

OPINION AND AWARD  
BEFORE  
RICHARD L. AHEARN

AAA NO. 01-16-0004-1675  
(TRYG HOFF GRIEVANCE)

WASHINGTON FEDERATION OF STATE EMPLOYEES  
and TRYG HOFF,  
Grievant,

and

WASHINGTON STATE DEPARTMENT OF ECOLOGY,  
Employer.

Appearances:

For Grievant:  
Sharon English  
Younglove & Coker  
PO Box 7846  
Olympia, WA 9850-7846

For the Employer:  
Charlynn Hull  
Assistant Attorney General  
Labor & Personnel Division  
7141 Cleanwater DR SW  
PO Box 40145  
Olympia, WA 98504-0145

## OPINION

### **I. INTRODUCTION**

Washington Federation of State Employees (Union) and the Employer are Parties to a collective bargaining agreement (CBA) that was in effect at all times material to this matter. Tryg Hoff (grievant) has been employed by the Employer in its Water Resources program for approximately 11 years and for several years has been a shop steward in the bargaining unit covered by the CBA. On December 9, 2015, the Union filed the grievance at issue in this matter, alleging that the Employer failed to provide grievant a copy of the supervisory file of his immediate supervisor within 14 days of the request, as required by Article 31.2 of the CBA.

With no mutual resolution of the grievance, the Parties selected me as the arbitrator to decide this matter. At the hearing held on April 18, 2017, the Parties had full opportunity to call witnesses, to make arguments and to enter documents into the record. Witnesses were sworn under oath and subject to cross-examination by the opposing Party. Both parties stipulated that the grievance is properly before me for decision and following issuance of my Opinion to aid in the implementation of any remedy, should that be necessary. Following the close of testimony I received timely filed and well written, comprehensive briefs from the Parties and the record closed effective June 2, 2017.

### **II. STATEMENT OF THE ISSUE**

The Parties stipulated that the issue before me is:

Did the Employer violate Article 31.2 of the CBA with regard to its response to the supervisory file request made on November 9?<sup>1</sup>

If so, what is the appropriate remedy?

---

<sup>1</sup> Although the grievance cited several articles in the CBA, the Parties stipulated that only Article 31.2 is at issue in this arbitration.

### III. RELEVANT PROVISIONS OF CBA

#### ARTICLE 29

#### GRIEVANCE PROCEDURE

##### 29.3

##### B. Processing

##### **Step 5 - Arbitration:**

##### D. Authority of the Arbitrator

1. The arbitrator will:
  - a. Have no authority to rule contrary to, add to, subtract from, or modify any of the provisions of this Agreement;...

#### ARTICLE 31

#### PERSONNEL FILES

**31.2** An employee may examine his or her own personnel file, supervisory file, attendance file, payroll file, and medical file (s). The Employer will provide access to the file within fourteen (14) calendar days of a request. Review of these files will be in the presence of an Employer representative during business hours, unless otherwise arranged. An employee will not be required to take leave to review these files. Written authorization from the employee is required before any representative of the employee will be granted access to these files. The employee and/or representative may not remove any contents; however, an employee may provide a written rebuttal to any information in the files that he or she considers objectionable. The Employer may charge a reasonable fee for copying any materials beyond the first copy requested by the employee or his or her representative.

##### **31.5 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. Upon request by the employee, the supervisor will share why the materials were not purged. The confidentiality and security of supervisory files will be maintained to the extent allowed or required by law.

### IV. EVIDENCE

#### A. Events Leading to the Grievance

An Economic Analyst 3, grievant reports to Dave Christensen (Christensen), Supervisor of Program Development and Operations Support. Christensen in turn is supervised by

Tom Loranger (Loranger), Program Manager, who reports to Deputy Director Polly Zehm (Zehm).

In late October 2015, Christensen informed his 13 direct reports, including grievant, that in a couple of weeks he would begin the annual review process by meeting with each of them. Christensen testified that such meetings provide employees an opportunity to offer their input regarding their successes and bring any matters to Christensen's attention. With the first such meeting between grievant and Christensen scheduled for November 9 at 10 AM, grievant by email at 7:23 AM requested that Christensen bring a copy of his "supervisory file" to the meeting.<sup>2</sup> Christensen responded 4 minutes later by stating that he would make the file available another time, but that it was outside the normal PDP process for that scheduled meeting.<sup>3</sup> Nevertheless, the planned meeting did occur, with grievant providing his assessment of the year, as is customary. Beginning the next day, November 10, until November 20, Christensen was out of the office, attending various conferences.<sup>4</sup>

Upon his return to the office on November 20, Christensen sent an email to grievant, asking if he still wanted to review the supervisory file and, if so, to provide a time when Christensen could make the file available for grievant's review. Grievant was not in the office on November 20, but responded on his next day of work, November 23, that he continued to want the supervisory file and that he had not yet received it, despite his request of November 9. Seven (7) minutes later Christensen replied, reminding grievant that the November 9 request was not part of the PDP process, but offering to make the file available for review the following week.

---

<sup>2</sup> "Supervisory files" contain notes, analyses, correspondence and other documents that relate to the performance of the employee under review. Their significance is reflected in Article 5.1 of the CBA that requires that performance problems be addressed with employees to provide an opportunity for needed training or correction before including in an evaluation.

Grievant testified he made a verbal request for the file prior to November 9. However, for purposes of this analysis, November 9 is considered the date of the formal request.

<sup>3</sup> There is no evidence that grievant challenged Christensen's assertion that the supervisory file was not part of the process for the first meeting.

<sup>4</sup> Although not clear on the record, I find it reasonable to infer that grievant was aware of Christensen's upcoming scheduled absences from the office.

Grievant did not respond directly to Christensen's November 23 message, but instead emailed Loranger, describing his relationship with Christensen as "broken," and complaining that he had not yet received a copy of the file, despite his November 9 request. Loranger did not respond directly to grievant. However, Christensen scheduled a meeting for the afternoon of December 3 for grievant to review the supervisory file.

At about 3 PM on December 3, the Union's Council representative, Tony Jones (Jones), sent Christensen an email stating he would not be attending the meeting, but requesting a copy of the supervisory file and stating that grievant would arrive that afternoon to pick up the copy. About fifteen (15) minutes later Christensen replied that he had provided the file to Human Resources for copying and that they would make the file available as soon as it was ready. Grievant did not attend the meeting and provided no explanation to Christensen for his absence.

On December 7, Union steward Pat Bailey (Bailey) intervened, notifying Human Resources by email that grievant still did not have his supervisory file and that the 14 day deadline had already passed. Following additional contacts by Bailey with Human Resources, on the afternoon of December 7, grievant received a copy of the supervisory file 28 days after his initial request. With respect to the copy, Alex Monroe (Monroe), Labor Relations Manager, expressed to grievant her understanding that he had received a copy of his supervisory file and that it was received "within the fourteen calendar days of the request as provided for in the CBA."

#### Grievant's Supervisory File

In contrast to most supervisory files that seldom exceed 10 to 15 pages, the supervisory file concerning grievant contained well over 200 pages. In addition, as with an increasing number of such files, much of the content was stored electronically. Further, as recognized in Article 31.5, the supervisory files are considered confidential. They are maintained under lock and key, available only to each individual supervisor.

### Parties' Past Practice Under Article 31.2

Although the language of Article 31.2 focuses on "access" to the supervisory file, Jones' testimony described a practice in which employees and/or the Union frequently bypass a request for mere "access" and instead only ask for a copy. It further appears that the Employer routinely provides copies within 14 days of receipt of such requests. The evidence also reflects that the Employer often exercises its right under 31.2 to request an extension of the 14 day requirement. Significantly, Jones testified that the Union had never denied such an extension request.<sup>5</sup>

### Harm

Following receipt of the supervisory file on December 7, grievant met with Christensen on December 21 and 23 to discuss his PDP. In one of those meetings grievant and Jones requested removal of certain matters from the file. Subsequently, in January 2016, grievant's evaluation was completed. There is no record evidence that the delay in providing a copy of the supervisory file impeded either the PDP process or the evaluation.

## **V. PARTIES' POSITIONS SUMMARIZED**

### **UNION**

In summary, the Union argues:

- The Employer's failure to provide a copy of the supervisory file to grievant within 14 days of his request violates Article 31.2.
- Good faith efforts do not relieve the Employer of its obligations under Article 31.2.
- Harm is not a necessary element of an Article 31.2 violation.
- The "make whole" remedy should include all relief requested in the grievance.

---

<sup>5</sup> Jones testified that he was accommodating because the Union appreciates reciprocal courtesy when needing its own extensions.

## **EMPLOYER**

In short, the Employer contends:

- Although Article 31.2 provides that access to the supervisory file will be granted within 14 days unless otherwise arranged, a copy of the file is not required.
- The Employer acted in good faith and reasonably complied with the requirements of Article 31.2.
- By providing access to the supervisory file on December 3 and a copy on December 7, the Employer provided grievant ample opportunity to meet with his supervisor for the PDP process.
- The Union failed to show that the grievant is entitled to any remedy.

## **VI. ANALYSIS**

### **A. Introduction**

As the moving party in this contract interpretation matter, the Union has the burden to establish a violation of Article 31.2 by a preponderance of the evidence. In seeking to discern the Parties' mutual intent, my obligation is to initially determine whether the language in dispute is either clear and distinct or instead subject to alternative plausible interpretations. If I conclude that the language is unambiguous, I need not consider other evidence. As expressed in a leading treatise:

If the words are plain and clear, conveying a distinct idea, there is no occasion to resort to interpretation, and the meaning is to be derived entirely from the nature of the language used. Elkouri & Elkouri, How Arbitration Works, 9-8 (7th Ed., 2012).

One arbitrator has described the analytical process of determining whether language is ambiguous or clear by the following:

"Perhaps a better way of putting it would be to ask if a single, obvious and reasonable meaning appears from a reading of the language in the context of the rest of the contract. If so, that meaning is to be applied." *United Grocers*, 92 LA 566, 569 (Gangle, 1989).

On the other hand, if I find that the language is ambiguous, I must consider past practice and other extrinsic circumstances that can provide meaning and context to the Parties' mutual intent.

## B. Merits

Each Party contends that a clear and unequivocal reading of Article 31.2 supports its position concerning the nature of the Employer's obligation. As a preliminary matter I am persuaded that the Union makes an appealing argument that the contractual language that the Employer "will" provide access within 14 calendar days of a request imposes an unconditional obligation. Notably, Article 31.2 does not express any exceptions to such a commitment. For instance, there is no mention of potential mitigating circumstances or defenses that would condition the mandate, such as temporary unavailability of a supervisor, or a request that is cumbersome. Significantly, by providing that an employee "may" examine his or her file and that the Employer "may" charge a reasonable fee for copying, the Parties also demonstrated an understanding of the difference between a term that expresses one's discretion or permission to engage in a certain act, versus a term that reflects an unconditional obligation. See Garner, A Dictionary of Modern Legal Usage, 942, (2nd Ed. 1995). Consistent with this framework, I am persuaded that the Parties' agreement in Article 31.2 on the phrase "will provide" reflects their intent to express a mandatory, unconditional obligation.

In the context of the above considerations, I carefully evaluated the Employer's forceful contention that it acted in good faith and reasonably complied with its Article 31.2 obligations. In that regard I acknowledge that the Employer's ability to respond was hampered by Christensen's extended absence immediately following the November 9 request and subsequently by intervening holidays and grievant's schedule, who was not in the office upon Christensen's November 20 return. I further appreciate that at all stages of the communications between the Parties, the Employer responded promptly, never firmly rejecting any request. Indeed, even Christensen's initial message expressed a willingness to provide the file at "another time." I also find it significant that grievant's file was voluminous, containing more than 200 pages, in contrast to the normal 10-15 page file. Finally, upon receipt of the Union's December 3 request, the



Employer provided a copy in 4 days. Nevertheless, although each of these circumstances make the Employer's position sympathetic, I am obligated to apply the Parties' written agreement, and in particular to observe the restrictions of Article 29.3.

### C. Conclusion Regarding Merits

Stripped to its essentials, it is clear that the Employer did not provide grievant with either access to, or a copy of, his supervisory file within 14 days of the November 9 request. Further, although confronted with various impediments and circumstances that compromised its ability to comply, the Employer failed to take advantage of the simple expedient of requesting an extension. In light of the foregoing, and particularly as extension requests have been routinely granted, I am unable to agree that the Employer fulfilled its Article 31.2 obligations by anything short of compliance with the deadline. Rather, I am compelled to conclude that the Employer's failure to provide access or a copy within 14 days of grievant's November 9 request constituted a technical violation of Article 31.2.<sup>6</sup>

### D. Remedy

#### 1. Copies

The Parties also dispute whether Article 31.2 requires the Employer to provide a copy rather than mere access.<sup>7</sup> Initially I agree with the Employer that "access" and "copy" represent separate and distinct concepts. Thus, access encompasses many forms and generally signifies an opportunity to view or inspect a particular object, often with certain restrictions. On the other hand, a copy constitutes a faithful reproduction of the original and usually involves no restrictions.

A review of the structure of Article 31.2 reveals that it fundamentally addresses access to and examination of the personnel files, as the first six sentences discuss:

---

<sup>6</sup> In reaching my conclusion I am also aware that an indelible part of any contractual obligation is a commitment to perform in good faith. St. Antoine, The Common Law of the Workplace, 92 (1998). Thus, my conclusions herein could be different if the evidence indicated that either the Union or the Employer acted in bad faith.

<sup>7</sup> As the alleged violation rests on the Employer's failure to comply with the 14 day requirement of Article 31.2, I analyze the dispute over whether the Employer is required to provide copies as a remedial issue.

- Examination of the files
- Access to the files
- Review of the files in the presence of a representative of the Employer, unless otherwise arranged
- Requirement of written authorization before an employee representative is allowed access
- Restriction on removal of any information from the file by an employee

Only in the last sentence of the Article does the following singular reference to copying appear: “The Employer may charge a reasonable fee for copying any materials beyond the first copy requested by the employee or his or her representative.” In light of the foregoing, I am persuaded that the foundational and overriding focus of Article 31.2 concerns access to and an examination of the supervisory file. Moreover, references to the presence of an employer representative, the requirement of written authorization and the restrictions against removal of material would be superfluous if copying were the essential means by which the Employer was required to comply.

On the other hand, I appreciate that arbitrators often rely on past practice, either to explain ambiguous terms, or even to establish the meaning of otherwise seemingly unambiguous language. In that regard the evidence that the Employer routinely grants the Union’s frequent requests for copies could suggest that the Parties’ past practice has modified the meaning of “access” to include copying. Further, in addition to the practices to which Jones testified, Monroe’s message accompanying the copies of grievant’s file arguably acknowledged that copying was consistent with the Employer’s Article 31.2 obligations.

It is well established that in order to amend a clear term of an agreement by past practice, convincing proof of a mutual agreement is required. Elkouri & Elkouri, supra at 12-27. Such proof would require evidence that the Parties mutually agreed to a specific modification of “access” that would require copies rather than other forms of access as contemplated by Article 31.2. The record here, however, fails to demonstrate that the Parties over an extended period of time understood and accepted copies as the only

means of providing “access.” Rather, the record reveals that traditional access meetings continue to occur and that requests for copies of certain documents arise in that setting. Further, although the Employer appears to respond to whether a request seeks copies or access, I am not persuaded that such conduct relates to a modification of the Parties’ intent. In light of the foregoing I am compelled to find that the common understanding of access, in various forms including but not limited to copies, satisfies the Employer’s Article 31.2 obligations.

## 2. De Minimus

A leading treatise affirms that arbitrators often apply the “de minimus” principle that if: “...the action complained of is such a slight departure from what is generally required by the agreement that the action must be viewed either as a permissible exception or as not creating an injury at all.” Elkouri & Elkouri, supra at 18-28. With respect to the injury here, although grievant testified that the Employer’s delay impeded the PDP process, there is no evidence of any demonstrable harm or injury to grievant. Rather, the record reflects that grievant received a copy of the supervisory file well before his PDP meetings of December 20 and December 23, requested the removal of certain material and signed his evaluation a few weeks later. Significantly, there is no contrary evidence that the conduct of those meetings was in any way impaired as a result of the delay.

I also recognize that the Union routinely grants the Employer’s requests for extensions to fulfill Article 31.2 requests, and that the circumstances here present compelling reasons that would have supported such a request. In light of the foregoing, I am persuaded that the Parties’ general experience as well as the specific facts here, strongly suggest that the Parties have routinely considered a brief delay such as occurred here to pose no harm.

### 3. Conclusion Regarding Remedy

I am persuaded that a fair reading of the entire record demonstrates that the Employer takes its Article 31.2 obligations seriously and that this incident is an anomaly that arose out of unusual circumstances and that is unlikely to recur. Moreover and most significant, I find no evidence of measurable injury or prejudice to grievant. In light of the foregoing I am persuaded that an affirmative remedy would be superfluous and therefore I will not require anything additional of the Employer at this time. Hill, *Remedies in Arbitration*, 393 (2nd Ed., 1991).<sup>8</sup> In reaching my conclusions, I addressed only those matters I deemed necessary for proper resolution, although I did evaluate all the well-expressed arguments of the Parties including the authorities and evidence on which they relied, even if not specifically addressed in this Opinion.

---

<sup>8</sup> Although there is authority for dismissing a grievance on the basis of the de minimus doctrine, I find application to the remedy more appropriate as the obligations of Article 31.2 are unconditional. My conclusion, however, should not be interpreted as license to ignore the 14 day mandate. Rather, I am aware that: "[A]t some point, ... 'the de minimus "acorns" can grow into an "oak" of some size.' Fairweather's *Practice and Procedure in Labor Arbitration*, 476 (Fourth Ed., 1999), citation omitted.

## AWARD

Based on a careful review of the record and for the rationale described above, I issue the following award:

1. By failing to provide access to grievant's supervisory file within 14 days of his request, the Employer violated Article 31.2.
2. With no demonstrated injury or harm resulting from the Employer's technical violation of Article 31.2, no further action is required.
3. Pursuant to Article 29.3, my fees
4. and expenses will be shared equally by the Parties.

Respectfully submitted,



Richard L. Ahearn

Arbitrator

June 28, 2017

