IN THE MATTER OF THE ARBITRATION

WASHINGTON FEDERATION OF STATE EMPLOYEES

and

AAA 75 390 00196 08
Reduction in Pay

STATE OF WASHINGTON
DEPARTMENT OF LABOR & INDUSTRIES

Appearances: For the Union: Julie L. Kamerrer, Esq.
Younglove & Coker

For the Employer: Valerie B. Petrie, Esq.
Asst. Attorney General

DECISION AND AWARD

The undersigned was selected by the parties through the procedures of the American Arbitration Association. A hearing was held in the above matter on August 27, 2008 in Tumwater, Washington. The parties were given the full opportunity to present testimony and evidence. At the close of the hearing, the parties elected to file briefs. The Arbitrator has considered the testimony, exhibits and arguments in reaching his decision.

ISSUE

The parties agreed on the following issues:

> Did the Employer have just cause for the reduction in pay of Grievant from Range 46, Step L to Range 46, Step E for a time period of 6 months? If not, what is the appropriate remedy?

BACKGROUND

The State of Washington Department of Labor and Industries, hereinafter referred to as the Employer, has as one of its functions auditing taxes paid by Employers to cover Workers Compensation. The Washington Federation of State Employees, hereinafter referred to as the Union, represents many of the employees of the Department. The Collective Bargaining Agreement in effect at the time of the grievance commenced on July 1, 2005.

The Department employs auditors who are the employees who perform the review of the taxes paid by employers for Compensation coverage throughout the State of Washington. The auditors are located in six different Regions in the State. Region 3 has its headquarters in Tacoma, Washington. The City of Port Angeles and the Counties surrounding that City are part of Region 3. There is only one auditor who services that area. That auditor is the Grievant.[1] His area of service is larger than the area covered by the other auditors in the Region. Grievant began work with the Employer as an auditor in 1980. He is the only auditor who works by himself. Five other auditors work out of Tacoma and two are in Bremerton.

There are different types of audits that the auditors perform. A random audit is done on some businesses. The computer picks those employers that are to be subject to a random audit. Audits can also be done for cause. A complaint may be filed or some issue may have arisen out of a claim being filed by an employee of an employer. Some audits are more complex than others. If an employer has several different classifications, the taxes paid on each

[1] There were other employees of the Department who work in Port Angeles performing duties different than Grievant's, but he was the only auditor there.

position can vary. Taxes are paid based on the risk of injury for that particular job. The higher the risk of injury is the higher the tax on that job. In addition to those two types of audits, a mail-in audit has been added over the last few years. In the regular audit, an interview is done of the Employer as part of the audit, and extensive records are reviewed A mail-in audit is much simpler.

The Supervisor of the Region assigns cases to an auditor. After the case is assigned, a letter is sent to the employer. This precedes the actual audit. The letter requests that certain information be made available. After that is done, an individual in the office in Tacoma schedules the audit. It can be at the employer's place of business or at the auditor's office.[2] After the appointment, the auditor prepares a report that may include a tax assessment based on what the information revealed.

The auditors were not initially required to perform any set number of audits. When Les Hargrave became the Supervisor in Region 3 this changed. He required auditors to complete 8 audits per month. This also became a requirement for auditors in all the Regions.[3] The auditor could choose which audits to complete from an inventory the auditor had of cases assigned to that auditor. Mr. Hargrave was Grievant's Supervisor during fiscal year 2006. The fiscal year began July 1, 2005 and ended June 30, 2006. Grievant was unable to complete the required number of audits during that fiscal year.

Article 27 addresses discipline. It provides in pertinent part:

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[2] Grievant testified that the woman scheduling his audits was not familiar with the area he covered and often he had to reschedule for convenience. In addition, an employer may not show for the audit and he would have to reschedule it himself.

[3] The State Legislature required all Agencies to set benchmarks. In this Agency a certain percentage of employers had to be audited. This prompted the new requirement.

> 27.1 The Employer will not discipline any permanent employee without just cause.
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> 27.2 Discipline includes oral and written reprimands, reduction in pay, suspension, demotions and discharges. Oral reprimands will be identified as such.

Grievant was disciplined for his failure to complete the required number of audits. His pay was reduced 10% for three months. He grieved that decision, but the matter was not pursued to arbitration.

Kevin Davis became the Supervisor of the auditors of Region 3 during the summer of 2006. He had been the Lead Auditor in the Region before being promoted to Supervisor. He determined that the auditors in his Region should complete nine audits a month instead of eight.[4] One of those audits could be a mail-in audit. He informed the auditors in the Region of this requirement. He also told them that if an auditor met the requirement for all three months in a quarter, the auditor would then go on a quarterly review rather than monthly. That meant as long as 27 audits were completed in a quarter, it did not matter if 9 were done in each of the three months. This gave the auditor flexibility during the quarter. He also added an additional new requirement. Any backlog from the previous fiscal year also needed to be completed. Thus, any auditor who did not finish 96 audits for fiscal year 2006 had to complete those as well. That had not been the case in the past.

Grievant had a backlog of 15 audits from fiscal year 2006 at the beginning of fiscal year 2007. Mr. Davis directed Grievant to complete his 9 audits for July and to clear up the backlog by the end of the first quarter. In August, he

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[4] The requirement for the other Regions did not change. It remained at eight.

extended that deadline to the end of the fiscal year. Grievant had done little in the way of reducing his backlog for the first six months of the fiscal year and in fact had a backlog from the current fiscal year by then. The chart below shows the number of audits completed by Grievant in each month during fiscal year 2007.

July	Aug	Sept	Oct	Nov	Dec	Jan	Feb	March	April	May	June		Total
10	9	8	8	5	10	7	5	9	6	8	3	=	88

Because he was behind in the current fiscal year, he had done virtually none of the backlog from the previous year. Based on these figures, Mr. Davis told Grievant the 2006 backlog would be forgiven. He told this to Grievant on January 18, 2007.

Mr. Davis sent a memo to Grievant each month indicating how many audits Grievant needed to complete that month. This was part of the work plan from Mr. Davis to Grievant to help remind him of what he had to do. Mr. Davis also visited the Port Angeles office each month. Grievant told Mr. Davis during those visits the audits he felt he could complete that month. Mr. Davis during those meetings often gave Grievant assistance in learning new methods, such as changes in the excel spreadsheet format, that could shorten the time it took him to complete an audit.

Grievant was twenty audits behind at the end of fiscal year 2007. It was determined that discipline should be imposed. A letter was sent on October 29, 2007 informing Grievant that his salary would be reduced for six-months from Range 46, Step L to Range 46, Step E. This represented a reduction in pay of $674 per month for that six-month period. He grieved that reduction.

POSITION OF THE EMPLOYER

An employee can only be disciplined under the contract for just cause. Just cause exists when an employee is given notice of the rule; proof is offered that the employee violated the rule; a fair investigation has taken place: and the discipline imposed is reasonable and evenhanded. All of those requirements have been met here.

Grievant knew what was expected and was provided ample training in order to assist him in completing his assignments. His training profile shows the number of courses he was able to attend as part of his job. He was informed on a regular basis that his performance was below standard. His Supervisor regularly met with him and discussed his performance and provided a monthly work plan for him. All of these actions were documented and placed into evidence in this proceeding. Thus, Grievant knew what he had to do.

The evidence clearly showed that Grievant failed to perform up to the standards set. Grievant admitted he had a problem meeting those standards. He violated the Employer's Rules and the investigation concluded that was so. It was based on that investigation that discipline was issued. At the pre-disciplinary meeting, Grievant offered an explanation for his failure. He did not offer those reasons at any time during his monthly meetings with Mr. Davis. The investigation also showed that some of the reasons offered were not substantiated by the records, such as his claim that he had to use FMLA Leave. The records indicated he hardly used any.

The Employer considered various forms of discipline before deciding on the discipline to issue. It considered Grievant's length of service and prior

discipline. Its decision was reasonable and fair and should be upheld by the Arbitrator.

POSITION OF THE UNION

It was unfair of the Employer to expect Grievant to complete the same number of audits as the other auditors given his location. It took him much longer to get to an employer's business location than it did for other auditors. The area he covered was far larger than any other auditor in the Region. His remote location also limited the amount of time he could interact with other auditors or his Supervisor. Though they met monthly, other auditors had far more time with the Supervisor since he worked at or near their location.

New auditors were provided a substantial training course. That course did not exist when Grievant began working. New methods were introduced to enable auditors to complete their tasks more efficiently. Grievant did not have that information or training on these new methods. He had to pick it up as he went. A witness who testified on Grievant's behalf had been an Auditor 3 like Grievant and is now an Auditor 5. She confirmed that the training received by those hired years ago did not compare to the training given those hired more recently. She also stated that the management style of Mr. Davis had caused discontent in the office and resulted in high turnover. There had not been any in the past.

Grievant's Supervisors introduced new rules that limited the interaction between Grievant and other employees of the Department in Port Angeles. That caused friction in the office that further slowed Grievant.

Grievant had to use much of his leave during the 2007 fiscal year. Since he was the only auditor in the office, there was no other individual who could take calls from businesses with whom he was dealing or otherwise assist him. The number of audits required each month did not change regardless of whether he was on vacation or other leave for most of the month. The requirements for Region 3 were higher than anywhere else in the State. That was not fair to the auditors in the Region or to Grievant.

It was unfair to initially require Grievant to complete audits from the prior fiscal year. He was not put on notice that this would be required prior to the beginning of the new fiscal year. He was set up to fail from the beginning by adding this burden. For all these reasons, the Employer failed to prove it had just cause for the discipline imposed.

DISCUSSION

The Employer listed in its brief the factors it must prove in order for it to demonstrate it had just cause to take the disciplinary action it did. Initially, it must show there is a published rule, the rule was violated and that its investigation was properly done. The Rule allegedly violated here involves a failure to meet the minimum audit requirements. The State standard was eight per month. Mr. Davis decided to increase the amount of audits that had to be completed to either 9 per month or 27 per quarter, depending upon the prior success of the auditor in meeting the 9 per month requirement. He then added a new requirement that any backlog from the prior fiscal year also had to be completed. Grievant had a difficult time keeping pace under the old standard. To his credit, Mr. Davis recognized that this new standard was putting

Grievant in a tenuous position so he eliminated the prior year's backlog from what was expected of Grievant. Despite that change, Grievant still failed to attain the set completion rate. This is not in dispute. He thus violated the Rule as published and the investigation revealed this was so. However, those are only the first steps in the analysis. The Employer must also show that the Rule is reasonable and was reasonably applied to Grievant in order to prevail.

Mr. Davis believed his staff was capable of handling the increased workload. He felt allowing the auditor to do one of the audits as a mail-in audit and the experience of the auditors in his Region made this increase possible. The problem with that analysis is in Grievant's case it made a bad situation worse. If he had trouble meeting the monthly audit requirement when it was eight per month, it was going to be that much more difficult for him to do nine per month plus the backlog. Mr. Davis again to his credit tried to assist Grievant in improving his efficiency during their monthly meetings. He kept him appraised on a regular basis as to where he stood that month and what he still needed to do. Nevertheless, there was a snowball effect each month during the 2007 fiscal year, as the requirement for the next month added this increasing 2007 backlog to the number of audits required for that succeeding month. This burden was then compounded for the first six months with the need to do last year's backlog on top of the requirements for the current year. The goal for each month thus became more and more difficult if not impossible for him to attain. Were the expectations on Grievant despite Mr. Davis's efforts, more than he could have reasonably been expected to meet? For the reasons noted below, the Arbitrator finds the answer to that question is yes.

Grievant was a long-term employee. He began as an auditor when the tools available to auditors were not nearly as extensive as they are today. The Excel spreadsheet and the advancements in computer programs sped up the audit process as new shortcuts were created. Perhaps, that is why Mr. Davis felt the increase in workload was justified for the Region as a whole. The Employer argues that it recognized this fact and for that reason gave Grievant ample opportunity to get advanced training to assist him in learning these shortcuts. Conversely, Grievant testified the training he attended was not geared towards his job and did not fully assist him in learning what he needed to learn to complete the tasks as assigned.

The Arbitrator has reviewed the training record of Grievant submitted by the Employer as an exhibit. In 2007, he attended training courses on Interviewing techniques, IRS Materials, Testing, Skip Tracing, Medical Terms, Fact User, and Ethics. There was no evidence that Grievant was deficient in any of the skills that were within the scope of training he received in 2007. In fact, the testimony was that he was meticulous in his audits and the quality of the audits was excellent. Furthermore, all of the above training occurred after the discipline had already been issued, except for the Ethics course. He actually took no course other than that one during the fiscal year in question. His last course before the 2007 fiscal year began was in January and February of 2006. They were on using Excel. However, Grievant testified these were the courses to which he referred that were not directly related to his duties. They were not geared just for auditors, and apparently were not the type of training on Excel new auditors were receiving. From the above, the Arbitrator finds that while Grievant was a seasoned auditor, it is not at all clear that his experience alone

enabled him to keep pace with the changing skills needed for his job. He did take a course in Time Management in 2004, but how that related to the skills he needed for the modern day is unknown. Mr. Davis did meet each month with Grievant and try to show him some of the techniques he did not know and did do a power point presentation on Excel for all auditors. Again, this assistance was undoubtedly a step in the right direction. What was missing was giving Grievant in depth training on these new techniques and a learning curve as he absorbed the information he was being shown. Thus, the Employer argument that Grievant had ample training is not necessarily the reality. While this failure alone might not merit overturning the discipline, there is more.

Grievant's area of coverage was larger than that of any other auditor. He had to drive further to meet an employer than other auditors. The testimony was that it could take between an hour and an hour and one-half just to get to the location of some the businesses he had to audit. The Employer did offer a chart showing how Grievant's efficiency seemed to be better the further he traveled, but spending time in a car for an hour or hour and one-half each way has to slow one down. Similarly, driving to a site and having an owner never show also has an effect on efficiency. There was too little consideration give to these obstacles when discipline was imposed.

The inflexibility of the monthly quota for those who did not meet the requirements three months in a row also is troubling. Employees are entitled to take sick leave and vacation leave.[5] Grievant was entitled to 14.6 hours of sick

[5] Grievant testified that he also used FMLA. The Employer stated that its records showed that very little FMLA leave was used. There is no indication that he did not use the other leave he stated he used. No records were offered to prove or disprove this claim. In June of 2007 Grievant only did three audits, whereas he averaged 9 the first three months. Was leave taken in June to account for this?

leave each month. He was entitled to vacation time each month. Grievant testified his wife was ill during the period so he used most of his leave to be with her. If he is gone for a week or more during a month, he has lost valuable productive time. Where in the 9 per month audit requirement is there an adjustment for time off. It is unfair to Grievant to be required to do the same number of audits per month whether he is there all four weeks or only for two of them. Why not pro rate it as is done for part-time employees who are not expected to do 9 audits per month given the hours they work?

The bottom line is Mr. Davis had a one size fits all production requirement without consideration of challenges facing this employee or any other employee. While his attempts to assist Grievant should be applauded,[6] they just did not go far enough. The Union argues that Grievant was set up to fail. While the Arbitrator certainly does not find that was the intent of the Employer, in fact, to the contrary it was not, the end result was the same. He was put in a no-win position that led to his ultimate discipline.

Given these valid considerations, what the Arbitrator is having a difficult time understanding is why Grievant when asked each month about his progress and any problems, never raised any of these issues. He did not say I need more training. He did not say my area of coverage is presenting difficulties. He said nothing. He kept all this to himself until he was disciplined, just as he did when he was disciplined the first time. While the standard

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[6] The Arbitrator recognizes that in many respects Mr. Davis fully extended himself to try to help Grievant. However, in other respects he ignored individual differences in the challenges faced by the auditors who he supervised.

applied to him might have been high given the problems noted[7], his silence compounded the problem and in no small way helped get the matter to where it is now. Thus, he too bears major responsibility for the present situation. If he raised these issues and they fell on deaf ears, the Arbitrator would have been more sympathetic to his plight than he is at present given Grievant's silence.

The Arbitrator finds that the standard set by Mr. Davis, which incidentally was subsequently lowered to the prior level for fiscal year 2008 was unfair to Grievant. As noted earlier one of the factors in deciding if just cause exists is whether the application of the rule and the discipline imposed was reasonable. The Arbitrator finds here it was not. Standing alone, this might have resulted in the total reversal of the discipline. However, it is not the only facts for consideration. Grievant's silence was unfair to his Employer. He deprived them of the opportunity to do more to assist him. Mr. Davis appeared willing to help, but Grievant failed to ask for any. It is this fact that leads the Arbitrator to the conclusion that discipline should be imposed on Grievant, but not to the extent it was imposed by the Employer. The discipline imposed was a 17% reduction in pay for six months. The prior discipline caused a loss in pay of 10% for three months. The Arbitrator finds the proper discipline should have been the same 10% reduction, but for the same six months initially imposed.

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[7] It also does not reflect well on him that he did not even complete the required number of audits in fiscal year 2007using the 8 per month standard.

AWARD

1. The grievance is sustained in part and denied in part.

2. The disciplined imposed on Grievant shall be reduced to a 10% reduction in pay for six months.

3. Grievant shall be made whole for the difference in the discipline imposed and the discipline found appropriate here.

Dated: November 12, 2008

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Fredric R. Dichter
Arbitrator