In the Matter of the Arbitration

between Washington Federation of State Employees, AFSCME, AFL-CIO ("Federation"), on behalf of grievant Aurora Flores,

and

the State of Washington, Department of Labor and Industries ("Department").

Findings, Discussion and Award.

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| Case Numbers: | American Arbitration Association case No. 75 390 00312 07. Arbitrator's case No. IB1. |
| Representing the Department: | Kari Hanson, Assistant Attorney General, and Lawson Dumbeck, Assistant Attorney General, P.O. Box 40145, Olympia, WA 98504-0145. |
| Representing the Federation: | Christopher J. Coker, and Younglove Lyman & Coker, PLLC, P.O. Box 7846, Olympia, WA 98507. |
| Arbitrator: | Howell L. Lankford, P.O. Box 22331, Milwaukie, OR 97269-0331. |
| Hearing held: | In the offices of the Attorney General in Wenatchee, Washington, on February 21, 2008. |
| Witnesses for the Department: | Melvin Kollman, Angela Wilson, Dale Paris, Carl Hammorsburg, and Reuel ("Monty") Paradis. |
| Witness for the Federation: | Aurora Flores. |
| Post-hearing argument received: | From the Union by email on February 28, and from the Department on March 31, 2008. |
| Date of this award: | April 15, 2008. |

The Federation contests Ms. Flores' demotion from the supervisory Auditor 5 classification to the non-supervisory Auditor 3 classification. The parties stipulate that the issue presented in arbitration is: "Did the Department have just cause for the discipline of the grievant set out in [the letter of demotion], and, if not, what is the appropriate remedy?" There are no preliminary issues of substantive or procedural arbitrability; and the parties agree that the burden of proof is on the Department to establish just cause for the demotion. The hearing was orderly. Each party had the opportunity to present evidence, to call and to cross examine witnesses, and to argue the case. Testimony was taken down by a court reporter. The parties filed timely post-hearing briefs.

## FACTS

Ms. Flores has been an employee of the Department for nineteen years and has no prior discipline. She has been an Auditor since 1990.

The Department establishes rates for workers compensation insurance. Those rates depend on employers' disclosures of the size of each workforce and the sort of work performed by those employees. Sometimes those disclosures are not quite accurate; and it is the function of the Department's Auditors to ferret out such inaccuracies, including the most basic inaccuracy of all, failure to participate in the program. Division 5 of the Department, where this dispute arose, includes eight Auditors and an Auditor Supervisor and covers central Washington from Canada to Oregon.

Late in 2004 a new Auditor, Angela Wilson, joined that staff. She mentioned that her husband worked for a local company that was not correctly participating in the program, and Ms. Flores chose to audit that company. The owner of the company was far from pleased by that attention. The owner knew that Ms. Wilson was a recent employee of the State as an Auditor, although the owner did not know which agency she worked for; and the owner suspected that the business had been selected for an audit based on information provided by Ms. Wilson. The owner told Ms. Flores that the State should not employ an Auditor who had embezzled money. The record is not crystal clear about exactly how the owner characterized Ms. Wilson's past legal problems, but, more likely than not, there were no particular details of the nature or location of those problems except that the owner attributed the information to Ms. Wilson's father-in-law. Ms. Flores suggested that the owner talk to her supervisor.

Ms. Flores then immediately passed the owner's tale along to her supervisor, Dale Paris. Mr. Paris passed it up the management line, and it was addressed by a meeting of Mr. Paris, the next two levels of Department managers, and the Department's Human Resources representative. They agreed that Mr. Paris should contact Ms. Wilson's father- in-law and inquire about the story. Mr. Paris did so; and the father-in-law vehemently denied that he had ever told such a tale or that there was any truth to it at all. The Department did not ask Ms. Wilson about the allegation or talk to the owner directly.

Lacking the specifics that would allow any further investigation, the Department apparently put the story down to spite and considered the allegation unsubstantiated hearsay and ended its inquiry. Mr. Paris told Ms. Flores that he had looked into the allegation and that there was nothing to it.[1]

In May of 2005, Ms. Flores was promoted from Auditor 3 to Auditor 5 and became the Auditor supervisor for Region 5, the boss of her own prior section. Ms. Wilson was one of the Auditors in that section.

Ms. Wilson was an extremely regular and punctual employee; but about two months after Ms. Flores' promotion to supervisor, Ms. Wilson failed to show up for work for two days and did not return Ms. Flores' calls to her home. Eventually Ms. Flores talked to Ms. Wilson's husband, and the three of them met after work. Ms. Wilson said that she had been stopped for speeding and the usual records check disclosed an arrest warrant from Utah. She told Ms. Flores that she had had check writing authority for a client in her prior job and had written checks to herself during a difficult financial period. The client had eventually caught on, and Ms. Wilson had cashed out her retirement savings to make good the embezzled funds.[2] The client had involved the local police, and Ms. Wilson had been charged with three counts of forgery and one count of communications fraud. The three forgery counts had been dropped in court, and Ms. Wilson was allowed a guilty "plea in abeyance" to the single count of communications fraud, which plea would be dismissed after 36 months.[3] When Ms. Wilson left Utah, she explained, she had no reason to believe that there would ever be a warrant issued in connection with this conviction, and she was now required to return to Utah to straighten things out.

Ms. Flores called Mr. Paris—now her organizational peer—who had been her supervisor when these allegations first arose, and said, "Do you remember the information I have you about [Ms. Wilson]? It actually is true." Mr. Paris replied that he did not know what more he could have done to investigate the allegations when they first came up. (Mr. Paris did not mention this call to his superiors.)

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1. This formulation comes from Ms. Flores' testimony. Mr. Paris' recollection of the conversation was far less exact and he disclaimed any specific recollection of the words used.

2. Ms. Wilson eventually memorialized these events, at Ms. Flores' request, and these details are taken from that memo. It is not clear in the record exactly how much detail Ms. Wilson provided at the initial meeting with Ms. Flores.

3. These are the legal consequences of a "plea in abeyance" in Utah as Ms. Wilson understood them. There is no need to determine whether that understanding was accurate.

When Ms. Wilson returned from Utah, Ms. Flores asked her to write a memo explaining her legal history with her prior employer. Ms. Flores placed that memo in a supervisor's file in her office and did not pass it along to her superiors or inform them of Ms. Wilson's prior history.

Not long after her return, Ms. Wilson applied for an Auditor 4, Auditor Trainer, position with the Department officed in Olympia. As part of the selection process for that position, the Olympia office contacted Ms. Flores by phone and asked her a series of questions as Ms. Wilson's current supervisor. Ms. Flores gave Ms. Wilson a glowing recommendation and did not mention Ms. Wilson's prior history or the memo in Ms. Flores' file. She maintained that silence despite the final question of the reference check, which was "Is there more information that we did not cover you would like to offer about the candidate? Can you suggest another person to call who is familiar with the candidate's work?" Ms. Flores' only reply to that question, according to the caller's notes, was 'Don't take her.' She's very motivated and is always thinking to make things better." Ms. Wilson promoted into the Auditor Trainer position in February, 2006.

Meanwhile, back in Region 5, the business owner who originally passed along the rumor about Ms. Wilson's prior legal problems was still unhappy with the Department. That case was now in the hands of the Collections section; and the owner was still claiming that the Department had an employee who had embezzled money. As part of that ongoing dispute, the owner filed a broad public records request with the Department.

Ms. Flores' file still held the memo written by Ms. Wilson; and the business owner had filed a public records request. Ms. Flores asked Mr. Paris, her prior supervisor, whether she should disclose that memo. (Mr. Paris was Ms. Flores' organizational peer since her promotion to Auditor Supervisor, but he had long been her mentor and coach in the Department. He said that she certainly should, and she promptly brought the memo to the attention of her immediate supervisor and the Regional Administrator. When asked why she had not passed the memo along previously, she explained that she understood the matter had been taken care of by the Department when the allegations first came up.

After an investigation, the Department demoted Ms. Flores from her supervisory Auditor 5 classification back into an open Auditor 3 position. The letter of demotion sets out three specific reasons for the demotion: Her failure to notify her superiors of Ms. Wilson's arrest on an outstanding warrant in August, 2005, her failure to pass along the memo from Ms. Wilson, and her failure to mention either Ms. Wilson's history or the memo in response to the reference check when Ms. Wilson applied for promotion. The Federation grieved the demotion.

## DISCUSSION

There is no dispute that the demotion of Ms. Flores was disciplinary and therefore requires just cause under the parties' collective bargaining agreement. Whole volumes have been written on the just cause standard in labor arbitration. But in the end, just cause is simply the encapsulation of our common reaction to certain occasional failings of employee discipline. Those failings generally fall into three categories: It is not just to discipline an employee for something that he or she did not actually do. It is not just to discipline an employee to a degree that he or she should not reasonably have expected to be a possibility. And it is not just to base discipline on procedures or investigations that are substantially irregular or unfair.

In the case at hand, there is no substantial factual dispute either about what Ms. Flores did or about the particular disciplinary charges that resulted.[4] There is no substantial dispute that Ms. Flores did what she was demoted for.

The Union's primary defense of Ms. Flores amounts to an argument that she reasonably relied on Mr. Paris's brief notice to her, after the initial investigation, that the matter "had been taken care of." There are several problems with that argument. First, both Ms. Flores and Mr. Paris testified about just what was said in that very brief conversation; and Ms. Flores' version attributed to Mr. Paris the conclusion that "There's nothing to it," and not, as the Union suggests, that it "had been handled." Even assuming that it *might* make sense to rely on "It's been handled" later on, in the face of Ms. Wilson's subsequent written confession, it makes no sense at all to rely on "There's nothing to it" after Ms. Wilson admitted that she had indeed been involved in embezzlement. Similarly, Ms. Flores testified that Mr. Paris's reaction was "I checked, I called, I checked references, I don't know what more I could have done to find out if that was true or not." On Ms. Flores' own testimony, therefore, it should have been clear that the prior allegations had suffered from a failure of proof, not from somehow being "taken care of." Ms. Flores, with fresh proof in hand, in the form of Ms. Wilson's written confession, could not reasonably have believed that the matter was somehow eternally closed due to the prior inquiry.

Second, the Union suggests that it is "essential to the State's case...that [Ms.] Flores somehow intentionally tried to bide the Wilson issue from management." (Post-hearing brief at 5.) But that allegation is nowhere to be found in the demotion letter or in the Department's argument in support of the discipline. Ms. Flores was not charged with "intentionally trying to hide" Ms. Wilson's record, but with very serious negligence in failing to pass Mr. Wilson's written admission up the management chain.

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4. Some subsidiary portions of the written charges were deleted during the hearing by stipulation of the parties.

The Union is certainly right in pointing out that motive usually counts in employee misbehavior discipline cases. Motive does not usually count in failure-to-perform discipline cases, but the employer in a failure-to-perform case is usually required to show detailed efforts to correct the substandard performance prior to substantial disciplinary action. In the case at hand, the appointing authority's explanation of the importance of motive makes compellingly good sense: Ms Flores testified that she understood her responsibilities as a supervisor (her prior training is not at issue), but she failed to perform one of the most basic supervisory functions without providing any motive or explanation, either at the time or up until the arbitration hearing. She has never yet provided *any* explanation for her failure to inform higher management of Ms. Wilson's arrest, and of Ms. Wilson's subsequent written admission that she had been the subject of court proceedings arising from embezzlement charges; and she still insists that the apparent explanation, "I made a mistake," is incorrect. No employer should be obliged to continue the supervisory duties of an employee whose prior actions in such a situation have been unexplained and, frankly, incomprehensible; and no employee can claim to be much surprised at the loss of his or her supervisory responsibilities after such behavior.

The Union offers one final argument on Ms. Flores' behalf: the appointing authority testified that his decision to demote Ms. Flores to Auditor 3 was based, in part, on the fact that an Auditor 3 position was available and a (much rarer) Auditor 4 position was not, and the Union argues that the choice of degree of discipline should not have depended on that circumstance. But the Union does not contest the claim that no Auditor 4 position was available, nor does it explicitly suggest that the Department should have been required to pay Ms. Flores at the Auditor 4 rate for the available Auditor 3 work. If the Department had demoted Ms. Flores to a classification *beneath* the highest available nonsupervisory position, then the Union would have a compelling point. In this case, however, there is no dispute that the Department removed Ms. Flores' supervisory responsibilities and placed her in the highest available nonsupervisory position.

In short, we still do not know why Ms. Flores failed to tell her superiors that Ms. Wilson had missed work due to her arrest on a prior warrant. Ms. Flores' testimony seems to show that she understood that a supervisor should send that sort of information up the line. And we still do not know why Ms. Flores asked Ms. Wilson for a written record of Ms. Wilson's legal history and then tucked that memo away without passing it on up the line. That unexplained behavior seems to have the probable consequence of leaving Ms. Wilson under the impression that she had reported her legal problems while depriving the Department of the information Ms. Wilson thought she had reported. But the very fact that none of us—other than, possibly, Ms. Flores—knows why she chose to do those things is adequate justification for Ms. Flores' removal from supervisory duties. Even from the union point of view—perhaps *especially* from the union point of view—neither employees nor managers should have to accept a supervisor whose performance of his or her basic supervisory duty of communication includes substantially

AWARD

The Department had just cause to demote Ms. Flores. The grievance is dismissed.

Respectfully submitted,

Howell L. Lankford
Arbitrator