In the Matter of the Arbitration
between
Washington Department of Social and Health Services - Western State Hospital
and
Washington Federation of State Employees

Denise Riggs Reprimand Grievance

AAA Case No. 75-390-00174-10

Arbitrator's Opinion and Award

Arbitrator William Greer
P.O. Box 80847
Portland, Oregon 97280

April 18, 2011

Introduction

Washington Department of Social and Health Services - Western State Hospital (Employer) issued an oral reprimand to Denise Riggs (Grievant) on May 19, 2009 and later established a file that was to contain documents supporting the reasons for that discipline. Washington Federation of State Employees (Union) grieved, alleging that the Employer violated Article 31 of the parties' collective bargaining agreement by establishing that file. I deny the grievance.

The parties presented their cases in a hearing on December 21, 2010, in Tacoma, Washington. The Employer was represented by Emily Klockenkemper and Laura Wulf, Assistant Attorneys General, Attorney General's Office, Labor and Personnel Division, PO Box 40145, Olympia WA 98504-0145. The Union was represented by Gregory Rhodes, Attorney, Younglove & Coker, 1800 Cooper Point Road Southwest, Building 16, Olympia WA 98507.

The advocates fully and fairly represented their respective parties. The hearing was orderly; the parties had a full opportunity to present evidence and examine and cross-examine witnesses. The hearing closed on February 4, 2011, upon receipt of the parties' post-hearing briefs. The parties agreed that the grievance is substantively and procedurally arbitrable.

Statement of the issues. Did WSH violate Article 31 of the collective bargaining agreement when it maintained a file with documentation about Grievant's May 19, 2009 oral reprimand? The

Union asserts that the Employer violated the parties' contract; the Union has the burden of presenting evidence to prove that claim. The Employer has the burden of proving any affirmative defenses that it asserted.

Witnesses and exhibits. All witnesses testified under oath. The parties offered eight joint exhibits. The Union offered two exhibits and testimony from three witnesses (Grievant, Carol Dotlich, Sean Dannen). The Employer offered one exhibit and testimony from three witnesses (Diane Leigh, Stephanie Barron, Lori Manning). I have thoroughly reviewed all of the evidence that was received, relevant, and material, and I have thoroughly considered the parties' arguments and post-hearing briefs.

Facts

The parties. The Employer is an agency of the State of Washington. The Union is the exclusive representative of a bargaining unit of personnel employed by the Employer. Grievant, a psychiatric security nurse, is a member of the Union's bargaining unit.

Collective bargaining agreement. In the parties' 2009-2011 collective bargaining agreement (emphasis added):[1]

> Article 29 - Grievance Procedure
>
> 29.2.O. Grievance Files. Written grievances and responses will be maintained separately from the personnel files of the employees.
>
> Article 29.3.D Authority of the Arbitrator - The arbitrator will . . . [h]ave no authority to rule contrary to, add to, subtract from, or modify any provision of this Agreement; [and] [b]e limited in his or her decision to the grievance issue(s) set forth in the original written grievance unless the parties agree to modify it.
>
> 29.3.E.1 The expenses and fees of the arbitrator . . . will be shared equally by the parties.
>
> 29.6 Successor Clause - Grievances filed during the term of the 2009-2011 Agreement will be processed to completion in accordance with the provisions of the 2009-2011 Agreement.
>
> Article 31 - Personnel Files
>
> 31.1 There will be one (1) official personnel file maintained by the Employer

[1] The grievance arose during the term of the parties' 2007-2009 contract. During the negotiation of their 2009-2011 contract, they modified some terms of Article 31. The parties did not raise any arguments that those changes affect this dispute. I quote the 2009-2011 contract's terms.

> for each employee. The location of personnel files will be determined by the employing agency. All references to "supervisory file" in this Agreement refer to a file kept by the employee's first-line supervisor. Additional employee files *may include* attendance files, payroll files and medical files.
>
> 31.2 An employee may examine his or her own personnel file, supervisory file, attendance file, payroll file, and medical file. Review of these files will be in the presence of an Employer representative during business hours, unless otherwise arranged. . . .
>
> 31.3 A copy of any material to be placed in an employee's personnel file that might lead to disciplinary action will be provided to the employee. . . .
>
> 31.5 Supervisory files will be purged of the previous year's job performance information following completion of the annual performance evaluation, unless circumstances warrant otherwise. The confidentiality and security of supervisory files will be maintained to the extent allowed or required by law.
>
> 31.6. A. Adverse material or information related to alleged misconduct that is determined to be false and all such information in situations where the employee has been fully exonerated of wrongdoing will be removed from the employee's personnel file. The Employer may retain this information in a legal defense file and it will be used or released when required by a regulatory agency (acting in their regulatory capacity), in the defense of an appeal or legal action, or as otherwise required by law.
>
> 31.6.B Written reprimands will be removed from an employee's personnel file after three years if: 1. Circumstances do not warrant a longer retention period. . . .
>
> 31.6.C Records of disciplinary actions involving reductions-in-pay, suspensions or demotions, and written reprimands not removed after three years will be removed after six years if: 1. Circumstances do not warrant a longer retention period. . . .
>
> 31.6.D Performance evaluations will be removed from an employee's personnel file after six years if: 1. Circumstances do not warrant a longer retention period. . . .
>
> Article 35 - Management Rights - Except as modified by this Agreement, the Employer retains all rights of management, which . . . will include but not be limited to, the right to [listing of rights]."

Bargaining History. According to Union President and bargaining team member Carol Dotlich, the parties agreed in bargaining that Article 31.1 contained a finite list of all files that the Employer may maintain, so that "the employee would know what files are being kept and where they're kept so that they could ensure that the files . . . are accurate and that if they felt something was inaccurate they would have an opportunity submit a document rebutting what they felt was incorrect." (Tr 25.)

According to Employer Chief Negotiator Diane Leigh, the parties *did not* agree in bargaining that Article 31.1 contained a finite list of all files that the Employer may maintain. The files

enumerated in that section are those that were easily identifiable and to which, under Article 31.2, employees are guaranteed access. The Employer also maintains grievance files, investigative files, and EEOC files. (Tr 54.) In the negotiations regarding legal defense files, according to Leigh, the parties discussed how the Employer might take disciplinary action on an employee and later remove the documentation of that discipline from the employee's personnel file (under Article 31.6), but the Employer "may still need to retain a copy of it because [the Employer] may be sued down the road, either by the employee themselves or by the alleged victim. And you need to be able to show that you did the investigation. You may do an investigation and find out that there was no misconduct. But there's still a need to keep that investigation to show that you did an investigation and to be able to defend the State in legal actions down the road." (Tr 61-62.) In addition, she established that the parties discussed "when we take the items out of the personnel file—sometimes those items have to go in a legal defense file—because this [contract language] only talks about when it's been found to be false or the person has been fully exonerated." (Tr 68-69.) The Employer's position is that a document removed from a supervisory or personnel file cannot be referenced for future disciplinary action. (Tr 64.) The Employer supported Leigh's testimony with copies of the Employer's bargaining notes.

The Employer's evidence—both the testimony from Leigh and bargaining notes regarding Article 31—are detailed, consistent, and reflects the understanding of several Employer representatives who participated in the bargaining. For those reasons, I accept the Employer's version of the parties' bargaining history.

Background. As public employees, the actions of bargaining unit personnel are subject to scrutiny by the public. A Washington Secretary of State document retention schedule for investigation files regarding sustained employee misconduct charges provides that the "summary report goes in the employee's Personnel File. . . ." The schedule also states: "Reference relevant collective bargaining agreements for retention conditions for represented employees."

The position description for Human Resources Manager employed by the Employer's Human Resource Department (HR) states that one of the essential functions of the position is to consult "on all phases of Just Cause disciplinary process including review and analysis of mitigating circumstances relating to employee performance, attendance, misconduct and possible criminal behavior." The position description for a Human Resources Consultant 4 (HRC4) states that the essential functions of the position includes providing "professional level consultation to managers and supervisors . . . regarding sensitive matters of employee performance management, just cause . . . FMLA [Family and Medical Leave Act], attendance . . . [and] grievances."

When an HRC confers with a supervisor or manager regarding an employee, the HRC documents that consultation in files that it refers to as HR "administrative files," "tracking files,"

"grievance files," or "legal defense files."

Events. On May 19, 2009, Supervisor Christy Forsythe issued an oral reprimand to Grievant regarding her attendance. Forsythe placed a copy in a supervisory file that she maintained regarding Grievant's employment. Before June 25, 2009, HR did not ask Forsythe for documentation of employee oral reprimands. (Tr 45.)

In July 2009, HRC4 Stephanie Barron asked Forsythe to provide her with a copy of Grievant's supervisory file for review by HR. Barron wanted the supervisory file to supplement an existing HR file on Grievant entitled "Riggs, Denise/Attendance Issues." Barron wanted Grievant's supervisory file at least in part to determine whether some of the absences referred to in the reprimand were covered by FMLA. Barron told Forsythe that HR is charged with "maintaining discipline and legal defense files. . . ." Forsythe did not provide the requested information to Barron. On August 20, the Union filed this grievance, alleging that the Employer violated several contract provisions, including Articles 31.1, 2, 3, 5, and 6A, when HR maintained a "disciplinary file" on Grievant.

The Employer stipulated that HR maintains a file on Grievant with documentation relating to her May 19, 2009 oral reprimand. (Tr 41.) That file includes a letter memorializing the oral reprimand, and the letter refers to a number of dates on which Grievant had unscheduled leave.

Positions of the Parties

Union

1. The parties negotiated very specific contract terms that established the location and terms for retaining employee disciplinary records. The Employer violates Article 31 by: (a) keeping a permanent record of recorded discipline other than as specified by Article 31, and (b) ignoring the retention schedule mandated by Article 31.6, as it pertains to these unauthorized files. While the grievance arose through Grievant's experience, the Union's objection extends to the Employer's practice in general. The Union takes no position in this grievance regarding the need for HR to view and keep file materials during the process of *implementing* a disciplinary act, whether defending against a grievance or simply in consultation prior to a supervisor's implementation of a disciplinary act. The issue here involves HR keeping an *ongoing* file recording acts of discipline, and related materials, after those actions have been taken and memorialized in the appropriate locations.

2. The language of Article 31 is clear and unambiguous. In particular, Section 31.1 provides that: "Additional employee files may include attendance files, payroll files and medical files." That sentence does not list the types of additional files that the employer *can* maintain, but it provides

a very specific list of the additional files that they "*may*" retain. In addition to those enumerated files, Article 31.6 authorizes a "legal defense file" under the very specific set of circumstances where an employee has been exonerated of the alleged wrongdoing, and the material would otherwise be completely deleted from any file. Records involving unsubstantiated allegations of misconduct would not be released pursuant to a public disclosure request, if challenged by the employee. *Bellevue John Does 1-11 v. Bellevue School Dist. #405*, 164 Wash.2d 199, 215, 189 P.3d 139 (2008).

3. Public employees are subjected to a disproportionate level of scrutiny, as compared to private sector employees. An employee's personnel file follows him or her through a career in state government and is subject to public disclosure requests. For this reason, the Union wanted an employee to be able to know exactly what and where information is being kept, to be able to review that information, and to be able to provide rebuttal information. The Union negotiated for very specifically delineated files in which information such as discipline would be housed, so that all employees would know what existed and were subject to disclosure in a public disclosure request. Had the Union been aware that duplicitous [duplicate] files documenting an employee's disciplinary history and performance concerns were being housed by the HR department, or anywhere else besides these files delineated within the contract, the Union would have addressed this issue in bargaining the newest contract, to take effect in 2011. The Union very clearly thought that it had negotiated a *finite* list of files which could immediately be identified and accessed so that an employee could know what material existed and was potentially subject to disclosure.

4. The Union protected its members by negotiating a retention schedule for discipline and performance related documents. Article 31.6 defines the length of time that specific items must be retained before they are authorized for removal. Likewise, pursuant to Article 31.5, oral reprimands contained in a supervisory file will be removed after one year, when the supervisor purges that file. This is critically important because, unlike unsubstantiated allegations of misconduct, substantiated discipline is obtainable under a public disclosure request. When the item is purged from a personnel file or supervisory file, it no longer exists and cannot be disclosed because there is nothing to disclose. The timeframes for removal are of one of the most important means by which the Union can protect its members. The existence of the HR files is disturbing for two reasons: (a) an employee would have no knowledge of the existence of these files and no opportunity to dispute the validity of the material and/or to provide a rebuttal statement that would be seen by anyone requesting the material in a public disclosure request; (b) the files themselves could be kept in perpetuity, in violation of the retention provisions specifically negotiated by the Union—the Employer specifically asserts that these files are not subject to the contract's retention provisions.

5. The Union urges the arbitrator to apply the common sense rule that "when parties list specific items, without any more general or inclusive term, they intend to exclude unlisted items, even

though they are similar to those listed." *Elkouri and Elkouri—How Arbitration Works* 467 (5th Ed. 1987).[2] If the parties had intended that the final sentence of Article 31.1 reflect a *general* list of the types of files that might appropriately be maintained, they would and could have stated: files "*such as*" attendance, payroll, and medical. The fact that the contract specifically identifies "legal defense" files indicates that the parties could clearly have also identified "HR" files, but they did not do so.

6. The grievance requests that any HR "disciplinary file" be destroyed and that Grievant be made whole.

Employer

1. Article 31 addresses "personnel files," "attendance files, payroll files, and medical files." Article 31 does not prohibit the Employer from maintaining other business records, and Article 31.6 specifically authorizes the Employer to maintain legal defense files. Furthermore, Article 31 does not govern the retention of documents in HR administrative files. HR's administrative files are distinct from the supervisory files, personnel files, payroll files, attendance files, and medical files listed in Article 31. While Article 31.2 guarantees direct employee access to those listed files, employee access to HR administrative files must be sought through a public disclosure request or a Union request for information. The reason for that limit on access is that HR administrative files may contain confidential information about employees, patients, and privileged attorney-client communications.

2. The parties differ in their view of the purposes for which HR maintains administrative files. The Employer keeps those files for business purposes, including legal defense. The Union seems to attribute some nefarious purpose to their retention but provided no proof of such a purpose. The Union makes the strained argument that the State has violated Article 31 by maintaining this rather ordinary business record.

3. What may constitute the State's legal defense will vary greatly with a given matter and is solely management's right to determine, under Article 35 "Management Rights." In addition, the contract explicitly provides that documents removed from supervisory or personnel files may be retained where management determines "a longer retention period" is "warrant[ed]." Therefore, the Employer may maintain records such as written reprimands, reductions in pay, suspension, demotions, and performance evaluations, even after those documents are to be purged from personnel files. Article

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[2] I note that the quoted discussion is followed by the following text: "The hazards of this rule of interpretation in some instances lead parties to . . . follow a specific enumeration with the statement that the clause is not to be necessarily restricted to the things specifically listed." *Elkouri and Elkouri—How Arbitration Works* 467 (6th ed. 2003) at 468. In this case, the parties agreed to a variation of that approach in Article 31.1: "Additional employee files *may include* attendance files, payroll files and medical files."

31.6 C.1 places no restriction about where the Employer may store such documents, and Article 31.6 does not circumscribe management's discretion in determining what "circumstances" warrant a longer retention period. However, once a document is properly purged from a supervisory file or personnel file, those "circumstances" do not include use of that document to support future disciplinary actions. Consistent with the language of Article 31, records of oral reprimands—like a record of any other form of discipline—may be retained after they are purged from supervisory files, if management deems that "circumstances" warrant a longer retention period.

4. When one interpretation of an ambiguous contact would lead to harsh, absurd, or nonsensical results, while an alternative interpretation, equally plausible, would lead to just and reasonable results, the latter interpretation will be used. *Elkouri* at 471 (6th edition). The Union's interpretation of Article 31.1 as prohibiting the Employer from having administrative files to which employees did not have access would effectively preclude HR from maintaining the confidentiality necessary for it to do its job.

5. The administrative files are also known as and can serve as legal defense files (which are not subject to employee review because they are not one of the type of files listed in Article 31.2) or grievance files (which are not subject to employee review under the terms of Article 29.2). Neither Article 31 nor Article 29 prohibits HR from maintaining business records, including retention of administrative files for the purposes such as legal defense.

6. The Union did not show that Grievant suffered any actual harm, so no remedy is appropriate.

Discussion

On May 19, 2009, the Employer issued an oral reprimand to Grievant. Grievant's supervisor retained documents supporting the reasons for the discipline in Grievant's supervisory file. HR later established a separate HR file (also referred to by the Employer as an "administrative file") regarding the oral reprimand. HR requested Grievant's supervisor to provide copies of the documents supporting the reasons for the oral reprimand for inclusion in the HR file. Grievant's supervisor did not provide those additional requested documents to HR. The Employer maintains a file on Grievant with documentation relating to her May 19, 2009 oral reprimand.

The issue is: Did WSH violate Article 31 of the collective bargaining agreement when it maintained a file with documentation about Grievant's May 19, 2009 oral reprimand? After analysis of the record, I understand that the issue, more specifically, is: Did WSH violate Article 31 of the collective bargaining agreement when it maintained *an HR* file with documentation about Grievant's

May 19, 2009 oral reprimand?

The Union argues in essence that, under Article 31, the Employer was not entitled to *create* an HR file about Grievant's oral reprimand or to *maintain* in an HR file any information that is purged from Grievant's supervisory file.

Creation of HR files. The parties agreed in Article 35, "Management Rights," that: "Except as modified by this Agreement, the Employer retains all rights of management . . . ." One right of management is to create a file system for business records. Did the Union show that the contract modified or limited the Employer's authority to create its HR file regarding Grievant's oral reprimand?

In Article 31, the parties addressed several types of files that the Employer is authorized to maintain regarding employees: an "official personnel file," a "supervisory file," "[a]dditional employee files *may include* attendance files, payroll files and medical files," and "legal defense file[s]."

In that context, what did the parties mean by "may include"? A respected authority states:

> Arbitrators give words their ordinary and popularly accepted meaning in the absence of a variant contract definition, or extrinsic evidence indicating that they were used in a different sense or that the parties intended some special colloquial meaning. Consequently, in the absence of such evidence when each of the parties has a different understanding of what is intended by certain contract language, the party whose understanding is in accord with the ordinary meaning of that language is entitled to prevail. . . . Arbitrators often have ruled that, in the absence of a showing of mutual understanding of the parties to the contrary, the usual and ordinary definition of terms as defined by a reliable dictionary should govern.[3]

A common dictionary definition of "may" is: "1. expressing possibility. 2. expressing permission," and a common dictionary definition of "include" is: "1. have or contain something as part of a whole: . . . . 2. Make or treat someone or something as part of a whole or group."[4] Neither party argues that "may" or "include" means something other than those dictionary definitions.

"Include" and "may include" are common terms in collective bargaining agreements. From a search of the parties' subject 2009-2011 collective bargaining agreement, I note that they used the expression "may include" in ten separate locations, including Article 31.[5] The parties did not agree, in

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[3] Ruben, ed., *How Arbitration Works* (BNA 6th ed. 2003) at 448-50.

[4] *Pocket Oxford American Dictionary* (Oxford University Press 2nd ed. 2008).

[5] http://www.ofm.wa.gov/labor/agreements/09-11/wfse/wfse.pdf

Article 31, that additional employee files "may include *only*" the files listed.

I interpret Article 31 to provide that, when the parties stated that "[a]dditional employee files *may include*" certain types of personnel-related files, they agreed that the Employer had the authority to retain both the specified files and *other* unspecified types of files. In other words, Article 31.1 gave *examples* of files that the Employer could maintain but did not prohibit the Employer from maintaining *other* personnel-related files, such as HR files.

The phrase "may include" is clear and unambiguous, so I do not need to consider other evidence in reaching my decision. To the extent that the phrase is argued to be unclear or ambiguous, however, extrinsic evidence supports my opinion. First, as noted in the section above entitled "Bargaining History," I have credited the Employer's evidence about the parties' bargaining history. The bargaining history indicates that the parties agreed that the list in Article 31.1 was not a finite list and that the Employer needed files other than those listed in that section.

Second, part of the context of Article 31.1 is the provision of Article 31.2 that employees may examine only their own "personnel file, supervisory file, attendance file, payroll file, and medical file." In addition, the parties knew that the Employer has other files but did not agree that employees could examine those other files.

Third, it is not unreasonable to interpret "may include" to authorize the Employer to create HR files, at least to the extent that: (a) the Employer takes the position that a document purged from a supervisory file cannot be referenced for future disciplinary action, reducing the significance to an employee of such contents of an HR file; and (b) an employee has the right to review any material in his or her own "personnel file, supervisory file, attendance file, payroll file, and medical file" that the Employer may later include in an HR file.

Maintaining documentation in HR files. As determined above, the Employer has the authority to create HR files. The ultimate issue is: Did the Employer violate Article 31 by maintaining an HR file with documentation about Grievant's oral reprimand?

First, in July 2009, HR asked Grievant's supervisor for supporting material related to Grievant's May 2009 oral reprimand. Grievant's supervisor did not provide HR with the supporting material. To show that the Employer violated Article 31 by keeping such supporting material in an HR file, it is necessary for the Union to present evidence that the Employer actually received and kept in Grievant's HR file the supporting material from the supervisory file. Because the supervisor did not *provide* the supervisory file supporting material to HR, the Employer could not have violated Article 31.5 by *retaining* that supporting material.

Second, the Employer stipulated that HR maintains a file on Grievant with documentation relating to her May 19, 2009 oral reprimand. That file appears in the record. It includes a letter memorializing the oral reprimand, and the letter refers to a number of dates on which Grievant had unscheduled leave.

As noted earlier, the parties agreed in Article 35, "Management Rights," that: "Except as modified by this Agreement, the Employer retains all rights of management . . . ." One right of management is to maintain a file system for business records. Did the Union show that the contract modifies or limits the Employer's authority to maintain an HR file regarding Grievant's oral reprimand?

I conclude that the Union did not show that the contract modifies or limits the Employer's authority to maintain its HR file regarding Grievant's oral reprimand. As background, Article 31 does not directly address the purging or removal of oral reprimands from employee files. However, Article 31.5 does address the purging of particular material from supervisory files:

> Supervisory files will be purged of the previous year's job performance information following completion of the annual performance evaluation, unless circumstances warrant otherwise. The confidentiality and security of supervisory files will be maintained to the extent allowed or required by law.

An oral reprimand is part of an employee's annual job performance. Given the structure and content of Article 31, I interpret Article 31.5 to provide that an employee's oral reprimand is one element of an employee's "previous year's job performance" that is retained in the employee's supervisory file for a certain period and then is to be purged from the supervisory file, "unless circumstances warrant otherwise."

To the extent that the HR file includes documentation from the *supervisory file*, the HR file essentially duplicates part of the supervisory file. Significantly, regarding that apparent parallel, the parties specifically agreed in Article 31.1, in part: "All references to 'supervisory file' in this Agreement refer to a file kept by the employee's first-line supervisor." Therefore, the parties' agreement in Article 31.5 about the Employer purging information from *supervisory files* does not apply to documentation of an oral reprimand that the Employer obtains from a supervisory file but retains in an *HR file*.

To the extent that the HR file includes material from some other Employer source, such as *attendance and payroll files*, the Union did not show that the contract prohibits the Employer from keeping information from those sources in its HR files.

Further, the Union did not show that the Employer's retention of Grievant's oral reprimand documentation violated the final sentence of Article 31.5: "The confidentiality and security of supervisory files will be maintained to the extent allowed or required by law." The Secretary of State's retention schedule incorporates the parties' agreement, and—as discussed above—I interpret that agreement not to require the Employer to purge Grievant's oral reprimand documentation from her HR file.

Conclusion

The Union did not prove that the Employer violated Article 31 of the collective bargaining agreement when it maintained an HR file with documentation about Grievant's May 19, 2009 oral reprimand.

Respectfully submitted,

William Greer
Arbitrator
Portland, Oregon
April 18, 2011

In the Matter of the Arbitration
between
Washington Department of Social and Health Services - Western State Hospital
and
Washington Federation of State Employees

Denise Riggs Reprimand Grievance

AAA Case No. 75-390-00174-10

Award

I have carefully reviewed all of the parties' evidence and arguments. I deny the grievance.

Respectfully submitted,

William Greer
Arbitrator

April 18, 2011