

In Re the Arbitration of:

WASHINGTON FEDERATION OF )  
STATE EMPLOYEES on behalf of )  
Bruce Witham, )  
Grievant )

AAA No. 75 390 00540 06

and )  
STATE OF WASHINGTON, )  
Respondent. )  
\_\_\_\_\_ )

OPINION ON ARBITRABILITY

Date: April 25, 2007

Arbitrator  
Carol J. Teather  
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## OPINION ON ARBITRABILITY

Background

On April 7, 2006, the Washington Federation of State Employees (“WFSE”) filed a grievance on behalf of Bruce Witham (“Grievant”) alleging a violation of Article 2 and Article 5, sections 5.1 and 5.2 of the applicable collective bargaining agreement (“CBA”) between the Washington Federation of State Employees and the State of Washington. *See* Respondent’s Exhibit (R. Ex.) 3. Specifically, the grievance alleged that: “Management did not follow the evaluation process outlined in the CBA and the resulting PDP was both inaccurate and retaliatory in nature.” The remedy requested was:

1. Management will destroy the inaccurate and inappropriate evaluation completed on 4/5/06 and remove all copies from all files including but not limited to Mr. Witham’s personnel file.
2. Management will complete a balanced and accurate evaluation for the period of 4/16/05 through 4/16/06 in accordance with the CBA.
3. Management will cease all retaliatory behavior and actions towards Mr. Witham.
4. Any other remedy that would make Mr. Witham whole.

R. Ex. 3.

The parties were unable to resolve their dispute at the initial steps of the grievance procedure, and the grievance was submitted to arbitration. The arbitrator was selected through the American Arbitration Association.

Prior to the hearing, the State of Washington (“the State”) moved for an award and order denying relief and dismissing the grievance on the grounds that the essence of the grievance is the content of the Grievant’s Performance and Development Plan (“PDP”) covering the performance period April 16, 2005, to April 16, 2006, as opposed to the process leading up to it. The State contends the content of a PDP is not arbitrable citing Article 5, section 5.2.D of the CBA.

Regarding the allegation of a violation of Article 2, the State contends that WFSE and the Grievant have not provided information sufficient to plead a cause of action for discrimination. The State framed the issue to be decided here as follows: “Is the content of an employee performance evaluation substantively arbitrable under the terms of the Collective Bargaining Agreement, as grieved under Case No. 75 390 00540 06, which alleges a violation of Article 5.1 and 5.2.” Respondents’ Memorandum in Support of Motion for Award and Order Denying Relief and Dismissing Matter.

The WFSE responded to the motion stating that it is not challenging the contents of the Grievant’s PDP for the performance period April 16, 2005, to April 16, 2006. Rather, it is challenging the evaluation process which led up to that PDP and claiming a violation of Article 5, Section 5.1 of the CBA. The WFSE agrees that the contents of a PDP are not arbitrable. The WFSE points out that the State’s argument to the effect that it complied with the provisions of the CBA covering the evaluation process is an argument on the merits of the grievance and not the question of arbitrability. The WFSE also points out that the grievance additionally alleges retaliation for the actions of the Grievant in complaining to his employer of unlawful harassment, in violation of Article 2. Grievants’ Response To Motion For Dismissal.

The State replied to the Grievants’ response to its motion by essentially stating that it had demonstrated compliance with the evaluation process required by Article 5 of the CBA in the documentation it had submitted with its motion. The State also pointed out that the Grievant had not cited to any protected status outlined in Article 2, section 2.1 and, therefore, lacked standing to raise a claim of discrimination or unlawful harassment under Article 2. Respondents’ Reply to Grievants’ Response to Motion for Dismissal.

### Discussion

Where the collective bargaining agreement provides that the determination of arbitrability is vested in the arbitrator or where the parties agree to submit the

question to arbitration, the arbitrator has jurisdiction over the issue of arbitrability. *See* HOW ARBITRATION WORKS, 278 (Elkouri & Elkouri 6<sup>th</sup> ed. 2003). In the instant case, the parties submitted the arbitrability issue to this arbitrator, and the CBA provides that “[t]he arbitrator will hear arguments on and decide issues of arbitrability... .” CBA, Article 29, section 29.4.D.2. Thus, this arbitrator has authority to decide the issue of arbitrability.

It is undisputed that the content of the Grievant’s PDP is not arbitrable. The WFSE and the Grievant are challenging the evaluation process leading up to the Grievant’s PDP for the period April 16, 2005, to April 16, 2006, claiming a violation of Article 5, section 5.1 of the CBA. Article 5, section 5.2.D of the CBA specifically provides that: “The evaluation process is subject to the grievance procedure.” Thus, I find that the issue raised by the grievance concerning the evaluation process used by the State is arbitrable.

In reaching my conclusion concerning arbitrability of the evaluation process, I did not consider the evidence and argument presented by the State on the evaluation process it claims to have followed, as this information goes toward the merits of the grievance. After both parties have had a full and fair opportunity to present their cases, this information will be considered in deciding the merits of the grievance.

I also find that the issue of a violation of Article 2 of the CBA is arbitrable. The State is correct in pointing out that the grievance does not identify which of the protected classes described in Article 2, section 2.1, forms the basis of the Grievant’s claim of discrimination under Article 2. Yet, this argument seems to go more toward the merits of the grievance rather than its arbitrability. Thus, I find the issue of a violation of Article 2 of the CBA is arbitrable.

### Conclusion

The arbitration will involve a determination of whether the State failed to follow the evaluation process set forth in Article 5 of the CBA in evaluating the Grievant’s performance for the period April 16, 2005, to April 16, 2006. It will

also involve a determination of whether the State discriminated against the Grievant in violation of Article 2 of the CBA, and then retaliated against him for reporting the discrimination.

April 25, 2007

A handwritten signature in black ink, reading "Carol J. Teather". The signature is written in a cursive style with a large, stylized initial 'C'.

Carol J. Teather  
Arbitrator