

IN THE MATTER OF THE ARBITRATION BETWEEN

WASHINGTON FEDERATION OF	)	
STATE EMPLOYEES,	)	ARBITRATOR'S OPINION
	)	AND AWARD
	)	
UNION,	)	
	)	
And	)	EVERETTE HUNTER
	)	TERMINATION GRIEVANCE
	)	
WASHINGTON STATE DEPARTMENT	)	
OF SOCIAL & HEALTH SERVICES,	)	AAA NO. 75 390 00459 05 LYMC
	)	
	)	
EMPLOYER.	)	
	)	

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BEFORE: JOSEPH W. DUFFY  
ARBITRATOR  
PO BOX 12217  
SEATTLE, WA 98102-0217

REPRESENTING  
THE UNION: GREGORY M. RHODES  
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REPRESENTING  
THE EMPLOYER: JANETTA E. SHEEHAN  
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HEARING HELD: JUNE 2, 2006  
OLYMPIA, WA

## OPINION

### Introduction

Washington Federation of State Employees (“union”) serves as exclusive bargaining representative for a bargaining unit of employees who are employed by Washington State in the Department of Social and Health Services (“employer”). The union and the employer (“parties”) submitted this dispute to arbitration under the terms of their 2005 - 2007 collective bargaining agreement (“Agreement”), which they introduced at the hearing as a joint exhibit (R12). The parties selected me to arbitrate this dispute from a panel of arbitrators supplied by the American Arbitration Association.

The authority of the arbitrator is defined in Section 29.4 D of the Agreement. (R12, p. 60)

The hearing took place on June 2, 2006 at the offices of the Attorney General of Washington in Olympia, WA.

At the start of the hearing, the parties agreed that the grievance is properly before me for a final and binding decision on the merits. The union, however, reserved its right to object to any consideration of two charges that the union believes cannot be a basis for discharge since the employer did not conduct a timely investigation under the rules that applied at the time the alleged misconduct occurred. The parties agreed that I should reserve my ruling on that issue for this decision. (TR5-10) The parties also agreed that I should retain jurisdiction to aid in the implementation of the remedy, should that be necessary. (TR10-11)

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 make arguments and to introduce documents into the record. Witnesses were sworn under oath and subject to cross-examination by the opposing party. A court reporter transcribed the hearing and provided me with a copy of the transcript.

The parties agreed to the submission of twenty-five exhibits into the record. (R1-R21, G1-G4) (TR10, TR160) A total of fourteen witnesses testified at the hearing. Two of those witnesses testified by telephone conference call. The grievant attended the hearing but chose not to testify. At the conclusion of the testimony, I closed the record to further evidence. The parties agreed to submit post-hearing briefs simultaneously to me and to each other postmarked by July 5, 2006. (TR250) I received the briefs, postmarked by the agreed deadline, and closed the record on July 6, 2006.

### Issue for Decision

The parties agreed on the following statement of the issue for decision: Did the State of Washington/Department of Social and Health Services have just cause to discharge Everett Hunter on August 2, 2005? If not, what is the appropriate remedy? (TR9-10)

### Background

The grievant, Mr. Everett Hunter, went to work for the employer as a Social Worker 3 with the Department of Social and Health Services (“Department”), Division of Children and Family Services (“DCFS”) on February 19, 2002. (R11) Almost three and one-half years later, the employer sent the grievant a Notice of Intent to Dismiss dated July 20, 2005. (R2) Following a July 28, 2005 *Loudermill* meeting, the employer issued the grievant a Notice of Dismissal terminating his employment on August 2, 2005 (R1).

The grievant received information on the employer’s rules and policies in 2002, 2003 and 2004. He received training on a variety of subjects including the three week Children’s Administrative Academy, Investigation Training Core/Spec CA, Child Protective Team Training, Basics of CPS TRN-Timelines CPS, Working with Law Enforcement, Non-Discrimination Training and Workplace Harassment, Child Sex Abuse Investigation and Interviewing, as well as other training. (R8; TR150-152)

### EDPPs and Counseling Memos

In November 2003, the grievant received an “Employee Development and Performance Plan” (“EDPP”) for the period August 2002 to August 2003. (R15) An EDPP is an evaluation of an employee’s work performance that is ordinarily done on an annual basis. (TR171:14-17)

In the November 2003 EDPP, the grievant’s supervisor at the time, Mr. Dan Escobar<sup>1</sup>, referred to a table on the EDPP form that listed referral assignments, case status and case closures and compared the grievant’s numbers to the unit average. Mr. Escobar concluded that the grievant “is normally functioning within standard expectations.” Mr. Escobar included a number of complimentary statements about the grievant’s work, such as the following:

Mr. Hunter presents with professional clarity, his role to concerned citizens, service providers, community professionals, school personnel, law enforcement agencies, and foster parents, in his effort to protect children and improve family relationships. He has a strong working relationship with law enforcement that has been a valuable resource on investigations.

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<sup>1</sup> The record shows that Mr. Escobar received a demotion from his supervisory position for his handling of one of the matters for which the grievant is charged with misconduct. (E16)

Mr. Hunter has continued in his position as a full-time Social Worker 3 since 8/02. With his many years of experience in the social work field he has a good understanding of risk to children. As an experienced worker Mr. Hunter has developed skills to cope with stressful workload demands. His current workload is managed in a 40-hour workweek. He promotes cooperative behavior and team efforts. He is supportive to new workers and has made himself available to workers needing support in potentially high risk situations. Mr. Hunter has also been an example and buffer taking emergent referrals out of rotation without stressful reaction or complaint.

Mr. Hunter has regular work attendance for dependability and attendance. Leave slips are turned in timely, and he is in compliance with policy and procedure for family emergencies and illnesses.

Mr. Hunter exhibits integrity and honesty. He is open and honest in his communication with children, parents and coworkers.... (R15)

The EDPP also contained some critical comments, such as the following:

Mr. Hunter's documentation on investigations is factual but has lacked consistent practice for comprehensive steps to meet policy and unit standards for best practice on high standard investigations. Mr. Hunter has been quick to acknowledge errors and make necessary corrections in case file documentation. (R15)

The EDPP also references a Counseling Memo that the grievant received from Regional Administrator, Chris Robinson. (R15, p. 1011) The Memo, dated October 13, 2003, described the grievant's failure to follow supervisory directives on a referral he received. The problems with the grievant's performance included not following several basic steps in trying to locate a child, not documenting the efforts made to find the child, and delaying the interview with the child from February to April. The Memo ends with the admonition that further disciplinary action or dismissal may result from any future misconduct or poor work performance. (R3, p. 1075) The grievant questioned many of the facts on which this Memo is based, but the employer was not persuaded by his contentions. (R3, p. 1077)

The grievant received another EDPP in April 2004 for the period August 2003 to April 2004. (R14) Statistics for the grievant and for the unit included in the report show that the grievant "is normally functioning within standard expectations" for referral assignments, case status and case closures. This EDPP repeated many of the positive comments from the previous

EDPP and also raised the issue of inadequate documentation again. The review also noted that the grievant: "...continues to struggle with organization on timelines in prioritization, case crisis, emergency tasks and needed information in SERs...." (R14)

In the April 2004 EDPP, the grievant included the following comments:

I feel that there is too much pressure placed on me as a worker. Not only is the work that I do stressful but the extra stress of feeling [I'm] being watched and everything that I do appears to be an issue. This places a lot of undue stress on me as a worker. I need to feel that I have support and not be under the spot light all the time. This would make the job that I do a lot easier and less stressful.  
(R14, p. 1009)

At about the same time that Mr. Escobar issued the April 2004 EDPP, he also issued a Counseling Memo to the grievant dated April 26, 2004. The Memo begins by raising a concern about the inadequacy of the grievant's documentation in a specific case. The Memo includes the following concerns about the grievant's work:

The quality of this investigation is not an isolated incident. Several cases have been returned for follow-up documentation to meet agency and unit expectations. Practice issues have been addressed in e-mail and you have made changes for improve[d] practice.

A pattern of inconsistency for best practice has become evident in your work. I am not discounting the work you have gone back on to meet unit standards on specific investigations, or specific changes in your practice for improvement. However, a level of consistent practice has not been evident in your work.... (R3, p. 1073)

The Memo goes on to establish a plan of action that includes a number of detailed steps that the grievant was to follow in handling cases.

On November 14, 2004, Mr. Escobar issued another Counseling Memo to the grievant. The dates in the Memo may be confused (see TR 229-231). The subject, however, is the grievant's failure to request an extension for the initial face-to-face meeting with the client in a specific case. The Memo ends with the warning that: "This must not reoccur" and warns that further incidents of this type could lead to further corrective or disciplinary action. (R3, p. 1072)

#### Six CIRs Initiated in 2005

In 2005, the grievant received six Conduct Investigation Reports ("CIR"). A CIR dated January 26, 2005 alleged that the grievant claimed overtime hours that he did not work. (R3, p.

1066) Mr. Fred Gold investigated this CIR for the employer. Mr. Gold testified at the hearing that some of the approximately twenty hours of overtime claimed could not be verified in the sense that the hours could not be related to any work that the grievant produced. In the course of the investigation, the grievant withdrew his request for two hours of overtime for December 27, 2004. The grievant told Mr. Gold that he planned to work that day and wrote down the entry but then did not work as planned. (TR186:17-191:14) The grievant filed a grievance over the CIR and the employer and the grievant agreed to a settlement in which the employer paid the grievant for 6.75 hours of overtime rather than the amount he originally claimed. (R3, p. 1069) The employer's letter documenting the settlement, dated May 18, 2005, concludes with the statement: "I now consider the grievance matter settled." The employer took no further action on the CIR. (TR140)

Ms. Robinson testified on cross-examination, however, that she considered the overtime issue when making the decision to terminate the grievant's employment. She testified she considered the overtime pay CIR as an indication of the grievant's lack of credibility. (TR166:3-171:11)

A second CIR dated February 4, 2005 related to personal use of the State SCAN phone system and the State cell phone. (R3, p. 1063) Testimony at the hearing established that the employer took no disciplinary action on this CIR. The cell phone use did not result in any additional charges and the SCAN use was de minimus. The employer resolved the matter by directing the grievant not to repeat the personal use of the State phones. (TR139-140)

A CIR dated April 4, 2005, alleged that the grievant made inappropriate comments of a sexual nature to female co-workers. (R7) As a result of an initial complaint by one co-worker, the employer began an investigation that included interviewing nine other female co-workers as well as the grievant and the grievant's supervisor. The report of the investigation identifies only the original complainant by name. The other nine women are not identified. (see TR101) The report indicates that five of the nine women interviewed expressed concerns about the grievant's behavior toward them or comments that he made to them. The grievant wrote a six page response to the CIR that included discussion of the previous CIRs as well. (R7, p. 1178-1183) The Regional Administrator scheduled a pre-termination meeting for May 9, 2005. (R7, p. 1184)

Ms. Dawn Cooper testified at the hearing. Ms. Cooper serves as an Area Administrator with the Department. She has worked in the Department for nineteen years. Since about 2000,

she has been responsible for six investigation units and an intake unit at the Department's Tacoma office. In early 2005, the employer sent her to the Bremerton office because a child fatality had occurred and Ms. Cooper was sent in to stabilize the staff and the operation of the Bremerton office. The grievant worked in the Bremerton office at the time. She testified that toward the end of March 2005 a supervisor came to her to report that an employee had expressed concerns about being uncomfortable working around the grievant because of inappropriate comments the grievant made to her. Ms. Cooper conducted the investigation of the allegations related to inappropriate comments and sent her report to Ms. Robinson for action.

Ms. Robinson testified that she reviewed the investigation report submitted by Ms. Cooper. Ms. Robinson decided that the comments made by the grievant did not constitute hostile work environment sexual harassment, although the comments made the co-workers uncomfortable. Ms. Robinson testified that: "I decided that given everything else that was going on, that taking action on that [the complaints about comments the grievant allegedly made to female co-workers] was not necessary."(TR141:16-18) Ms. Robinson also testified, however, that termination of the grievant's employment was the appropriate discipline for the other alleged misconduct (Michelle D., Julie S. & the work performance CIR) because she believed this CIR established that the grievant had "...a pattern of inappropriate communication with women". (TR159:7-8)

A CIR dated February 22, 2005 alleged that the grievant engaged in misconduct through substandard work performance. (R4) The CIR contained six separate allegations that the grievant failed:

1. To interview alleged victims on referrals within mandatory time frames.
2. To adequately assess risk in written Investigative Risk Assessments.
3. To document Investigative Risk Assessments.
4. To make appropriate collateral contacts.
5. To use interpreters as required by policy.
6. To conduct High Standard of Investigations. (R4, p. 1146)

The investigation report shows that in approximately ten of the grievant's cases that were studied the grievant either failed to comply with deadlines and procedures or the documentation he provided is so confusing and incomplete that an independent reviewer could not determine from the file with any certainty what had been done or left undone on the case. (R4, p. 1155-

1158; see also TR119-126 and TR176) In his written response the grievant offered explanations for the problems found with many of the cases, but the explanations did not overcome the lack of documentation or incorrect documentation that the files showed. The grievant also contended that the manner in which he investigated and documented the cases was consistent with the standards of practice in effect at the Bremerton office at the time the particular referrals arrived in the office. The grievant also contended in his response that he carried more referrals than others, that he had been singled out and discriminated against while others had not been disciplined for the same type of work performance problems, that he needed additional resources because of his lack of clerical skills and that his actions did not constitute misconduct, but rather should have been dealt with through corrective action in the EDPP process. (R4, p. 1144-1145)

Ms. Robinson testified that the review of the grievant's cases "...found that the great majority of his cases had significant problems." (TR176:20-22)

Ms. Cooper testified that after the death of a client of the Bremerton office the Department initiated a review of cases that were open but inactive. That case review applied to all CPS workers. She testified that in the course of that review problems with the grievant's case load surfaced. She testified that the CIR on performance issues followed the discovery of problems that came out of the general review of cases. (TR89-91, TR106-110) Ms. Cooper testified that the Department, in this general review, discovered performance problems with a couple of other workers. She also testified that the problems discovered with the performance of other workers were "not as egregious as these [the grievant's]." (TR107:8-13)

A CIR issued February 22, 2005 alleged that the grievant made inappropriate advances to Julie S., a female client on his caseload. (R5) The incident allegedly occurred when the grievant visited the client's home on January 17, 2003. (TR56:2) The client alleged that the grievant got in her personal space when he was talking to her and said: "...he could make me love him, but that he wasn't asking for sexual favors." (TR59:20-21) Julie S. testified at the hearing that this comment from the grievant followed another statement: "He asked me about when I'm out with my boyfriend, didn't something go off in my head saying, 'Julie you shouldn't be here with him, you should be at home with your kids...'" (TR59:17-20)

Julie S. reported the grievant's statement to another social worker, Ms. Belan Lopez. Ms. Lopez reported what she had learned to her supervisor, Mr. Fred Gold, but Mr. Gold did not pass



the information along to the chain of command. Mr. Gold ultimately received a Counseling Memo on April 18, 2005 for his failure to report the grievant's alleged misconduct. (R18)

Nothing further happened about the Julie S. allegation in 2003 or 2004. In early 2005, as a result of a routine "peer review" that the Department does every six months, the reviewer learned of the grievant's alleged comments when she interviewed Julie S. on March 4, 2005. Part of the peer review involves interviewing clients from among the random sample of cases selected for peer review. (TR89:7-20)

The employer conducted a follow-up interview with Julie S. and her mother on March 9, 2005. In that interview Julie S. again described the comment and said that "It was out of line and it scared me to death." She told the interviewers that the grievant came to her home again to see her older children and that nothing out of the ordinary happened. On August 13, 2003, because Julie S. had an auto accident and received a third DUI, the grievant and the police came to her home and took her children into care. (TR61:9-16)

When interviewed, the grievant denied that he made the statement Julie S. alleged that he made. He also pointed out that Julie S. had problems with another CPS social worker and Julie S. was not believable because of her drug and alcohol problems. (R5, p. 1052)

The employer interviewed social worker Maureen Randles who also worked with Julie S. She told the interviewer the following:

Mo describes Julie S. as a 'manipulator' and reports she [Julie] was caught in lies by both Mo and the court. One incident where she lied was when she adamantly denied relapsing in October so further testing had to be completed which found that she had in fact relapsed. (R5, p. 1053; see also TR193)

As a result of complaints by Julie S. about Ms. Randles' handling of Julie S's case, Ms. Randles was removed as her social worker. (Ms. Randles was also subsequently demoted from her job as a Social Worker 3. Ms. Randles accepted a voluntary demotion in settlement of a grievance she filed over her January 24, 2006 demotion. (R19))

Ms. Robinson testified she believed the grievant made the comment to Julie S. and she believed that conduct constituted an abuse of authority by the grievant. (TR152:19-153:9)

Another CIR issued on March 14, 2005 alleged that the grievant asked a female minor client, Michelle D., whether she was sexually active and what positions she liked. (R6) Michelle

D., age fourteen<sup>2</sup>, was removed from her home because of violence toward her by her mother. When the grievant saw her, Michelle D. was a resident at the Crisis Residential Center (“CRC”). The employer concedes that this CIR was not issued in compliance with time frames for issuing CIRs that applied in early 2005 and before. (TR165:8) The investigation under this CIR led to another charge that the employer made against the grievant, which was threatening or retaliating against the client for reporting the earlier comment. On this charge, the employer contends that no CIR was needed because the grievant admitted the threat. (TR164:13-14)

Ms. Cooper testified that the issues concerning Michelle D. first came to her attention through comments made to her by the grievant’s co-workers. (TR91:19-92:15) Ms. Cooper assigned Mr. Jim Pritchard to investigate the allegation. (R6)

The facts concerning the handling of the Michelle D. allegations by the grievant’s supervisor and later by other levels of management are complex and will be discussed in greater detail below. Ultimately, in making the decision to discharge the grievant, the employer relied on the conclusion that the grievant “confronted her inappropriately” after he learned of the allegations Michelle D. made. (R1)

#### The Grievant’s Assignment to Desk Work during the Investigation of the CIRs

The employer removed the grievant from client contact on about February 22, 2005. He was assigned to desk work first in the Bremerton office, then in Tacoma and finally in Port Townsend, which is closer to his home. (TR99-100; TR137-138)

#### Changes in the Collective Bargaining Laws and in the Procedures for Investigating Misconduct

The Washington Legislature recently enacted some major changes in the State’s collective bargaining laws and those changes had a significant effect on the relationship between the union and the employer. Among the changes was a move to a system of grievance/arbitration for handling grievances that involves the use of independent labor arbitrators.

Under the prior system that preceded the new collective bargaining law, the employer applied Personnel Policy 545 when “reviewing, investigating and disposing of allegations of employee misconduct.” (R7, p. 1185) The Policy contained some strict time limits, including the requirement that “the initiation of a CIR investigation must occur within fourteen (14) calendar

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<sup>2</sup> The record contains references to her age as 16 but her correct age at the time was 14. (R6, p. 1097)

days following the date the first supervisor in the employee's chain of command discovers or becomes aware of the misconduct..." (R7. p. 1186)

As a result of the changeover to the Agreement that occurred on July 1, 2005, Personnel Policy 545 no longer applies to employees covered by the Agreement. Article 27, Section 27.4 of the Agreement, provides:

All agency policies regarding investigatory procedures related to alleged staff misconduct are superseded. The Employer has the authority to determine the method for conducting investigations. (R12, p. 52)

The union contends that in this case the employer wrongfully relied on alleged misconduct that occurred prior to July 1, 2005 and that was not appropriately handled under Policy 545 at the time. That issue will be discussed at greater length below.

#### The March 17, 2005 Grievance

The grievant also filed a grievance under the prior collective bargaining agreement. (R21) The statement of the grievance includes the following:

I have received 6 CIRs since the beginning of 2005. I believe that this constitutes a pattern of harassment and that I am being singled out for behavior that is the same as other social workers that have not been issued CIRs. (R21)

The employer responded to the grievance by letter from Ms. Robinson dated June 20, 2005. Ms. Robinson denied the grievance. At that point, only a few days remained before the July 1 transition to the new system of investigating misconduct and handling grievances. In addition, the employer's initial March 22, 2005 response to the grievance contained some confusing information in that the memo referenced Personnel Policy 541. Mr. Kurt Spiegel, Senior Field Representative for the union, testified that Policy 541 applied to unrepresented employees but the grievant's grievance came under the then existing collective bargaining agreement. (TR235) Aside from that issue, however, Mr. Spiegel testified that when the grievant received the June 20 response to the grievance the union understood that any grievance not at the mediation level under the old system by July 1 would be "considered dead" after July 1, 2005. Mr. Spiegel testified he did not believe that it would have been possible to move the grievance to the mediation level in the short interval from June 20 to July 1. (TR238)

The employer offered opposing testimony concerning the status of the grievance after June 20. Ms. Amy Heller, Labor Relations Administrator, testified she believed the grievance

could have been moved to the Secretary's level by June 30 and therefore would not have been dead and would have been eligible for mediation. (TR242)

The union argues that even if the State is correct and the union could have pursued the March 2005 grievance the result would have been the same. The person who would have reviewed and decided on the grievance at the Secretary's level would have been Ms. Heller, the same person who denied this grievance at Step 2. (R13) The employer argues that the grievant has waived any issue of the CIR time frames because he raised that issue in his March grievance and did not pursue the grievance. The union disagrees.

In my judgment, the fact that the union did not pursue the March grievance after receiving the employer's June 20, 2005 response to the grievance does not constitute a waiver of the issues raised in the March grievance. I don't believe it is reasonable to conclude that the union could have obtained a decision on the grievance at the next level within the short period of time from June 20 to June 30, 2005.

#### The Present Grievance

The union filed a grievance dated August 16, 2005 over the termination of the grievant's employment. (R13, p. 1199)<sup>3</sup> The employer denied the grievance at Step 2. (R13) This arbitration followed.

#### Discussion

The Agreement provides that the employer will not discipline any permanent employee without just cause and defines discipline to include termination. (R12, Section 27.1, 27.2, p. 52)

#### The Just Cause Standard

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*

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<sup>3</sup> The grievance references a violation of Article 2.1 based on the fact that the grievant served as a Shop Steward. Nothing in the record indicates that claim was pursued to arbitration. (R13, p. 1199)

*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 questions 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.*, 7L.A.764; 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.<sup>4</sup>

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<sup>4</sup> Labor arbitrators applying a just cause standard ordinarily conduct a *de novo* review of the facts to determine whether the evidence shows that the events actually occurred as the employer alleged they occurred. The State, in its brief, cites *Baldwin v. Sisters of Providence* 112 Wn.2d 127, 769 P.2d 298 (1989), which announced a different just cause standard, i.e. that just cause exists if the employer did not act arbitrarily and capriciously and did act based on substantial evidence that the employer reasonably believed to be true. The *Baldwin* standard is usually applied in "handbook" employment termination cases where employees are not represented by a union and is not the standard ordinarily applied by labor arbitrators.

### Burden of Proof

The principle is well established in labor arbitration that the employer has the burden of proof in a discharge case. In cases such as this one in which serious misconduct has been alleged, the employer is held to a standard of clear and convincing evidence for proving its case.

### Analysis

The grievant's termination occurred near the time that the parties made the transition from the former collective bargaining agreement and the policies and procedures followed under that agreement to a new system. Because of that accident of timing, this case involves some complicated procedural questions that have no doubt not been addressed previously. The union believes that I should not give any consideration to certain of the charges against the grievant because those charges were not properly handled under the former system of investigating and dealing with misconduct. The employer disagrees.

Before dealing with the charges that have alleged procedural defects, I have decided to begin the just cause analysis by focusing on the charge of substandard work performance as set forth in the CIR dated February 22, 2005. (R4) No procedural defect with this charge has been alleged.

#### 1. The Work Performance Issues

The union asserts that this charge is unfounded because in the past when the grievant was confronted with work performance issues he was receptive to correcting the problems and he improved. The union argues that the grievant received praise for his work and was considered a "lifesaver" in the office because he would always take additional referrals. The union also argues that the Bremerton office had serious staffing and organizational problems. In addition, the union argues that the employer relied on an issue over a Spanish interpreter when the grievant clearly observed that the client had a sufficient command of English.

The grievant is a short-term employee of the Department. During his term of employment, he received corrective action a number of times for certain performance issues.

On October 13, 2003 he received a Counseling Memo from Ms. Robinson for inappropriate management of a case. The Memo is based on failing to follow certain basic steps in trying to locate a child, not sending a letter to the family as instructed by the supervisor, failing to document the efforts he made to find the child and delaying the interview with the

child for an unreasonable amount of time. (R3, p. 1075) The Memo warned that further discipline including discharge could result from future misconduct or poor performance.<sup>5</sup>

The EDPP issued in November 2003 noted problems of inconsistent documentation. (R15)

On April 26, 2004, Mr. Escobar, a supervisor who viewed the grievant favorably (TR219:3-9), issued a Counseling Memo to the grievant because of inadequate documentation on a particular case. The memo states: "The quality of this investigation is not an isolated case." And: "A pattern of inconsistency for best practice has become evident in your work." (R3, p. 1073) Mr. Escobar established a specific plan of action for the grievant to deal with the performance issues.

On November 14, 2004, the grievant received another Counseling Memo from Mr. Escobar. The memo warned the grievant that requesting an extension of the first face-to-face meeting in a case must be timely and must be reasonable and related to the circumstances. The Memo cites a case in which the grievant failed to make a timely request for an extension and delayed the initial face-to-face meeting. Mr. Escobar wrote: "This must not reoccur. Any reoccurrence is likely to result in further corrective or disciplinary action." (R3, p. 1072)

The EDPP issued in April 2004 mentioned the same performance issue with inadequate documentation as the EDPP from the previous year mentioned. (R14) This EDPP, as the previous one did, noted that: "Mr. Hunter has been quick to acknowledge errors and make necessary corrections in case file documentation" (R14, p. 1007) Nevertheless, the grievant continued to make the errors even though he had been counseled and warned about the possible disciplinary consequences of not complying with the documentation requirements and not maintaining best practice standards. The review also noted that the grievant: "...continues to struggle with organization on timelines in prioritization, case crisis, emergency tasks and needed information in SERs...." In this EDPP, the grievant complained that he was being watched too closely by management and that this monitoring of his work had increased the stress of his job.

As a result of a peer review and as a result of a Department review of all inactive cases in the Bremerton office, the employer found significant problems with a number of the grievant's

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<sup>5</sup> In evaluating the past corrective actions issued to the grievant, I have followed the principle that is commonly applied in labor arbitration that states: If an employee could have grieved prior discipline and did not do so, then the prior discipline is presumed to be valid. (see Brand, *Discipline and Discharge in Arbitration*, p. 91 (BNA Books; 1998))

cases. (see R4, p. 1155-1158) Ms. Johnson testified that she was assigned along with Mr. Jaurigue to investigate the performance issues. She and Mr. Jaurigue interviewed the grievant and Mr. Escobar and they reviewed the identified case files. Ms. Johnson testified she and Mr. Jaurigue divided up the ten cases identified and she reviewed five or six. Ms. Johnson testified that she found that she could not tell from some of the files if the children had been seen and when interviews had taken place. Children were not seen in a timely manner and safety assessments were not completed within the time limits. Interviews with collaterals were not carried out and referrals that seemed necessary were not made. (R4, p. 1153; TR122:11-124:3; TR125:18-126:6)

As Mr. Escobar noted in April 2004, “A pattern of inconsistency for best practice has become evident in your work.” (R3, p. 1073) The grievant had previously been warned about performance issues by Ms. Robinson in October 2003, but the problems continued. The review conducted in early 2005 confirmed that the same issues and problems with the grievant’s work performance had persisted. Ms. Cooper testified that reviews done by the Department identified other social workers with the same kind of performance problems, but none were “as egregious as these.” (TR106:11-107:15) Nothing in the record establishes that other workers had the same level of performance problems as the grievant or that the grievant received more severe disciplinary treatment than other workers for the same kind of conduct.<sup>6</sup>

Although the grievant contended that he had a greater number of referrals than others in the office, Ms. Robinson testified that based on the year 2004, the grievant received an average of nine referrals per month, but some of those were multiple referrals on the same family. She testified that he received an average of 5.9 or 6.0 new families per month in 2004. Ms. Robinson testified the Department has a goal of 6.5 referrals per worker per month but has not been able to achieve that goal. Ms. Robinson testified the grievant was under the 6.5 referrals per month if the number is based on families rather than total referrals. (TR146:7-17)

The record shows that problems existed in the Bremerton office and the employer had to take action on those problems by sending in Ms. Cooper to “stabilize” the situation. The fact that the office had problems does not excuse the grievant from carrying out his responsibilities, however.

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<sup>6</sup> Although not determinative in this case, I note that the grievant filed an EEO case alleging that the employer singled him out for discipline because of his race and sex and the complaint was found to be unsubstantiated. (R17)



The overall picture of the grievant's performance shows that he had skills as an investigator and he has good success relating to clients. (see TR200) The record also shows quite clearly that the grievant has consistently had serious work performance problems with documentation, timeliness and follow-through on his cases. The employer has counseled and warned him, but his work has not improved. The grievant responded to the charges of poor work performance in part as follows:

I was unaware that I would receive a CIR for casework that did not meet the new standards. I was given an opportunity to correct only some of these requests. Most of them were provided to me in a list the morning of 2/22/05, the day I received the CIR. I feel that I have completed what was asked of me based on my understanding of what was requested of me. These appear to me to be performance issues best addressed in the evaluation process. I do not understand how these constitute misconduct. I was in no way insubordinate in my efforts to complete my work. (R4, p. 1145)

The explanation quoted above demonstrates a basic lack of understanding or concern for the consequences of his work performance problems. If children are not interviewed on a timely basis, if appropriate referrals are not made, if collaterals are not contacted and if another person reading the file cannot determine what the grievant did or didn't do then the risk to the clients is substantially increased. The defense that "I would have corrected a specific problem if someone told me to" is really no defense at all. The grievant has the responsibility to perform the work correctly in the first instance. The grievant knew the Department's requirements for investigations. He had been warned repeatedly that he had to improve his performance and he clearly failed to do so. On the basis of the performance issues alone, I find that the employer had just cause to terminate the grievant's employment.

## 2. Julie S.

The union contends that the Julie S. issue cannot be a basis for termination because the employer did not comply with Policy 545 in handling the matter. The alleged event took place on January 17, 2003. On about January 30, 2004<sup>7</sup>, Julie S. reported the incident with the grievant to her social worker, Ms. Lopez. After that discussion, Ms. Lopez reported what Julie S. told her

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<sup>7</sup> Ms. Lopez identified the date Julie S. reported the incident to her as 1/30/03. (R5, p. 1050) Mr. Gold indicated the reporting may have taken place in January 2004. (TR182) Julie S. testified she reported the incident "about eight months later". (TR61) Julie S. did not start working with Ms. Lopez until after August 2003 when her children were taken away. Therefore, the 2004 date is correct.

to Mr. Gold, her supervisor. Mr. Gold did not supervise the grievant and he did not report the matter. The employer later disciplined Mr. Gold for not reporting the incident. (R18)

Personnel Policy 545 requires that a CIR must be initiated within fourteen calendar days “following the date the first supervisor in the employee’s chain of command discovers or becomes aware of the misconduct.” (R9, p. 1038) The union argues that the term chain of command is broad enough to take in Mr. Gold or anyone else with supervisory responsibility. The union argues that any other interpretation of chain of command is too strict and inconsistent with the purpose of Personnel Policy 545.

I disagree with the union’s analysis. The word chain implies a series of things that are linked together. An employee’s chain of command is commonly understood to mean the line or link between the employee and the people who directly supervise the employee, from the immediate supervisor up the chain to the head of the organization. In this case, Mr. Gold clearly was not in the grievant’s chain of command. (TR183:16-184:5)

The employer’s Counseling Memo to Mr. Gold contains some confusing information. The Memo includes the following:

Because you were not the supervisor of the worker involved, and were aware that the supervisor had been told of the allegation.... (R18)

The employer contends that it learned of the Julie S. allegation in 2005 during the peer review conducted by Ms. Clarke. Therefore, how could Mr. Gold have been “aware that the supervisor had been told of the allegation?” Also, why would Mr. Gold be disciplined for not reporting it if he was aware that the supervisor already knew about it? Ms. Robinson testified that Policy 545 was not violated because Mr. Gold did not report the allegation to anyone above him and no one in the grievant’s chain of command knew about it. (TR153:13-154:7) I find it hard to reconcile the testimony and the statement in the Counseling Memo.

Assuming for the sake of argument that the employer did not violate Policy 545, the allegations from Julie S. are quite stale in two ways. First, she waited over a year to report the allegations. Second, the CIR was not initiated until after the peer review in early 2005, more than two years after the alleged event.

In addition, the reporting occurred after the grievant had been to Julie S.’s home to remove her children following her third DUI. The fact that the grievant removed her children could have given her a motive to retaliate against the grievant.

Also, Julie S. had conflicts with the Department. The record indicates that Julie S. was involved with Washington Families United (R1) and had complained about her current social worker, Ms. Randles, to the point that Ms. Randles was removed from her case.<sup>8</sup> Her complaints against Department social workers could have been part of a strategy to get her children back by putting the Department on the defensive. Julie S. testified to the frustration she felt with the requirements that Ms. Randles placed on her and the pace of progress toward getting her youngest child back. (TR62:4-63:18)

Although Ms. Randles may have had her own reasons to be upset with Julie S. (see TR215:18) her testimony about Julie S.'s honesty and reliability certainly raise some doubts about the credibility of Julie S. (TR197 and TR205:16-25) Ms. Robinson testified that Julie S. had been consistent in her statements and Ms. Robinson was "not aware of any other times when she had not been truthful...." (TR154:12-16) Ms. Randles testified, however, that Julie S. lied about being clean and sober and wanted Ms. Randles to ignore a positive UA. Ms. Randles also testified that Julie S. told the Court Commissioner in response to a direct question that she had been clean and sober for forty-five days when in fact a positive UA for Julie S. from a test performed prior to the court appearance came back a few days later. (TR196-197)

Other social workers who interviewed Julie S. found her to be credible, but they did not provide any reasons why they reached this conclusion. (R5, Lopez, p. 1050 Johnson & Jaurigue p. 1051, Clarke, p. 1052)

Julie S.'s mother corroborated the fact that the conversation with the grievant outside the home upset Julie S. The mother did not hear what was said, however. In addition, the comment that the grievant made initially when he asked Julie S. if she ever thought when she was out with her boyfriend that she should be home with her children also could have been what upset her.

The Department obviously has a clear obligation to investigate thoroughly any allegation of abuse of authority by a social worker with a client. Because of the status that CPS clients are in, a lack of credibility for many of the clients is built into the situation. Social workers are more likely than the clients to be believed in many situations, which opens up the potential for abuse by the social worker. The Department appropriately conducted a full investigation. In my

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<sup>8</sup> Ms. Randles of course has her own issues in that she was demoted in 2006 and settled her grievance by accepting a voluntary demotion. (R19)

judgment, however, the evidence does not clearly and convincingly establish that the grievant made the alleged comment to Julie S. in January 2003.

### 3. Michelle D.

The employer concedes that the allegations related to the sexual comments involving Michelle D. were not handled in compliance with Policy 545. Therefore, I find that the allegation related to the sexual comments (TR21:4-8) cannot be a basis for this termination. The rules in place at the time cannot now be ignored because the system later changed and eliminated those rules.

Ms. Robinson testified, however, that she took action on another allegation related to Michelle D. This allegation involved an inappropriate confrontation of Michelle D. by the grievant. Ms. Robinson testified that no CIR was needed to deal with that allegation since the grievant admitted it. (TR164:9-14)

Policy 545 provides in Section I that: "If the affected employee admits to the allegation(s), a CIR can be waived...." (R9, p. 1039) The union contends that the grievant never admitted misconduct and therefore this section of Policy 545 does not apply. I find that the record shows otherwise. The grievant may not have agreed that his behavior constituted misconduct, but he admitted the behavior that the employer characterized as misconduct.

When interviewed by Mr. Jim Pritchard on March 24, 2005, the grievant was asked about his meeting with Michelle D. that occurred after she made the allegations concerning sexual comments. Mr. Pritchard asked whether the grievant brought up the allegation with Michelle D. and the grievant answered that he did in a meeting on December 22, 2004. Specifically, the grievant answered:

Yes, I talked with her about making allegations with foster parents and how that would not be good and that I was reluctant to place her in a foster home....  
I said that with the allegations you made it would be difficult to place you. (R6, p. 1097)

Mr. Pritchard and the grievant then had the following question and answer exchange:

Q. Do you think that your statement to Michelle D. concerning placement might have been perceived as a threat given she disclosed an allegation against you?  
A. Yes, but I was just being honest and up front. (R6, p. 1097)

Mr. Pritchard also confirmed in his testimony at the hearing that the grievant admitted to confronting Michelle D. (TR21:9-15; TR22:7-23:3)

Ms. Robinson testified that the grievant also admitted in a meeting with her that he had confronted Michelle D. about the allegations she made against him. (TR158:7-18)

At the hearing, Mr. Lampley from the CRC testified that he believed the grievant's behavior toward Michelle D. was verbally threatening in the way he talked to Michelle D. when he confronted her about the sexual comment allegations. (TR44:1-18; see also R6, p. 1093; and see TR49-51 and TR133)

Although the grievant characterized his behavior toward Michelle D. as being "honest and up front" he also admitted that she could have perceived his behavior as a threat not to place her. I find that this admission brings the matter within Section I of Policy 545.

The union argues that the grievant worked to have Michelle D. released to her grandparents for the holiday and helped to get the restraining order dismissed so that she could return home. The employer points out that Michelle D. spent twenty-one days at the CRC, which is far outside the norm for time spent by a client at the CRC. (TR115:4-116:10) The union contends that the holidays and the lack of placement possibilities explained the length of her stay at the CRC.

Whether the grievant worked on Michelle D.'s behalf after the meeting with her on December 22 is not relevant to the charge that he confronted Michelle D. inappropriately on December 22. He could have confronted her inappropriately and then on calm reflection decided to carry out his responsibilities.

After considering all the evidence on this charge, I find that the employer has met its burden to prove that the grievant confronted Michelle D. inappropriately and in a manner that constituted an inappropriate use of authority.

#### Other Issues

Ms. Robinson testified and noted in the termination letter that the grievant has a "pattern of inappropriate communication with females." (R1, TR154:17; TR159:7) Ms. Robinson based this conclusion on the allegations made by Julie S. and Michelle D. and on the allegations investigated concerning the comments to co-workers. Ms. Robinson concluded that this "pattern" reflected negatively on the grievant's credibility. On the record before me, a pattern of inappropriate communication with females has not been established by clear and convincing

evidence. Although Ms. Cooper testified credibly about her investigation of the comments to co-workers and her conclusions, no witness testified from first-hand knowledge of inappropriate comments to co-workers. Although hearsay is admissible in labor arbitration, a finding of misconduct cannot be based on hearsay alone. In the overall picture, however, whether or not the employer established a “pattern” is not determinative here. The charges related to substandard work performance do not depend on an assessment of the grievant’s credibility. The facts supporting those charges are found in the case records and the testimony about those records.

The question often arises in a labor arbitration whether the employer must prove each and every charge on which a discharge or disciplinary action is based. Some arbitrators believe that a discharge cannot be sustained unless each and every charge contained in the termination letter is proven. In my judgment, the answer to the question depends on the seriousness of the proven charges. I find in this case, that the substandard work performance charge alone would be a sufficient basis for termination. When combined with the charge of inappropriately confronting Michelle D., I don’t believe any doubt exists that the employer had just cause to terminate the grievant’s employment. The fact that other serious charges could not be proven or were barred by a procedural defect does not take away from the seriousness of the proven charges.

#### Conclusion

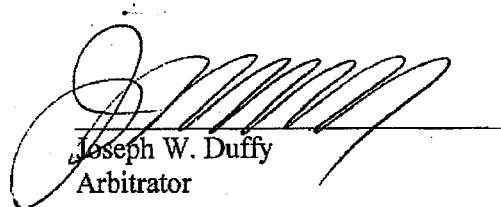
After full consideration of the entire record submitted by the parties, I find that the employer had just cause to discharge the grievant on August 2, 2005. No remedy is appropriate.

IN THE MATTER OF THE ARBITRATION BETWEEN

WASHINGTON FEDERATION OF	)	
STATE EMPLOYEES,	)	ARBITRATOR'S
	)	AWARD
UNION,	)	
	)	
And	)	EVERETTE HUNTER
	)	TERMINATION GRIEVANCE
WASHINGTON STATE DEPARTMENT	)	
OF SOCIAL & HEALTH SERVICES,	)	AAA NO. 75 390 00459 05 LYMC
	)	
EMPLOYER.	)	
_____	)	

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

Dated this 7th Day of August 2006

  
Joseph W. Duffy  
Arbitrator