did not count on the Sister's cell phone records to show that she called him for approximate 55 minutes thereafter. Because his phone logs show he spoke with the family members for approximately 10 minutes, it would be unlikely that the family members' version of the conversation would be accurate because of the duration of the phone call and the amount of details discussed during the conversation. However as the evidence clearly establishes, the Grievant did in fact engage in a much longer conversation with the family members and thus providing him ample time to tell the family members of all the matters detailed in the Sister's notes, e-mail, and statement.

I also find the Grievant to be inconsistent concerning record-keeping. Initially he stated that he was unaware of any policies to maintain records. However, the documentary evidence showed that he had received training on this particular issue. What I find more telling however is the Grievant's own actions concerning records.

He admits that he shredded the records. Therefore the Employer has indeed proven this allegation. The Grievant's explanation that phone logs are not normally kept is contrary to what he did when the new staff took over. He provided the new staff with phone logs, albeit empty. Why would the Grievant provide the new staff with phone logs if they were not required to maintain them? This does not seem logical unless the Grievant knew that phone logs must be maintained in order to continue the care of the Resident and convey the history of contacts with family members. As the Grievant stated, one of his primary duty is to communicate with the

family members. It seems very logical that phone logs would be maintained in the file to detail contacts with family members.

Furthermore, at the time of the investigation, the Grievant informed Detective Penney that he could not provide specific answers without looking at his notes. He informed Detective Penney that he would provide the notes. At the time he made this statement, a presumption is inferred that he still maintained the notes or else why would he not answer the questions rather than respond to the questions that he could not answer them without referring to his notes.

When he made the statement to Detective Penney that he had to look at his notes in order to respond her questions, he should have remembered that he had already shredded his notes and phone logs. Otherwise he would not have told Detective Penney that he would provide his notes.

The Grievant could not answer Detective Penney's questions at the time of interview near the date of the incident. Nothing has been shown that something occurred that would have caused the Grievant to have a clearer recollection approximately 2 years later. I find that this inconsistency adds to the overall credibility resolutions.

I also find suspect the Grievant's explanation that he brought up the subject matter of public masturbation with the family members in 2009 because the Resident had engaged in this behavior sometime during the summer of 2009. Indeed his testimony indicates that he would have no reason to bring up the subject matter of the Resident's past behavior relating back to the documented incident in 2007 of public masturbation. Thus, the Grievant must necessarily assert that the Resident engage in similar behavior in 2009. There is absolutely no evidence to indicate such occurrence.

If the Grievant was the sole person who witnessed this behavior, there is no evidence that he brought this up at a team meeting or otherwise informed the other staff. If the Grievant was so concerned about the Resident's behavior in 2007 and brought up the subject matter at a team meeting, why would similar behavior in 2009 not be reported by the Grievant? There is no record evidence that the Grievant brought this to the attention of the team.

With respect to the Grievant's supporting witness, Clark, I find that there are some glaring inconsistencies in her testimony also. Firstly, I find that because of her past experience she is not an objective witness. However there are two specific points which do not support her statements. Firstly, she explains that the Sister got her phone number by contacting a friend, Judy Clinton. However Clinton's testimony does not support this.

Clinton admitted that an unknown female called her and asked for her help. However that person was very specific as to the type of help they sought. Clinton's testimony showed that the person was trying to keep the resident in the same housing section and sought her help because Clinton had encountered the same issue. No discussion between Clinton and the unknown female about sexual abuse was raised. It is not logical to assume that if the Sister called Clinton, she would not have raised the subject matter of sexual abuse. Additionally, the caller indicated their desire to keep the resident at that facility. While in this case, the Grievant asserts that the family members were attempting to remove the Resident from Rainier School. Thus, it seems illogical that Clinton would have been the source of Clark's phone number that was written down by the Mother and Sister.

But more importantly, Clark testified that she identified two individuals as the Sister's sources of information about the sexual abuse allegations. I find it very unlikely that she in fact provided these names to the investigators and no follow-up interviews were pursued by the investigators. As both investigators stated, their reports would have indicated the names provided by Clark.

Turning to the question of the Sister's credibility I find that her testimony at hearing remained consistent with her prior statements and interviews. I find it important as did the Employer, that her statement had significant details of the conversation and was corroborated by her contemporaneous notes and her Mother's notations. I also find that the specific names mentioned by the Sister in her e-mail also demonstrate that she obtained the information from the Grievant. The Union's argument that this information could have been obtained from correspondence from the Rainier School to the Mother is indeed a possibility however that possibility is not supported by any concrete evidence.

I find the assertion that the Sister was "detached from reality" is unsupported by the evidence. The Union argues that the Sister credibility is affected because of her politics and her faith, and is indicative of her personal flaws (detachment from reality). Indeed, the Sister did express her political opinions one, which is shared by many people in this country and not indicative of any character flaw.

Secondly, the fact that she brought up her faith during the conversations with the Grievant and Clark is being used to support that she had personal flaws. To the contrary, I find that her personal faith is not indicative of any personal flaws. The evidence has not demonstrated that inference. Both the Union's witnesses have raised the fact that the Sister talked about her faith. It seems illogical that someone would reach out to someone during their conversations hoping to bond with the other person based on their faith, and then engage in such deception.

I find very important that the Sister's subsequent actions are supportive of her credibility. Specifically, I do not believe that a "detached from reality" person would insidiously involve their minister and friend as an accomplice to this fabrication. The seriousness of the allegations contained in the e-mail and more importantly the recipient thereof (wife of State Senator), is not an action that is taken very lightly. The reporting of sexual abuse to a Senator's wife is a serious undertaking. I simply do not believe that the Sister used her friendship and faith to manipulate her friend and minister in perpetrating these false statements.

As stated earlier, the Employer did not shun its duty of fair investigation. It more than considered the allegation of the Sister "detached from reality" argument. As part of the investigation and follow-up on the Grievant's arguments, the superintendent specifically asked a manager to converse with the Sister, in an effort to get a sense of her credibility or "detachment from reality". The Employer complied with its duty to provide a thorough investigation. The fact that the Employer reached a different conclusion than the Grievant does not establish a violation of any due process rights.

The parties also argued regarding the appropriate standard of proof to be applied in discharge cases. Some arbitrators have raised the level of proof from a preponderance of the evidence to clear and convincing evidence when employee terminations are involved. I find that under either standard, the Employer met its burden of proof.

Normally, disciplinary cases issues involve progressive discipline and corrective behavior. Additionally termination of employment normally raises the argument whether the degree of punishment was warranted by the misconduct. In this case, the Union has not raised these issues, and in fact has stated that they are not contending otherwise. Nevertheless, I do find that Grievant's misconduct was so egregious that it warranted termination without the use of progressive discipline principles.

I also agree with the Employer that it properly considered the Grievant's prior disciplinary history even after the Grievant had requested the removal of such information from his record. The contract specifically provides a time period in which the Grievant can request the removal of disciplinary history from his work record. In the instant case, the Grievant failed to submit a timely request. As a result thereof, the contract specifically allows the Employer discretion to consider such disciplinary actions based on unusual circumstances. The Employer acted within its rights to consider prior disciplinary actions.


However, the Employer's consideration of prior disciplinary actions, in the end, does not play a role in my finding that the proven allegations by themselves without reference to prior disciplinary history or other allegations (destruction of documents) are egregious enough to warrant immediate dismissal.

Accordingly, based on the reasons set forth above, I find that the grievance is without merit. I find that the Employer had just cause to terminate the Grievant's employment based solely on the statements made to the family members. Additionally, I also find that the Employer had just cause to discipline the Grievant for failing to maintain his notes and phone logs as per standard operating procedures.

AWARD

The grievance is denied.

Dated this 16th day of April, 2012.



Eduardo Escamilla
Eduardo Escamilla
Arbitrator