In the Matter of Arbitration Between	)	
	)	
	)	
WASHINTON PUBLIC EMPLOYEES ASSOCIATION, (Union),	)	
	)	
	)	
and	)	RULING ON ARBITRABILITY
	)	
STATE OF WASHINGTON, LIQUOR CONTROL BOARD, (State or Agency).	)	AAA Case No. 75 390 271 06 Aslpund Grievance
	)	
	)	
	)	

BACKGROUND

In November 2005, the Union filed a grievance alleging that the Agency had given Steve Asplund (Grievant) a written reprimand without just cause. When the grievance was not resolved at lower levels of the grievance procedure, the Union requested arbitration in May 2006. In response, the State asserted that the dispute was not arbitrable under the terms of the parties' collective bargaining agreement. The Union then filed a demand for arbitration with the American Arbitration Association (AAA).

Pursuant to AAA procedures and the parties' contract, David W. Stiteler was appointed as the neutral arbitrator of the dispute. In due course, the matter was set for hearing on December 13, 2006.

On October 24, Assistant Attorney General Morgan Damerow, on behalf of the State, contacted the Arbitrator and indicated that the parties had agreed to submit the arbitrability dispute for resolution in advance of the scheduled hearing date, pursuant to a provision in their contract. With the assistance of the AAA, a briefing schedule was established.

Pursuant to that arrangement, the State submitted a motion to dismiss the grievance on substantive arbitrability grounds. The motion was accompanied by a supporting memorandum, and sworn declarations from Diane Leigh, Deputy Director of the State's Labor Relations Office, and Mickie Patterson, the Agency's Human Resources—Labor Relations Manager. Leigh's declaration had as attachments a copy of the parties' contract, the Union's letter demanding arbitration, and the State's response asserting that the matter was not arbitrable under the contract. Patterson's declaration explained her involvement in the negotiations and stated that the Union's initial proposal for the discipline article had no restrictions on the types of discipline that could be pursued to arbitration, that the State expressed concern about the potential expense of arbitrating reprimand issues and proposed limiting grievances over reprimands to the first three levels of the grievance procedure, and that the parties eventually agreed on language to do that. Attached to Patterson's declaration were a copy of the Union's proposal, the State's counter-proposal, and the parties' tentative agreement for a discipline provision.

The Union filed a brief arguing that the grievance was arbitrable. It was accompanied by a sworn affidavit from Leslie Liddle, the Union's Executive Director, and copies of the contract, the grievance, and the State's letter claiming the grievance was not arbitrable. Liddle's affidavit stated that she was the Union's chief negotiator in bargaining, that the parties never discussed unwarranted discipline, that the Union understood that Article 26.1 addressed the problem of unwarranted discipline, that it was the Union's understanding that the written reprimands referred to in Article 26.7 were only those imposed with just cause, that the Union understood from the parties' discussions that any violation of Article 26.1 would be subject to arbitration, that the State never gave any indication that unwarranted written reprimands would not be subject to arbitration, and that the intent of limiting the arbitrability of justified written reprimands was to assure that they were accurate.

The parties each submitted reply briefs. Accompanying the State's brief were sworn declarations from Caroline Lacey and Joe Olson, members of the State's bargaining team. Both stated that the parties had specifically discussed limiting the grievances of written reprimands to the agency head level, that no one from the Union had explained the Union's view that Article 26.7 applied only to justified written reprimands as a way to assure their accuracy, that no one from the Union explained that the Union believed that a written reprimand could be arbitrated if the Union thought it was unwarranted, that the parties eventually agreed to language limiting grievances of reprimands to the agency head level, and that the State believed this would apply to all written reprimands.

ISSUE

The parties did not formulate a joint statement of the issue to be decided. However, their respective issue statements establish that there is no real debate over the question presented.

The State says the issue is "[w]hether a written reprimand * * * which alleges a violation of Article 26.1 [just cause] is substantively arbitrable under the terms of the Collective Bargaining Agreement."

The Union frames the issue as "[c]an the collective bargaining agreement provision barring arbitration of written reprimands be invoked to avoid arbitration of a written reprimand imposed without just cause?"

I find the issue to be:

> Does Article 26.7 of the parties' contract bar arbitration of a grievance concerning a written reprimand?

RELEVANT CONTRACT LANGUAGE

ARTICLE 26
DISCIPLINE

26.1 The Employer will not discipline any permanent employee without just cause.

26.2 Discipline includes oral and written reprimands, reductions in pay, suspensions, demotions, and discharges. Oral reprimands will be identified as such.

* * * * *

26.7 The Employer has the authority to impose discipline, which is then subject to the grievance procedure set forth in Article 27. Oral and written reprimands, however, may be processed only through the agency head step of the grievance procedure.

ARTICLE 27
GRIEVANCE PROCEDURE

27.1 Terms and Requirements

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A. Grievance Definition

A grievance" is an allegation by an employee or a group of employees that there has been a violation, misapplication, or misinterpretation of this Agreement, which occurred during the term of this Agreement. * * * * *

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27.2 Filing and Processing

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B. Processing

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Step 4 If the grievance is not resolved at Step 3, the Union may file a demand for arbitration (with a copy of the grievance and all responses attached). It will be filed with the Director of the OFM Labor Relations Office (OFM/LRO) and the agency head/designee within fifteen (15) days of the receipt of the Step 3 decision.

Within fifteen (15) days of the receipt of the arbitration demand, the OFM/LRO will:

1. Schedule a pre-arbitration review meeting with the OFM/LRO director or designee, the agency's Human Resource Office representative, and the Union's representative to review and attempt to settle the dispute.

2. If the matter is not resolved in this pre-arbitration review, within 15 days of the meeting, the Union may file a demand to arbitrate the dispute with the American Arbitration Association (AAA).

* * * * *

D. Authority of the Arbitrator

1. The arbitrator will:

a. Have no authority to add to, subtract from, or modify any of the provisions of this Agreement;

* * * * *

2. The arbitrator will hear arguments on and decide issues of arbitrability before the first day of arbitration at a time convenient for the parties, immediately prior to hearing the case on its merits, or as part of the entire hearing and decision-making process. If the issue of arbitrability is argued prior to the first day of arbitration, it may be argued in writing or by telephone, at the discretion of the arbitrator. Although the decision may be made orally, it will be put in writing and provided to the parties.

* * * * *

SUMMARY OF PARTIES' ARGUMENTS

State. The State argues that the Union's grievance of a written reprimand is not arbitrable and that the case must be dismissed. In the contract, the parties agreed that questions of arbitrability are for the arbitrator to determine. Although there is a

presumption in favor of arbitrability, a party cannot be compelled to arbitrate a matter it has not agreed to submit to arbitration. Here, the parties expressly agreed that reprimands may not be grieved to arbitration. In bargaining, the Union initially sought a provision that did not limit arbitration of any type of discipline, including reprimands. After the State raised concerns about the expense of arbitrating disputes over reprimands, the parties eventually agreed to language that limits reprimand grievances to the first three steps of the grievance procedure. Thus, according to the State, the parties' intent—that grievances over written reprimands are precluded from arbitration—is clear from the unambiguous language of the agreement.

Union. The Union contends that the grievance is arbitrable for several reasons. Article 26.1 prohibits the State from disciplining employees without just cause. Article 26.2 provides that oral and written reprimands are recognized forms of discipline. Article 26.7 allows employees to grieve discipline but precludes arbitration of reprimands. However, the Article 26.7 bar to arbitration of reprimands does not trump the unambiguous requirement in Article 26.1 that discipline be imposed only for just cause. During bargaining, there was no discussion of unjustified reprimands,

and the Union agreed to the bar in Article 26.7 with the understanding that it dealt only with reprimands issued for cause. The Union felt that limiting grievances of justified reprimands to the first three steps of the grievance procedure would provide sufficient protection to insure that such reprimands were free from factual or typographical errors. According to the Union, because the reprimand at issue was unwarranted, denying Grievant the right to arbitrate the matter deprives him of the contractual protection of Article 26.1. That conclusion would also encourage managers to ignore just cause in issuing reprimands and would result in innocent employees enduring bogus reprimands which remain in their personnel files for years and could harm their careers.

DISCUSSION AND ANALYSIS

This is the parties' first contract, the result of negotiations in 2004 following the passage in 2002 of the Personnel System Reform Act, which extended full collective bargaining rights to State employees. The dispute is a question of first impression. Here, the parties specifically allocated arbitrability disputes to the arbitrator.

In substantive arbitrability disputes, there is a rebuttal presumption in favor of arbitrability which applies absent positive assurance of the subject's exclusion from arbitration. *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 US 574, 582-583, 46 LRRM 2416 (1960). The inquiry is typically two-pronged: has the subject matter of the dispute been specifically excluded from arbitration under the agreement; and if not, is there other forceful evidence that the parties did not intend disputes over that subject matter to be arbitrated.

The first of those questions--whether the parties expressly excluded written reprimand grievances from arbitration—is a matter of contract interpretation. The focal point for the analysis is the language of Articles 26 (Discipline) and 27 (Grievance Procedure). A review of those provisions establishes that the parties clearly and unambiguously expressed their intent that grievances over written reprimands not go beyond the third step of the grievance procedure. Said differently, from that language it can be said with positive assurance that the parties intended to exclude written reprimands from arbitration.

Article 27.1.A defines "grievance" in broad terms as any alleged "violation, misinterpretation or misapplication" of the agreement. The underlying grievance certainly meets that definition. The Union has alleged that the Grievant was given a written reprimand without just cause. Article 26.1 unambiguously prohibits the State from disciplining an employee without just cause. Article 26.2 specifically defines discipline to include written reprimands.

If the inquiry were to end there, the obvious conclusion would be that the grievance is arbitrable. However, Article 26.7 expressly provides that grievances over written reprimands may not be advanced beyond the agency head level of the grievance procedure.

Based on that provision, the State asserts that it should not be compelled to arbitrate a grievance that the parties contractually agreed was not arbitrable. The Union counters that, to the extent there is any tension or conflict between the provisions, the just cause requirement of Article 26.1 is pre-eminent. As the Union interprets the language, any discipline imposed without just cause, even written reprimands, may be grieved to arbitration.

The words chosen by the parties to express their intentions are clear and express distinct, but mutually compatible, agreements. The State agreed in Article 26.1 that it would not impose discipline, including written reprimands, without just cause. The Union agreed in Article 26.7 that it would not pursue grievances over a particular form of discipline—written reprimands—beyond the agency head level. It is that express agreement to exclude grievances about written reprimands from proceeding to arbitration that precludes this grievance from arbitration.

Even if the language of the contract was not clear and unambiguous, there is other evidence to support the conclusion that the parties did not intend for written reprimand grievances to be arbitrable.

The limited bargaining history submitted does not support the Union's interpretation. The Union contends that its negotiators believed that the bar they agreed to in Article 26.7 applied only to reprimands issued with just cause.

> As attested to by the Union's chief negotiator, at no time during contract negotiations did either party contemplate, nor did they discuss, the topic of ***unwarranted*** written reprimands. Throughout the negotiation of Article 26 the Union understood the written reprimands plainly barred from arbitration by Article 26.7 to be ***warranted*** disciplinary actions—not bogus ones. Union' Brief on Arbitrability, pp. 3-4. (Emphasis in original.)

That subjective belief, however, apparently was not clearly communicated across the table to their management counterparts. The Union negotiators "assumed" that the State team had the same understanding of the language. However, as another arbitrator said in addressing this principle, what matters is the intent the parties disclosed to each other in bargaining, not their "undisclosed understandings and impressions." *Kahn's & Co.*, 83 LA 1225 at 1230 (Murphy, 1984); *Elkouri & Elkouri: How Arbitration Works*, 6th Ed., Ruben, ed., 456 (BNA 2003)(*Elkouri*).

The evolution of the contract language further undermines the Union's position. The Union first proposed language that did not contain a limitation on arbitration for any disciplinary action, including written reprimands. The State balked at the potential expense involved in arbitrating reprimand grievances and rejected the Union's proposal. The State's counter-proposal provided that reprimand grievances could only go to the agency head level. The parties eventually agreed on the State's language. There is nothing in that language to suggest that the parties contemplated two classes of reprimand grievances, those concerning reprimands without just cause and those concerning reprimands with just cause, with the former being arbitrable and the latter not.

Principles of contract interpretation also support this conclusion. Article 26.7 allows grievances over any level of discipline. That general provision is followed by the express limitation regarding written reprimands. Specific terms ordinarily govern over general terms, absent clear contractual intent to the contrary. Snow, *Contract Interpretation, in Common Law of the Workplace*, St. Antoine, ed., 72 (BNA 1998); *Elkouri* at 469–470.

It is generally accepted among arbitrators that a party may not be granted in arbitration what it failed to win in bargaining. Elkouri at 454. The Union initially proposed no limitation on the right to arbitrate any type of discipline, a position the State rejected. The parties ultimately agreed to language specifically excluding certain

discipline from arbitration. To read the contract as the Union suggests effectively would be award it something it sought but did not gain in negotiations.

Under the Union's suggested interpretation, an arbitrator faced with a grievance over a written reprimand would first have to determine the merits of the claim—was there just cause for the reprimand—in order to decide whether the dispute was substantively arbitrable. That puts the cart before the horse, and would effectively render the express limitation on arbitration of reprimands meaningless. An interpretation that gives meaning to all provisions is favored over an interpretation that would render a provision without effect. *Elkouri* at 463.

Finally, to suggest that the parties intended that reprimands imposed without just cause are arbitrable while those imposed with just cause are not is contrary to the plain language of Article 26. If the parties intended such a result, they did not express their intent in the words they chose. This contract, as is typical, contains a limitation on the arbitrator's authority, prohibiting the arbitrator from adding to or modifying the provisions of the agreement. To interpret the language as the Union suggests would require me to read terms into it, which would exceed my authority.

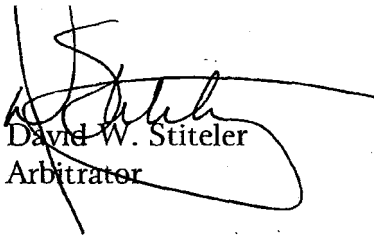
The Union has raised valid concerns about the potential harm to employees from reprimands issued without the required just cause. Those concerns, however legitimate, are appropriately raised in at the bargaining table, not in the arbitration arena.

The arbitration provision in the parties' contract is broad. But it is not limitless. The parties also agreed to the specific limitation in Article 26.7. My authority as arbitrator flows from their agreement. They expressly agreed that grievances over written reprimands would not proceed past the agency head level of the grievance procedure. That is their bargain, and it is the bargain I must enforce. The grievance will be dismissed.

RULING

Having fully considered the parties' submissions, authorities, and arguments, and after carefully reviewing the language of the contract, I conclude that the grievance in this case challenging the written reprimand imposed on Grievant is not arbitrable under the terms of the parties' contract. The grievance is therefore dismissed.

Respectfully issued this29th day of November, 2006.



David W. Stiteler
Arbitrator