

IN THE MATTER OF THE ARBITRATION BETWEEN

TEAMSTERS LOCAL UNION NO. 117,)
)
) ARBITRATOR'S OPINION
) AND AWARD
)
) UNION,)
)
) DR. THOMAS C. WALLACE
and) TERMINATION GRIEVANCE
)
)
) STATE OF WASHINGTON,)
)
) DEPARTMENT OF CORRECTIONS,)
)
) FMCS NO. 100311-02154-8
)
) EMPLOYER.)
)
 _____)

BEFORE: JOSEPH W. DUFFY
LABOR ARBITRATOR
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REPRESENTING
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HEARING HELD: OCTOBER 19, 2010
WALLA WALLA, WA

OPINION

Introduction

Teamsters Local Union No. 117 (“union”) serves as the exclusive bargaining representative for a bargaining unit of workers employed by the State of Washington, Department of Corrections (“DOC” or “employer”). The employer and the union (“parties”) submitted this dispute to arbitration under the terms of their July 1, 2009 through June 30, 2011 collective bargaining agreement (“Agreement”), a copy of which they introduced at the hearing as a joint exhibit. (J1)

This arbitration arose from a grievance filed by the union on behalf of the grievant, Dr. Thomas C. Wallace, contesting the grievant’s employment termination that occurred on or about October 26, 2009. (S1)

The hearing took place at the offices of the Department of Corrections in Walla Walla, WA on October 19, 2010. At the hearing, both parties agreed that the grievance is properly before me for a final and binding decision on the merits. (TR4:19-23) The parties also agreed that I should retain jurisdiction to aid in the implementation of the remedy, if a remedy is awarded. (TR5:6-11)

The hearing proceeded in an orderly manner. The attorneys did an excellent job of presenting the respective cases. Both parties had a full opportunity to call witnesses, to submit documents into evidence and to make arguments. Witnesses were sworn under oath and subject to cross-examination by the opposing party. A court reporter transcribed the hearing and made a copy of the transcript available to the parties and to me.

The parties submitted one joint exhibit (J1), fourteen state exhibits (S1-S14) and eleven union exhibits (U1-U11). A total of eight witnesses testified at the hearing, including the grievant (Katrina Suckow, Rhonda Erbenich, Pat Rima, Dr. Thomas C. Wallace, Nora Kristine Marks, Eydie Dean, Thomas Roe and Kyle King).

Following the testimony, the parties agreed to submit post-hearing briefs by simultaneous mailing or electronic submission to me and to each other, postmarked by December 17, 2010. (TR210) I received the briefs by the agreed deadline, and closed the record on December 17, 2010.

Issue for Decision

At the hearing, the parties agreed that the issue for decision is stated as follows: Did the employer have just cause to terminate the grievant's employment? If not, what should the remedy be? (TR5:1-5)

Background

The grievant, Dr. Thomas C. Wallace, went to work for the employer as a Psychologist 4 at the Washington State Penitentiary ("WSP") in Walla Walla, WA on approximately July 24, 2007¹. (U4, p.2) He testified that he came out of retirement to accept the job at WSP. From 1990 until he retired in 2005, the grievant worked at Wasatch Mental Health in Provo, UT, where, among other duties, he served as director and supervisor of a pre-doctoral psychology internship program. (U1, U2) He obtained his PhD degree in psychology in approximately 1988. Prior to entering graduate school in psychology, he had worked for many years in speech pathology and audiology.

When he worked at WSP, the grievant served as the only staff psychologist employed by the employer at WSP. He worked from a workplace on the third floor in the inpatient mental health unit. He provided direct patient care to the patients/offenders² in the unit and he performed psychological testing and evaluation of offenders in the general population. The grievant also supervised Psychological Associates. Three contract psychologists also work at WSP. The grievant had the responsibility to review the reports submitted by the contract psychologists and provide general oversight of their work. In the record, some dispute exists about the extent to which the grievant was considered the supervisor of the contract psychologists. (TR16:1-TR17:7; TR128-TR130; TR165:4-12; U4, U5)

Dr. Page, one of the contract psychologists, wrote a report dated May 28, 2009. The report dealt with an offender housed in the mental health unit. The first line of the text of the report states: "[offender] was referred for diagnostic evaluation, because of a difference of opinion as to his diagnostic status." (U6) In other words, the report is a "second opinion" on this offender. (TR137:7-17) The report also includes the following:

His recent report by Dr. Juguilon dated 05/22/09 contrasts significantly with that of Dr. Wallace from 05/20/09. Those seeming conflicts or contradictions extend

¹ The grievant testified that he began working at WSP on July 2, 2007. The record shows that his start date as a permanent employee was July 24, 2007. (U4)

² The terms "patient" and "offender" are often used interchangeably herein.

back to the time of [offender's] jail term and evaluative stays at Western State Hospital. His symptoms appear to have been internally inconsistent, as well as inconsistent from time to time, with descriptions of seeming melodramatics or histrionics. The resident has now been housed on the Mental Health Unit since his admission on May 1, 2009, spanning almost the entire month of May. He continues to be considered for psychotropics, yet his responsiveness to related prescriptions has been selective at best. Likewise, the resident continues to display extremes of seeming emotional lability and psychotic-like instabilities, at least during some clinical interviews.

Unfortunately, though [offender] was approached twice during the evening of my consultative visit, he claimed illness and refused participation in the diagnostic session. As such, my impressions are based solely on a review of the files. In that regard, I was expecting to examine a malingerer and I tend to interpret his refusals to be consistent with that assumption.

[Offender] mentioned that he may have acceded to interview, if I were willing to come to his cell. I take his position in that regard to reflect an attempt to control and direct the diagnostic session, rather than an expression of incapacitation or contrition/guilt which might be more in keeping with his status in prison for an offense of victimizing his own mother.

Prior to the assault by strangulation on his mother [offender] had established himself as chemically dependent and a seeming bully. He was convicted of 2nd degree assault twice in 1998, 3rd degree assault in 1999, and another 4th degree assault in 1998. The circumstances of those assaults would suggest a pattern of chemical dependency and a low threshold in this man for intimidation and retribution. From information available to me, his behavior and clinical history did not include treatment of psychosis prior to the offense against his mother in 2008. Rather than punctuating a turning point in this man's established history, that offense appears to have been entirely consistent with his known criminal history, without psychosis.

At the risk of slighting clinicians who have been convinced that [offender] is debilitatingly depressed and psychotic, I strongly suggest that malingering be ruled out or in by consensus among clinical staff on the unit. Obviously, this man represents a threat for escalating his presumable attention-seeking and manipulative behavior, and he may be capable of a suicidal gesture, if his bluff is called. On the other hand, it seems tantamount to malpractice and an inefficient utilization of resources to have treated him on the Mental Health Unit for a month and to have afforded him two lengthy evaluative stays at Western State Hospital, if he is characterological and manipulative, rather than a psychiatric treatment candidate. A carefully documented evaluative stay on the intensive Management Unit may provide helpful clarification.

Should [offender] become more amenable to a face-to-face diagnostic interview with me, I obviously would be willing to see him. Dr. Weber also represents another naive/objective resource in this regard; his history with the inmate population may be helpful background for teasing truth from fiction. (U6)

Ms. Erbenich, who works at WSP as a medical transcriptionist, testified that on June 3, 2009, the grievant spoke to her at the end of the workday in words to the following effect:

...[when typing reports] if I ever came across anything that was being said that was not appropriate, or not a good thing to say or was derogatory about anybody, then I needed to bring it to his attention.... (TR45:7-10 and see S3 and U9)

On the following day, June 4, Ms. Erbenich received Dr. Page's report for transcription and she took the report to the grievant and asked him: "...if this was the type of report he was referring to and after reading it he confirmed that it was." (S3, U9)

Ms. Erbenich testified and wrote in her statement that the grievant then told her the report was incompetent and was not to be placed in the offender's file for anyone else to see. In addition, she testified that the grievant told her not to make and distribute copies as she ordinarily would have and to give him the original. Ms. Erbenich then asked the grievant what to do about the copy of the report on the S: drive on her computer. Reports are accessible for reading by other staff via the S: drive. Her statement includes the following:

Since he did not want anyone to read this report I asked him what about the report that was on the S: drive on the computer. He told me to delete the report as he did not want anyone to have access to it. I told him I needed to have an e-mail from him giving me permission to delete the report as I could not delete a legal document without someone higher up in command giving me written permission to do so. He sent me an e-mail stating such on June 4, 2009. (S3, U9)

In her testimony, Ms. Erbenich stated:

...I told him I couldn't delete anything unless I had it in writing, because I just know you don't do that because that's what you were taught in school and—I mean, it was somebody else's report and, you know, how can you get rid of someone else's medical stuff? (TR48:6-11)

Ms. Erbenich testified she followed the grievant's directions. She testified she did not recall if the grievant asked her to keep a copy of the report on her computer elsewhere than on the S: drive, but her statement made on June 5, 2009 does not indicate anything about saving a

copy on her computer or being told to do so by the grievant. (TR50:20-22; TR53; S3, U9) The email that Ms. Erbenich requested and the grievant provided also does not mention keeping any copies. The text of the email reads in its entirety: “Please delete the [offender] report by Dr. Page dated May 28, 2009.” (U10, S2) Ms. Erbenich recalled that within a few days of June 5, Ms. Suckow came to her and asked where Dr. Page’s report was. Ms. Erbenich testified she told Ms. Suckow that the grievant had the original in his office. She testified that Ms. Suckow then went and obtained the original while the grievant was away from his office and asked Ms. Erbenich to retype it and to save it on her computer somewhere other than on the S: drive.

Based on Ms. Erbenich’s testimony about Ms. Suckow’s request that she retype the report, I find it unlikely that the grievant asked Ms. Erbenich to retain a copy of the report on her computer, as she would have had no need to retype the report if she previously retained a copy on her computer. (TR49:14-TR50:11)

When asked whether she had ever been asked by a doctor to delete a report before, Ms. Erbenich responded “no”. (TR50:12-14) Ms. Erbenich also testified that about a week later the grievant called her a couple of times asking about the report and the calls made her uncomfortable. She testified she felt badgered, “like he was coming at me” and “like it was my fault that he was being talked to now because of the report being deleted and Katrina had found out.” She testified: “When he would call, it was like—it just messed my whole day up.” Ms. Erbenich decided to call Human Resources because of the calls. (TR51-52)

At the time of the incident that led to this arbitration Katrina Suckow worked as the Correctional Mental Health Program Manager. She had responsibility for supervising all of the mental health staff at WSP, including the grievant. (TR14:3-20) She supervised the grievant from approximately August 2008 until his termination. (TR15:7-12) Ms. Suckow reported to the Health Care Manager, which initially was Pat Rima until she was promoted and then Kyle King succeeded Ms. Rima in that position. (TR14:21-TR15:6)

Ms. Suckow testified she became concerned on June 5, 2009 when she saw an email from the grievant to all staff requesting that any referral for psychological evaluations for contract providers be sent to him directly. Ms. Suckow testified her concern arose from the fact that she knew the grievant often was behind on reading his emails, and she worried that having the requests go through the grievant would create a larger burden for the scheduling person. She

testified that she talked to the grievant and he agreed that referrals could continue to be sent directly to the scheduler. (TR19:20-TR20:13)

Ms. Suckow testified that after talking with the grievant she went to talk with the scheduler to tell her that the procedure had not changed. When Ms. Suckow talked with the scheduler, the scheduler told her that the grievant had sent her an email asking who had referred the offender referenced in Dr. Page's report for evaluation. While Ms. Suckow was having this conversation with the scheduler, Ms. Erbenich, who works in the same area, told Ms. Suckow that the grievant had asked her and sent her an email asking that Dr. Page's report be deleted from the electronic drive.

Ms. Suckow testified that she asked Ms. Erbenich to write a memo describing the interaction with the grievant concerning Dr. Page's report. Ms. Suckow testified she wanted to document the situation for the following reasons:

Because it's my impression that it's common knowledge that you do not erase documents of a medical nature. And it was my impression that he had requested she erase it because he wasn't happy with the content.

There had been some previous discussion before this amongst clinical staff on the Mental Health Unit about the mental status of this offender and the fact that the document—he requested the document be erased was pretty alarming to me because we do—that is not typical for us to request documents like that to be erased. (TR19:21-TR22:4)

Ms. Suckow testified that she took Ms. Erbenich's memo and the grievant's email (U9, U10, S2, and S3) to her supervisor Mr. King and she discussed the situation with Mr. King. She testified that Mr. King requested that she meet with the grievant and ask about Dr. Page's report.

Ms. Suckow met with the grievant on June 8. She testified that she had not seen Dr. Page's report at this point, since Ms. Erbenich did not have a copy of it, and when she asked the grievant about the report he told her the report was "incompetent and inflammatory, specifically toward Dr. Wallace, and he indicated that he was saving DOC from a lawsuit and preventing problems with Dr. Page's license by withholding the document." (TR22:10-25) She testified that grievant told her that because he is the direct supervisor of Dr. Page, the grievant had the right to withhold the report.³ She testified the grievant told her he had the report in his files. She

³ In her memo describing the meeting with the grievant, Ms. Suckow wrote that the grievant stated that he "deliberately took the evaluation out" of the offender's file. In fact, he intercepted the report before it made it to the

testified he also told her the report contained a negative statement about the grievant⁴ and Dr. Page had not seen the offender. She testified that the grievant did not ask her for any guidance or ask her opinion on how to handle the matter. (TR23) Her memo to Mr. King documenting the conversation with the grievant includes the following:

...He stated that the evaluation was inflammatory and incompetent and would create problems for Dr. Page and the licensing board.

I then inquired about the electronic version of the report that was no longer on the S drive and Dr. Wallace indicated he took it out also. He stated that he does have a hard copy of the report in his filing cabinet. He indicated that the evaluation was “no good” and “drew a huge conclusion based on a cursory review of medical records.”

Dr. Wallace stated he spoke with Dr. Page about his inflammatory remarks in the evaluation and told him to [no] longer place inflammatory remarks in his reports. He then stated he told Dr. Page to “re-word” his report, but Dr. Page still maintained his position on [offender’s] diagnosis.

Dr. Wallace indicated that as the supervisor of the contract psychologist, he is responsible for the report. He reports this evaluation puts DOC at risk of a lawsuit. (S4, p. 3)

Ms. Suckow testified that she was concerned that the report would disappear all together as the grievant had the original and no one else had copies, so that day or the next day, when the grievant was out of his office, she retrieved the report from his office, made a copy of it and asked Ms. Erbenich to retype it and save it on her computer, but not on the S: drive.

Ms. Suckow testified the grievant never said to her that he was only holding the report until he decided how to handle it or that he was holding it while he consulted a professional

offender’s file, rather than removing it, but he may have said to Ms. Suckow that he “removed” the report. (S4, U10; TR25:1-11; TR36:1-18; TR37:19-TR38-8)

⁴ The record contains some confusing testimony about whether Dr. Page’s report refers to the grievant. My reading of the report reveals that Dr. Wallace is mentioned by name on the third line of the text in the report. Dr. Weber, who formally served in the grievant’s position, but who retired before the grievant came to WSP, now serves as a contract psychologist at WSP. Dr. Weber is mentioned in the third to last line of the text on page two of Dr. Page’s report. Dr. Page mentions Dr. Weber as a possible resource to conduct an objective evaluation of the offender. (U6) Nevertheless, testimony in the record indicates that the grievant is not mentioned in the report or is confused with Dr. Weber. (TR26:22-TR27:9; TR34:14-TR35:24; TR63:9-12; TR141) The grievant was not mentioned by name in connection with some of the strongly worded comments, such as the comment that the treatment of the offender up to that time bordered on malpractice, but his name is mentioned in the report. I don’t see any basis for confusion of the reference to the grievant on page one with Dr. Weber, or of the reference to Dr. Weber on p. 2 with the grievant.

organization. Ms. Suckow testified that if the grievant had asked her for guidance she would have suggested he talk with the records manager at WSP, or the grievant could have consulted the DOC's Health Record Guidelines. (TR27-TR29)

Ms. Suckow testified that in August 2009, Ms. Rima called her to ask about Dr. Page's report. Ms. Suckow testified Ms. Rima told her the grievant had said the report was no longer in his file cabinet. Ms. Suckow testified she reviewed the offender's medical file and found the report in the file, but she did not know how it got there. (TR31:1-14)

Pat Rima serves as the DOC Health Service Administrator East. She has been with DOC for twenty-six years. She supervises Mr. King, who supervises Ms. Suckow, who in turn supervised the grievant. Ms. Rima made the ultimate decision to terminate the grievant's employment.

Ms. Rima testified that in June 2009, or more probably in July 2009, she met with the grievant, Mr. King and Ms. Dean, the Union Representative. Ms. Rima described this meeting as an impromptu meeting to try and resolve the concerns about Dr. Page's report. Ms. Rima testified this was the first time she talked with the grievant about the issue and she had not read Dr. Page's report at that point. She testified she told the grievant he could not withhold the report from the offender's medical file and the grievant said he could. She testified that a "no-you-can't-yes-I-can" exchange ensued and she then spoke to the grievant as follows:

And I encouraged him to strongly look at the policies and to check his professional regulations around withholding records at that time and to rethink it and to put it back in the file. (TR61:1-4)

Ms. Rima testified she was surprised at how "intense" the grievance was about the issue and how adamant he was about not putting the report in the offender's file. Mr. King testified that he recalled the meeting and that placing the report in the medical file was discussed. (TR189-191)

The grievant testified that this meeting never took place. (TR158:8-TR159:12) Ms. Dean testified she could not recall one way or the other whether the meeting took place. (TR187)

Ms. Rima testified that a week or two weeks after meeting with the grievant, Dr. Burgdorff, a contract psychiatrist, came back from vacation and she discussed the issue with him. She testified that Dr. Burgdorff agreed that the report should be in the offender's file and he said to Ms. Rima: "I'll take care of it." (TR62:15-TR63:25)

On September 3, 2009, Ms. Rima held a pre-disciplinary meeting with the grievant. The pre-disciplinary notice letter, dated August 11, 2009, originally scheduled the meeting for August 20. (S4) The grievant had union representation at the meeting. The termination letter contains a description of the pre-disciplinary meeting, which includes the following:

During the meeting, you admitted you had the evaluation removed because you disagreed with Dr. Page's diagnosis of the patient and felt there were "derogatory" statements. You thought he made mistakes in his diagnosis, and even though your name was not mentioned in the report, you felt the derogatory statements were about you. You stated this was not the first time you had seen reports with derogatory statements, therefore you had directed Ms. Erbenich to watch in case there was a reoccurrence of those type statements. This was the reason Ms. Erbenich came to you with this specific report completed by Dr. Page. You said you blocked the report from going into the health record, had the electronic copy deleted, and prevented the appropriate distribution of copies, but kept a hard copy in your personal file cabinet located in your office. You again reiterated your feelings about Dr. Page's perceived errors, and the derogatory statements he made about you. You stated you kept a copy of the report in your personal file in case there was ever a need for it. You were very focused on discussing your opinions regarding Dr. Page's abilities, and repeatedly deflected any question I asked you about your behavior.

During the pre-disciplinary meeting, I informed you the original document had been placed in the patient's health record. I asked you if you were the one who put it there. You stated "no". I asked you if you knew how it got there, and you stated "no". I then asked if you were aware of it being in the health record, and you stated you had spoke to another contract psychologist who informed you it was now in the record. You said you found out about it approximately a week ago. You were very upset the original had been placed into the health record because prior to the document being placed in the record, you had multiple opportunities to place the original document in the official health record, however, you continued to refuse, stating you had no intention of doing so.

When asked if you were familiar with Department of Corrections (DOC) policies, WACs, and the RCWs regarding health records, you stated "yes". You stated that you have been a psychologist for 20 years and are familiar with the laws. When asked how you handle situations like these, you stated you would go to your supervisor.

When you were asked if you brought your concerns up to your supervisor, Kristina Suckow, CMHPM, you indicated she knew what was going on. You said you told Ms. Suckow there were problems, and reported the situation and your conversations with Dr. Page to her.... (S1)

Ms. Rima testified that the grievant never told her he was holding Dr. Page's report temporarily, or holding it while he consulted a professional organization or holding it while he wrote a rebuttal.

Following the pre-disciplinary meeting, Ms. Rima made the decision to terminate the grievant's employment. The termination letter, dated October 26, 2009, states that the termination is effective immediately. The union filed a grievance and when the parties could not resolve the dispute in the grievance procedure, this arbitration followed.

Discussion

The Agreement provides in Section 8.1 as follows: "The Employer will not discipline any permanent employee without just cause." (J1, p. 13) The parties did not define the term "just cause", which is not uncommon in collective bargaining agreements.

The terms just cause, justifiable cause and sufficient cause, as well as other similar terms, often are used interchangeably in the collective bargaining context. The terms have developed a specific meaning in labor arbitration based on numerous arbitration decisions issued over many years under many different collective bargaining agreements in a wide range of industries and employment settings.

Arbitration decisions often refer to the "seven tests" of just cause developed by Arbitrator Carroll R. Daugherty. (see *Enterprise Wire Co.*, 46LA359; Daugherty:1966; *Moore's Seafood Products, Inc.*, 50LA83; Daugherty:1968) The seven tests have been widely used and also criticized. (see *1989 Proceedings of the National Academy of Arbitrators*, Chapter 3, p.23) Leading arbitrators have taken issue with mechanical or automatic application of the seven tests except where the parties have specifically agreed on that approach.

In a 1947 arbitration decision, Arbitrator Harry Platt made the following observation about cause as applied by labor arbitrators in termination cases:

It is ordinarily the function of an Arbitrator in interpreting a contract provision which requires "sufficient cause" as a condition precedent to discharge not only to determine whether the employee involved is guilty of wrongdoing and, if so, to confirm the employer's right to discipline where its exercise is essential to the objective of efficiency, but also to safeguard the interests of the discharged employee by making reasonably sure that the causes for discharge were just and equitable and such as would appeal to reasonable and fair-minded persons as warranting discharge. To be sure, no standards exist to aid an Arbitrator in finding a

conclusive answer to such a question and, therefore, perhaps the best he can do is to decide what reasonable man, mindful of the habits and customs of industrial life and of the standards of justice and fair dealing prevalent in the community ought to have done under similar circumstances and in that light to decide whether the conduct of the discharged employee was defensible and the disciplinary penalty just. (*Riley Stoker Corp.*, 7LA764; Platt:1947)

Generally, a common understanding has developed in the field of labor/management relations that just cause requires: 1.) Notice to the grievant of the rules to be followed and the consequences of non-compliance; 2.) Proof that the grievant engaged in the alleged misconduct; 3.) Procedural regularity in the investigation of the misconduct, and; 4.) Reasonable and even-handed application of discipline, including progressive discipline when appropriate. (see Hill & Sinicropi, *Remedies in Arbitration, 2nd Ed.* (BNA Books; 1991) p.137-145) I have, therefore, considered the facts of this case against the just cause standard as that term is commonly understood in the field of labor/management relations.

Burden of Proof

The principle is well established in labor arbitration that the employer has the burden of proof in a discharge case.

Application of the Just Cause Standard to the Alleged Misconduct

1. Notice to the grievant of the rules to be followed and the consequences of non-compliance.

A trained professional with a PhD degree in psychology and a license to practice not only has acquired knowledge of the rules governing the profession through education and practice, but, equally important, the person knows how to find out what the rules are.

On November 29, 2007, about four months after the grievant began working at WSP, he received a Probationary Service Interim Review that was communicated to him on a Performance and Development Plan form. (U4) The review included a number of critical comments about the grievant's work performance to date. The review states:

As your immediate Supervisor and in my role as Mental Health Program Manager, I have several concerns about your performance. Most of those concerns stem from your failure to effectively carry out specific tasks enumerated....(U4, p. 2)

In that review, one of the items addressed was the following: “Become familiar with the various record-keeping practices, Forms used and Procedures followed by the Mental Health Program: DOC-wide and WSP-specific.” (U4, p. 1)

Therefore, the employer had directed the grievant to become more familiar with record keeping practices and procedures more than a year and a half prior to the time the present events took place. The statement about becoming familiar with record keeping was repeated in the review that the grievant signed on January 30, 2008. (U5) In his comments on that review, the grievant wrote:

In addition to the excellent orientation and support I’ve received at WSP since the earlier evaluation, I have been able to develop collegial relationships with peer psychologists throughout the state and I find this to be very helpful in my continued orientation and development in this employment position. Since I am the only prison psychologist in this quadrant of the State of Washington, I would find it helpful to meet with my peers on a quarterly basis and to attend workshops designed for psychologists who work in correctional settings. The current local support I am receiving is excellent. (U5; see also TR130-TR131; TR167)

The DOC Health Record Guidelines contain a provision entitled “1.16 Completing, Voiding/Correcting, and Amending”. The first line of that provision states the following:

Corrections of incorrect data must be made properly. Incorrect information should never be obliterated from the health record so that it cannot be read; **this suggests tampering, which is illegal.** (S8) (emphasis by bold and underline in original)

In the review that he received in November 2007, the reviewer made a number of comments about the insufficiency of the grievant’s chart entries. (U4) The grievant testified that he referred to policies when he needed to answer a specific question. He testified that: “As the need arose, I learned various policies and procedures.” (TR133:5-6) He also testified on cross examination:

...You know, when I read these policies, I would go into them to answer a specific question about something that was happening right then, and once I find the answer, I’ve read the policy as far as I’m concerned. But that doesn’t mean I’ve digested the whole policy when I’ve got people waiting. (TR164:6-11)

Given the approach to learning DOC policies that the grievant described in his testimony, one would expect that he might have consulted the Health Record Guidelines in 2007 or early 2008

in order to be sure that he understood how to make correct chart entries, since he had been criticized for making inadequate entries.

In addition, the grievant testified that he reviewed all the reports by the contract psychologists. He did not say that he ever suppressed another report, but he said that he discussed the report with the psychologist if there were problems. He testified that:

Q. Is it your testimony that it was your job to approve all reports done by the contract psychologists?

A. That's what I did. I reviewed all of them. I didn't approve them. I didn't approve them, necessarily. I reviewed all of them, and if there was a problem, then I dealt with the individual psychologist. I feel that that would have been overbearing or heavy-handed if I were to insist on approving them, especially since they have their own licenses. (TR165:4-12)

Given the above description of the approach the grievant took to reviewing reports by the contract psychologists, suppressing a report by a licensed colleague must have been a highly unusual event. He testified he reviewed all the reports, which must have been a significant number. Ms. Erbenich testified that she had never previously been asked to delete a report. (TR50:12-14)

Other staff who did not have the qualifications and experience of the grievant found the action of suppressing the report unusual and somewhat alarming. Ms. Erbenich would not agree to delete the report without a written directive. Ms. Erbenich's reaction was: "...it was somebody else's report and, you know, how can you get rid of someone else's medical stuff?" (TR48:7-11) Ms. Suckow testified: "...it's common knowledge that you do not erase documents of a medical nature." (TR21:19-20)

Given the grievant's approach to consulting the policies when he needed answers to questions he was confronting and given his desire to avoid being heavy handed or overbearing with his contract psychologist colleagues, this unusual case of suppressing a medical report would seem to be exactly the kind of situation where the grievant would seek policy guidance.

The grievant did not do so, however. He testified as follows:

Q. Okay. The only other question I have is, prior to this whole incident that arose, that led to your termination, did not know that you needed further training on what the proper procedure was to deal with a report from a doctor under your supervision that you didn't agree with?

....

A. I wasn't aware if it didn't come to my attention. (TR170:4-13)

The contrast between this testimony about the policies on handling a report he didn't agree with and the grievant's testimony about the policy on writing a Comprehensive Medical Evaluation is noteworthy. The grievant offered the Comprehensive Medical Evaluation policy as a major reason for suppressing Dr. Page's report. He testified he knew that policy because he also wrote evaluations and he wanted to know what the standard was so he looked up the policy. (TR139-TR140) I find it hard to accept the proposition that the grievant would have detailed knowledge of one policy that he dealt with but would claim no knowledge of and not even consult the policies to address a question that he had never addressed before and that involved suppressing a report of a contract psychologist.

Based on the record presented, and particularly based on the grievant's qualifications and experience and the fact that he had been specifically directed to become familiar with record keeping practices and procedures, I find that the grievant knew or should have know that his conduct in suppressing the report submitted by Dr. Page did not comply with reasonable rules and guidelines for handling medical records.⁵ The DOC Guidelines state that "tampering is illegal", which should have put the grievant on notice that suppressing a report could have serious consequences. (S8)

2.) Proof that the grievant engaged in the alleged misconduct.

The grievant never denied that he suppressed Dr. Page's report, kept it out of the normal channels for handling medical records and retained the original in his personal files in his office, where it was not available to other practitioners in their dealings with the patient/offender. The only question is whether the grievant had reasonable justification for his actions.

The grievant contended that during most of the years that he worked as a psychologist prior to his employment at WSP, he served as a teacher/mentor to psychology students. In that previous work, he often sent reports back to the students for revision before the reports went into the medical files. (TR114-TR115) He contends that he carried over this gate keeping mentality to his job at WSP when he reviewed the reports of the contract staff.

⁵ At the hearing, the union focused on the fact that the Health Record Guidelines contain the statement "The original entry is never altered, destroyed or removed from the record." The union asserts the grievant did not alter, destroy or remove Dr. Page's report from the record. In my judgment, the argument makes a distinction without a difference. The grievant clearly intended to suppress the report. He did not alter or destroy it, but he sequestered it so that other practitioners did not have access to it, which violates at least the spirit of the guideline. In my judgment he removed it by intercepting it and removing it from the normal flow of documents that would have eventually carried the report to the patient's file. (S8; TR36-TR37)

This testimony, however, conflicts with the grievant's testimony that he did not approve the reports submitted by the contract staff, he only reviewed them. He testified that insisting on approving the reports of his licensed colleagues would be "overbearing or heavy-handed." (see above TR165:4-12) Clearly, the grievant understood that his job at WSP working with licensed psychologists differed from his previous work with students.

The grievant also contended that in suppressing the report he relied on the performance expectations that the employer communicated to him in his Performance and Development Plan. (U4, U5) That document states that the grievant will assign evaluations to contract psychologists and "evaluate the quality of that product." The document also states that he will direct the three contract psychologists and "oversee and require an acceptable level of competence in the work they submit." The grievant argues that, because he found Dr. Page's report incompetent, these statements in the Plan justified the suppression of Dr. Page's report. I don't find that argument persuasive.

Putting aside the law, the rules and the guidelines, common sense dictates that when a licensed medical professional receives a report from another licensed medical professional about a patient they both are treating in the same medical facility, that report should become part of the patient's medical file. If the professional who receives the report disagrees with it or believes the report is defective, then several fairly obvious courses of action are available. First, discuss the report with the author to obtain more information about how the conclusions were reached and ask that the author review and reconsider the conclusions. Second, take the report to a supervisor, explain the concerns and ask for help in deciding how to deal with the questioned report. Third, if not satisfied with the supervisor's response, take the matter to a higher level in the organization. Fourth, consult with someone in the organization familiar with how to handle medical records, such as the manager of medical records. Fifth, place the questioned report in the patient's medical file but add a statement noting the disagreement. Sixth, do as the grievant ultimately did and contact his professional organization for advice on how to deal with the questioned report.

The grievant testified that he talked with Dr. Page, but could not persuade him to interview the offender in the offender's cell. (TR145:4-25) Thus, Dr. Page's report stood as submitted.

The grievant's version of the actions he took to confer with his supervisor, Ms. Suckow, about the report from Dr. Page differs from Ms. Suckow's version. The grievant contends that he talked with Ms. Suckow about Dr. Page's report on his own initiative, and he testified after he explained his concerns she told him to have Dr. Page see the offender. The grievant testified after he talked with Dr. Page and did not persuade Dr. Page to visit the offender at his cell, the grievant did not return to seek further guidance from Ms. Suckow. (TR144:10-TR146:8) Ms. Suckow, by contrast, testified that the first time she talked to the grievant about the report was after Ms. Erbenich alerted her that the report had been suppressed.

I find, based on the record, that, more probably than not, the grievant did not discuss the report with Ms. Suckow until she came to him after talking with Ms. Erbenich. In that conversation, the grievant did not seek her guidance but told her that he planned to suppress the report. When confronted by management about suppressing the report and ordering Ms. Erbenich not to follow the procedures for filing and distributing the report and to delete the report, the grievant persisted in refusing to place the report in the offender's medical record. He continued to object to the report being placed in the file at the pre-disciplinary meeting, even though by that time it was already in the file.

Even though his conduct had been questioned by his supervisor and higher level management, for three months the grievant took no action to inform himself of the policy and legal requirements concerning the handling of this report. He testified that after the pre-disciplinary meeting in September, three months after he suppressed the report, he contacted his professional organization. He testified that through that contact he first learned that policies and regulations required that the report must go in the file and that he could write a rebuttal if he disagreed with the report. (TR153:10-TR155:4) He testified that he then wrote a rebuttal on September 16, 2009. He testified he did not want to be accused of "manipulating the medical file" so he asked a colleague to put the rebuttal in the file. (TR155) He testified that the colleague was Nora Kristine Marks. (TR165:18-25) Ms. Marks, however, testified that she did not put the rebuttal report in the medical file. (TR175:1-13) In addition the grievant testified that he never told Ms. Rima that he wrote a rebuttal and had it placed in the file and he may have told his supervisor but he couldn't remember. (TR166)

In short, the grievant did not take advantage of readily available means of finding the best way to deal with his concerns about and objections to Dr. Page's report. The grievant made a

decision on his own to suppress the report and he did not change course, seek information or file the rebuttal until he faced discipline for his conduct.

Dr. Page's report contains some strong opinions and some pointed criticism. The grievant testified he did not think the comments were intended for him, but he believed they were directed at Dr. Weber. The grievant testified: "Well, as I read this, I thought he was talking about Dr. Weber. I didn't ever think for a minute that he was talking about me." (TR141:10-21) He testified he thought the comments were insulting to Dr. Weber.

I find this testimony remarkable. Dr. Page's report shows that the grievant evaluated the offender on 05/20/09 and the grievant's report contrasts significantly with the report of Dr. Juguilon. The grievant is mentioned by name. Clearly, the grievant was heavily involved in the care of this offender as the grievant recounted at length in his testimony all the things he had done to develop the offender's history and the grievant's contacts with the offender's family. (TR136:6-TR137:6) Dr. Weber worked at this time as a contract psychologist, but he had previously held the job that the grievant held. Dr. Weber had retired from the job several years prior to the time the grievant arrived, but he came back as a contract psychologist. (TR35) In Dr. Page's report, he suggests that perhaps Dr. Weber could be used as an objective evaluator of this case because: "...his [Dr. Weber's] history with the inmate population may be helpful background for teasing truth from fiction." (U6) In my judgment, the reference to Dr. Weber in Dr. Page's report is praise and not criticism. I cannot see any basis for the grievant to conclude that Dr. Page's report contained anything that could be interpreted as an insult to Dr. Weber. Although the record does not provide a clear answer on this, it appears that Dr. Weber had not even been involved with the care of this offender. That appears to be why Dr. Page suggested Dr. Weber as an additional objective resource.⁶ (U6 and see footnote 4, above.)

In my judgment, I find it more probable than not that the grievant interpreted the remarks in Dr. Page's report to be aimed at the grievant and the grievant wanted to suppress that criticism. The report includes the following statements, which sound like harsh criticism:

At the risk of slighting clinicians who have been convinced that [offender] is debilitatingly depressed and psychotic, I strongly suggest that malingering be ruled out or in by consensus among clinical staff on the unit. Obviously, this man

⁶ Dr. Page's use of the word naive when describing Dr. Weber as "a naive/objective diagnostic resource" could possibly be confusing. In science, naive means not previously exposed to a particular experimental situation (e.g. the test was conducted on naive subjects, meaning the people who were the test subjects had never taken this particular test before). In other words, Dr. Weber had not been previously exposed to the patient/offender.

represents a threat for escalating his presumable attention-seeking and manipulative behavior, and he may be capable of a suicidal gesture, if his bluff is called. On the other hand, it seems tantamount to malpractice and an inefficient utilization of resources to have treated him on the Mental Health Unit for a month and to have afforded him two lengthy evaluative stays at Western State Hospital, if he is characterological and manipulative, rather than a psychiatric treatment candidate. A carefully documented evaluative stay on the intensive Management Unit may provide helpful clarification. (U6)

Management's response to the grievant's refusal to put the report in the medical file is somewhat out of the ordinary. Ms. Suckow, Mr. King and Ms. Rima all had the authority to order the grievant to place the report in the offender's medical file, yet none of them issued that order.⁷ They essentially went around him to make sure the report was placed in the file. The grievant contends that if he had received a direct order from management to place the report in the file he would have followed it. (TR150-TR153) I find that assertion self-serving and unpersuasive, however. The grievant had no legal or policy basis for suppressing the report. He made the decision on his own without consulting anyone or any policy. He told his management that he was suppressing the report, he did not ask for permission. More probably than not, he made the decision for self-serving reasons to suppress implied criticism of his work. The termination letter states that even in the pre-disciplinary meeting the grievant continued to insist that the report should not be in the file, even though he had no basis to make that assertion.

As discussed earlier, Ms. Rima testified that in June 2009, or more probably in July 2009, she met with the grievant, Mr. King and Ms. Dean, the Union Representative. Ms. Rima described this meeting as an impromptu meeting to try and resolve the concerns about Dr. Page's report. Ms. Rima testified this was the first time she talked with the grievant about the issue and she had not read Dr. Page's report at that point. She testified she told the grievant he could not withhold the report from the offender's medical file and the grievant said he could. She testified that a "no-you-can't-yes-I-can" exchange ensued and she then spoke to the grievant as follows:

And I encouraged him to strongly look at the policies and to check his professional regulations around withholding records at that time and to rethink it and to put it back in the file. (TR61:1-4)

⁷ The possible explanation that makes sense to me for their reluctance to issue the order is that they were deferring to the grievant's status as a licensed psychologist and since they don't have similar qualifications they were reluctant to order him to put the report in the file, but instead wanted to persuade him. The evidence does not provide a clear explanation for their reluctance to issue the order.

Ms. Rima testified she was surprised at how “intense” the grievant was about the issue and how adamant he was about not putting the report in the offender’s file. Mr. King testified that he recalled the meeting and that placing the report in the medical file was discussed. (TR189-191)

The grievant testified that this meeting never took place. (TR158:8-TR159:12) Ms. Dean testified she could not recall one way or the other whether the meeting took place. (TR187)

Because of the conflict in the testimony, I have to determine which testimony to credit and which testimony cannot be believed. Persuasive evidence to support an assertion that a meeting occurred would be contemporaneous notes, at least, and preferably a summary of the meeting sent in writing to the participants. None of that evidence is present in this record. Nevertheless, after considering the record and the entire testimony of the witnesses, I have resolved the credibility issue in the employer’s favor.

In my judgment, the fact that the employer never gave a direct order to the grievant to place Dr. Page’s report in the medical file is not the central issue. The grievant, for personal reasons and with no basis in policy, rule or law, suppressed a medical report on a patient in his care.

Based on the record, I find that the grievant had no reasonable justification for his conduct. The grievant refused to place a medical report⁸ prepared by another licensed psychologist in the patient’s medical file. He suppressed the report by taking the original, having the electronic record erased and preventing copies from being made. He refused, after being told by managers that his conduct was inappropriate and in conflict with legal and policy requirements, to place the report in the patient’s file. After June 8, 2009 when he talked with his supervisor, he took no further action to inform himself of the requirements for handling the report until September 2009, nearly three months later. Under threat of discipline, he consulted his professional organization and was told that he had to place the report in the file and he could write a rebuttal. He wrote a rebuttal and had the rebuttal placed in the file surreptitiously, without notifying management that he had done so. Thus, management had no direct knowledge that the grievant had finally responded and put a rebuttal report in the file. He took no responsibility for his actions and he made no effort to express remorse to the managers for the

⁸ At the hearing, a lot of attention focused on whether this report was a Comprehensive Medical Evaluation or simply an Encounter Note. In my judgment, how the document is characterized has no bearing on this case. The two-page report is entitled “Psychological Report” and the report clearly contains pertinent information about the psychologist’s assessment of the patient, the effectiveness of the care the patient had been receiving and raises significant questions about the direction the patient’s care should take in the future. (U6)

fact that he had chosen the wrong course of action, relying instead on the defense “nobody told me.” In his testimony he characterized his conduct as a minor mistake. (TR154-TR155)

3.) Procedural regularity in the investigation of the misconduct.

Because no dispute exists over the fact that the grievant suppressed Dr. Page’s report, not much investigation was needed.

After June 8 when Ms. Suckow first talked with the grievant about Dr. Page’s report, the process of dealing with this issue lingered for several months until the employer finally terminated the grievant’s employment in late October. In my judgment, however, the delay did not cause any harm to the grievant as he continued to work throughout that time and the critical facts had already been established in June.

4.) Reasonable and even-handed application of discipline, including progressive discipline when appropriate.

The grievant was a relatively short-term employee. He worked at WSP from July 2007 until October 2009.

The grievant encountered problems almost immediately when he went to work. His supervisor provided him with a memorandum of expectations, dated August 2, 2007. In a review conducted on about November 29, 2007, the supervisor described a number of concerns about the grievant’s performance, including: 1.) his failure to learn the OBTS record keeping system; 2.) his failure to make timely, accurate and complete chart notes; 3.) having only sketchy knowledge of patients, including not knowing the offender’s condition, medication status and sentence history; not knowing patient behaviors and whether they are medication compliant; 4.) referring to patients who have been discharged as if they were still present. (U4)

The grievant showed significant improvement by his next review that he signed on January 30, 2008. He also expressed satisfaction with the support he received. (U5)

The grievant also received three Memos of Concern during his employment. The first, dated April 25, 2008 dealt with the grievant sending a corrective memo to an employee and sending copies of the email to a number of other staff, rather than dealing with the employee individually and privately. The second, dated April 30, 2008, dealt with the grievant’s failure to follow through on arranging a high priority evaluation of an offender by a contract psychologist. The third, dated July 10, 2009, dealt with the grievant’s failure to complete a task assigned to him by Ms. Suckow and his refusal to follow her directive (issued three times) not to go out to

talk with a volatile offender while the offender was being escorted by custody staff. (S12, S13, S14)

The majority of labor arbitrators subscribe to the view that discipline is meant to be corrective rather than punitive. Therefore, labor arbitrators typically expect employers to apply progressive discipline prior to terminating an employee's employment. The purpose of progressive discipline is to correct an employee's unacceptable behavior through the application of escalating levels of discipline. Those corrective actions range from oral counseling through written warnings, suspensions and ultimately termination if the behavior is not corrected. Through progressive discipline the employer clearly communicates the areas of inadequate or unacceptable performance and the employee has the opportunity to adjust future behavior to the employer's reasonable expectations.

Progressive discipline is a two-way street, however. The employee must also demonstrate a commitment to correcting behavior and responding to the reasonable policies and directions of management.

In some instances, the employee's behavior falls within a class of offenses that are so serious that immediate termination without progressive discipline is justified. Sometimes parties list those offenses in the collective bargaining agreement and characterize them as "capital" offenses. This Agreement, however, is silent on the issue of capital offenses. Two respected arbitrators have written that progressive discipline is required: "...except in cases involving the most extreme breaches of the fundamental understanding [between employer and employee]." (Abrams & Nolan, *Toward a Theory of "Just Cause" in Employee Discipline Cases*, 85 Duke L. J. 594, 612 (1985))

Reasonable people may differ about where the line should fall between misconduct that justifies immediate discharge and misconduct that requires the application of progressive discipline prior to discharge.

The termination letter states that the grievant prevented medical information from being placed in the patient's health record and the grievant caused a medical report to be deleted from the computer record, all of which violated the DOC's Health Record Guidelines. (S1, p. 3; S8) At times, the employer alleged that the grievant removed the report from the offender's file, and, as discussed earlier, he did not remove the report, but the result was the same as if he had removed it. (see footnote 5, above.) In the termination letter, the employer cited a number of

other rules, policies and laws that the grievant allegedly violated, and not all of those references are necessarily applicable. Nevertheless, the essential charge is correct.

Withholding a report submitted by a licensed psychologist from a mental patient's file is a serious matter. The grievant contends he withheld the report out of concern for the patient, but I am not persuaded by that contention. (TR146:17-TR148:2) Patient care is better served by open sharing of information among treating professionals rather than suppressing information about the patient. Even the grievant's own testimony shows that he knew it was inappropriate and beyond his authority for him to withhold the report. ("I feel that that would have been overbearing or heavy-handed if I were to insist on approving them [reports of other psychologists], especially since they [other psychologists] have their own licenses." (TR165:4-12))

In my judgment, the grievant's conduct falls within the class of misconduct that justifies immediate termination without progressive discipline. The grievant's actions caused the employer to lose trust and confidence in his professional judgment. The grievant's conduct could have had a detrimental effect on the patient's care. In addition, Dr. Page's report raised important concerns about the use of resources and the length of the offender's stay in the mental health unit. The issues he raised deserved attention and reasonable consideration, but would never have come to light if Ms. Suckow had not discovered that the report had been suppressed.

The union offered testimony to show that medical records at WSP often are not complete and well-ordered. Ms. Dean, who worked at WSP for almost a year in medical records, testified that sometimes at WSP a backlog of reports develops in medical records, sometimes reports are not turned in by some medical professionals on a timely basis, sometimes errors are made in coding and entering patient information and sometimes reports are lost or misplaced. (TR183-TR185) Problems with medical records that result from system overload, system design flaws, or lax compliance with reporting requirements by staff are unfortunate and can potentially endanger patient health and safety. Those issues differ significantly, however, from intentionally withholding a medical report from a licensed psychologist from a patient's record. If Ms. Suckow had not inadvertently discovered the information about the withheld report and the deleted computer record, the grievant's actions might never have been discovered and the report could have been suppressed indefinitely.

Moreover, this particular report expressed disagreement with the treatment that had been provided to the patient. The report was requested as a second opinion, which is another reason why the report, rather than being isolated from view, should have been brought forward for further discussion and consideration. Dr. Page suggested that staffing of the case was needed. The grievant characterized this suggestion as putting the patient's care up for a vote, but I disagree with that characterization. Dr. Page stated, in effect, that important considerations about the patient's care were not being addressed and should be and one means for doing that would be to open up the discussion to include others with knowledge of the patient. In addition, if everyone but Dr. Page was satisfied with the direction that the patient's care had been taking, why was a second opinion requested? Obviously, someone other than Dr. Page also had concerns about the patient's care and requested the second opinion.

The union also cited the case of an employee at the Coyote Ridge correctional facility who received lesser discipline for a serious offense. In that case, a nurse charted a prescription for an offender and the doctor objected that her actions were beyond the scope of her duties. She received a three month wage reduction and remains employed. (TR186)

In my judgment, disparate treatment usually cannot be established based on one case unless the facts are identical or nearly identical. Here we know nothing of the nurse's length of service, her previous record, the rules related to charting prescriptions, what prescription she charted and what risks were associated with her actions. I find that this example is not comparable to the grievant's situation and therefore no disparate treatment has been established.

Conclusion

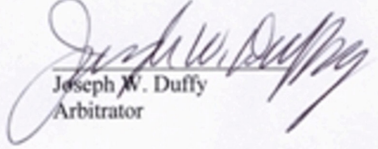
Based on the entire record submitted by the parties, I find that the employer had just cause to terminate the grievant's employment. Therefore, no remedy is appropriate.

IN THE MATTER OF THE ARBITRATION BETWEEN

TEAMSTERS LOCAL UNION NO. 117,)	
)	ARBITRATOR'S
)	AWARD
UNION,)	
)	DR. THOMAS C. WALLACE
and)	TERMINATION GRIEVANCE
)	
STATE OF WASHINGTON,)	
DEPARTMENT OF CORRECTIONS,)	
)	FMCS NO. 100311-02154-8
EMPLOYER.)	
_____)	

For the reasons set forth in the Opinion that accompanies this Award, the grievance must be and it is denied.

Dated this 20th Day of January 2011



Joseph W. Duffy
Arbitrator