AN ARBITRATION BETWEEN

WASHINGTON FEDERATION OF STATE EMPLOYEES, JEFFERY STEELE, GRIEVANT

AND

THE STATE OF WASHINGTON, DEPARTMENT OF SOCIAL AND HEALTH SERVICES, EASTERN STATE HOSPITAL

ARBITRATOR'S OPINION AND AWARD

AAA Case No. 75 390 306 06
March 26, 2007

PROCEDURE

This grievance arose over the termination of Jeffrey D. Steele (Grievant) who was employed as an MET 1 by the Washington State Department of Social and Health Services (DSHS), Eastern State Hospital (Hospital). The Grievant is represented by the Washington Federation of State Employees (Union). The Union has been recognized by the State of Washington as the representative of many of the employees and Departments in State government, including the DSHS. The State bargained a first Collective Bargaining Agreement (Joint #1) with the Union which took effect on July 1, 2005 and the terms of which will provide the basis for and administration of this grievance.

The parties were unable to resolve this grievance and it has been processed to arbitration under the terms of Joint #1, Article 29 – Grievance Procedure. The parties requested arbitration through the American Arbitration Association (AAA) and the grievance will be arbitrated under the rules of AAA and the Agreement. The Arbitrator was properly appointed by the parties under the above rules. The parties have stipulated that the grievance is properly before the Arbitrator for his consideration and decision.

A hearing was convened on the 12th day of January, 2007, at the Spokane offices of the Washington Attorney General. The parties were allowed a full opportunity at the hearing to present evidence, examine and cross-examine witnesses and to make argument. The Counsel for the Grievant presented argument to the Arbitrator in the hearing. The parties both elected to file written arguments and these were received by the AAA on February 21, 2007 and the hearing was declared closed by the AAA on that date. The AAA notified the Arbitrator and the parties that the Arbitrator had until March 29, 2007 to postmark his award to the AAA.

ISSUE

Did the Employer violate the Agreement, specifically Article 27 and 28 when it discharged the Grievant?[1]

[1] The parties were unable to agree on the wording of the issue and left it up to the Arbitrator. The Arbitrator used the language suggested by each party and the language of the grievance (Jt. #2) to frame the issue.

PERTINENT AGREEMENT LANGUAGE

Article 27 — Discipline

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

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

27.3 When disciplining an employee, the Employer will make a reasonable effort to protect the privacy of the employee.

27.4 All agency policies regarding investigatory procedures related to alleged staff misconduct are superseded. The Employer has the authority to determine the method of conducting investigations.

Article 28 — Privacy and Off - Duty Conduct

28.3 The off-duty activities of an employee will not be grounds for disciplinary action unless said activities are a conflict of interest as set forth in RCW 42.52 or are detrimental to the employee's work performance or the program of the agency. Employees will report any court-imposed sanctions or conditions that affect their ability to perform assigned duties to their appointing authority within twenty-four (24) hours or prior to their next scheduled work shift, whichever occurs first. Employees, excluding those in the Washington State Patrol (WSP), will report any arrests that affect their ability to perform assigned duties to their appointing authority within forty-eight (48) hours or prior to returning to work, whichever occurs first. Employees in the WSP will continue to abide by WSP regulations relating to off-duty conduct.

EXHIBITS

No. 1 Collective Bargaining Agreement
No. 2 Grievance Form
No. 3 Guilty Plea
No. 4 Notice of intent to dismiss
No. 5 Grievant's handwritten response

No. 6	Notice of dismissal
No. 7	Notice of home assignment
No. 8	Step one grievance letter
No. 9	Secretary Designee hearing letter
No. 10	Letter from Mark Prothero
No. 11	Department of Health letter, March 6, 2006
No. 12	Department of health letter, April 3, 2006
No. 13	WAC Civil Service Rules
No. 14	BCCU Guidebook
No. 15	Notice regarding disqualifying information
No. 16	Secretary's List
No. 17	Policy 532
No. 18	Employee non-disclosure agreement
No. 19	Withdrawn
No. 20	Resume of Jeffery D. Steele
No. 21	Certificate of discharge from active duty

APPEARANCES

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BACKGROUND

The Grievant was employed at the Hospital for nearly seventeen (17) years. It was established that during the entire period of the Grievant's employment his work record and evaluations were all positive. The Grievant made a phone call to his former wife on October 23, 2004. This phone call was made while the Grievant was off duty and off the Hospital's premises. The phone call was recorded on tape which was taken to the police. Contained in this phone call were words that the authorities interpreted as physically threatening to the Grievant's former wife. On May 12, 2005 the police arrested the Grievant for "harassment - domestic violence" and he was held in jail for approximately one day. The Grievant entered a guilty plea to a reduced charge of "misdemeanor harassment" on August 9, 2005. This plea was accepted by the court. It was established that the Grievant self-reported his legal problems both timely and completely to his Supervisor at the Hospital.

The Grievant was maintained in an active employee status[2] by the Hospital until October 9, 2005 when he was notified that he was reassigned to work at home. On October 19, 2005 he was notified by the Hospital that they intended to dismiss him and the dismissal was implemented on November 18, 2005. The instant grievance was filed on December 8, 2005.

DISCUSSION

Employer's Counsel summarized the State's position in the first sentence of her opening statement when she said,

> *"the state believes that this is really a very simple case. (The Grievant) was dismissed from DSHS, specifically Eastern State Hospital, because he was convicted of a disqualifying offense and was in a covered position at Eastern State Hospital. "* (Tr. p.17)

This is the first agreement between the State and the Union. The disagreement between the parties is what are the current policies and standards that govern the firing of employees. A review of the policies and standards that existed prior to the Agreement is necessary to determine if in

[2] There was a period of September 3, through October 4, 2005 when the Grievant was on authorized L&I leave due to an attack by a patient. (Ex #5)

fact they survived and are a part of the Agreement or were they deleted. The reason for the analysis is that the Employer appears to have followed these prior policies when terminating the Grievant. The Union is insisting that the Grievant can only be terminated under the terms of the Agreement, and that the policy previously in effect that is being used by the Employer to terminate the Grievant was not continued in this Agreement.

Harold Wilson, Hospital CEO, testified he is the ultimate authority for terminating employees; therefore he is the person who terminated the Grievant. The procedure that Mr. Wilson followed in this case is that when he became aware that the Grievant had pled guilty, he sent a referral to the Background Check Central Unit (BCCU). It is unexplained why he selected this route as he already had in his possession a copy of the Grievant's pleadings; he pled guilty to "harassment domestic violence" and his plea had been accepted by the Judge.

Mr. Wilson testified that all positions at the Hospital are covered positions[3] including volunteers. The initial DSHS decision to run a background check on all covered positions was implemented in the 2001-2002 year. It was found at that time that a number of the employees throughout the DSHS had "disqualifying crimes" on their records. The Department then created the Background Assessment Review Team (BART), a group of employees, including the Union, to review all persons in DSHS who had been identified as being disqualified. This team was given the authority to keep a person in position even though they had a disqualifying event. While Mr. Wilson could not say how many employees Department wide were disqualified, he said that there were seven (7) at the Hospital and they were all "cleared to continue work" by BART. (Tr. p. 78) Mr. Wilson testified that the team was disbanded once they had finished their review and there is no longer a review process.

The policy covering the background checks was contained in the Personnel Policy 532.[4] Attached to this policy was Appendix A. Appendix A has now been reincarnated as "Secretary's List of Crimes and Negative Actions". (Ex #16) The following testimony by Mr. Wilson in cross

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[3] Covered positions are those that will or may have unsupervised access to children, vulnerable adults or individuals with mental illness or developmental disabilities. (Ex. #17)

[4] This document was admitted in the hearing with a very limited scope, The parties agreed that the document disappeared with the advent of the Agreement on July 1, 2005 and was basically admitted for it's historical content.

examination is important to an understanding of what has taken place regarding the Employer's termination of the Grievant.

> *Q (Coker) Now it's true that we've had Policy 532 admitted for a very limited purpose.*
> *A (Wilson) Right.*
> *Q And it's true that Policy 532 was not in effect at the time of Mr. Steele's termination.*
> *A 532 went away 1 July of '05 when the contract came into effect.*
> *Q And I believe you testified earlier that you don't know where that — was that secretary's list that you're referencing to, was that part of 532?*
> *A The list there was an attachment. Policy 532 had an Attachment A.*
> *Q Was that a list of disqualifying crimes?*
> *A Which was a list of disqualifying events. When 532 went away, they redid the list as a secretary's list and ended up —I did not go down line for line and compare every — every entry versus Attachment A and the new list, but they were virtually the same list.*
> *Q Okay. So the list on –*
> *A But the current list was originally Attachment A to Policy 532.*
> *Q Which is gone?*
> *A Which went away June 30.*
> *Q Is this new list attached to any policy?*
> *A No, not to a policy per se.*
> *Q Do you have knowledge that Mr. Steele was given — was put on notice of this new list after 532 went away?*
> *A I do not know if he was.*
> *Q Was there anything in the record that you've seen that he was aware of this new list that was out there somewhere?*
> *A No, he was not. It was not included in our list. (Tr. pp. 84 & 85)*

Mr. Wilson readily agreed that Policy 532 went away, but that it's accompanying list, Appendix A survived as the Secretary's List. It was not attached to any policy. Mr. Wilson stated in his testimony that the basis for his decision to terminate the Grievant was that he had a disqualifying event

according to the background check from the BCCU. Mr. Wilson responding to the question of whether other factors were involved in the termination responded that he only used the disqualifying event. That he had no other choice than to terminate the Grievant after he was notified of the disqualifying event. (Tr. P. 83) Mr. Wilson in responding to the query about him making an analysis of the Grievant's work performance prior to termination indicated he had not done so. (Tr. P. 121) Regardless of the content of the letters Mr. Wilson sent to the Grievant, Notice of Intent To Dismiss (Ex. #4) and the Notice Of Dismissal (Ex. # 6), there is nothing the Grievant could have shown Mr. Wilson to mitigate his dismissal other than show that the conviction had been erased. Mr. Wilson wrote to the Grievant,

> "I have carefully considered all evidence and historical data found in your file and come to the conclusion that your arrest and conviction for harassment – domestic violence and the jeopardy that it places the Hospital in support the determination to dismiss you. (Ex. #6)

Here, we have Mr. Wilson saying he reviewed the Grievant's file prior to termination, however, in sworn testimony he said,

> *Q (Coker) And just to be clear on this issue, your testimony was that you did not make any analysis related to (Grievant's) work performance prior to termination, true.*
> *A (Wilson) True.* (Tr. P. 121)

Mr. Wilson maintained that he had no choice except to terminate the Grievant following receipt of the background check that showed he had a crime on his record. He said that he was required to do so by the Secretary's List. (Ex. #16)[5] However, the BCCU Guidebook contains the following:

> "Conducting a background check should be considered one component of the overall assessment of a person's character, competence and suitability to care for and have unsupervised access to children, juveniles or vulnerable adults. A background check

[5] The "Secretary's List" was objected to when offered by the Employer. The Arbitrator took the exhibit marked as #16 with the stipulation that he would decide the exhibits value during his deliberations. Mr. Wilson's testimony regarding this exhibit is that it was Attachment A on Personnel Policy 532 (Ex. #17) which was negated on July 1, 2005 to conform with Article 27.4. As no evidence was introduced that the "Secretary's List" was ever negotiated with the Union, it was attached to a now defunct policy and no form of authentication was offered this list must be considered as a part of 532 and it shall suffer the same fate. It has been allowed in for historical value.

> provided by BCCU should not be considered the sole basis to allow unsupervised access to vulnerable people." (Ex. #14, p. 24)

The policy above taken from the BCCU Guidebook clearly establishes that Mr. Wilson's statements that he had no alternative but to terminate the Grievant following the receipt of the negative background check is not accurate. He had multiple options that were spelled out in the Guidebook, Civil Service Rules (Ex. #13) and Articles 27 and 28 of the Agreement. He could have extended just cause to the Grievant, which he did not do. He could have looked at the Grievant's work record which is required by Article 28.3. Employer's Counsel agreed that there was not a conflict of interest, however, she argued that the Grievant's actions had the following impacts, "...work performance was damaged, harmed and lost because of this misconduct" (Emp. Br. p. 13) As to the impact on the Hospital program she wrote, "When an employee, such as (Grievant), is unable to maintain and control his own behavior, ESH cannot be expected to gamble whether he will maintain a therapeutic milieu at ESH." (Emp. Br. p. 14)

Mr. Wilson testified that he did not look at the Grievant's record prior to terminating him. He said at the hearing that he had not even seen the five and one-half page letter (Ex. #5) that the Grievant sent to him and three other administrators on October 20, 2005. The Grievant was not a newly hired employee with limited tenure; the Hospital had seventeen (17) years of work records and evaluations to determine what kind of a person he was. Even the most cursory of Employer investigations that are necessitated by just cause would have indicated that he had a clean record during those seventeen (17) years.

During the processing of this grievance, March and April of 2006, the Grievant filed with the Washington State Department of Health (DOH) for his Nursing Assistant license. While his license application was being processed, a red flag was raised when the DOH discovered the harassment – domestic violence conviction. The decision of the DOH is contained in a letter from the Department dated April 3, 2006.

> "The secretary of Health received and investigated the complaint in regard to a conviction.
> After careful consideration of the records and information obtained during its investigation, the Secretary of Health has determined there was no cause for disciplinary action against your

> registration/certification to practice as a nursing assistant. The case is being closed as no cause for disciplinary action because it is below threshold." (Ex. #12)

The Hospital objected to the introduction of the exhibits from the Department of Health. Their rationale was that they were the Employer and the Department of Health actions should not be considered. However, the Department of Health, another State Agency, making a decision whether or not the Grievant should have his nursing assistant license renewed after the DOH investigated the Grievant's conviction on the same issue is relevant. While there was no examination of author of the letters from the Department of Health, they state that they conducted an investigation and found "no cause" as stated above. The Employer did not challenge the validity of the DOH letters, only there applicability to termination in DSHS.

Just Cause[6] Seven Tests:

1) Notice
2) Reasonable Rules and Orders
3) Investigation
4) Fair Investigation
5) Proof
6) Equal Treatment
7) Penalty

Just cause as contained in Article 27 of the Agreement requires that employers implement certain actions when they are in the process of disciplining an employee. These actions known as the Seven Steps of Just Cause were first initiated by Arbitrator Carroll R. Daugherty several decades ago and have remained a precedent that many arbitrators have adopted. As Employer's Counsel stated in her brief, just cause is new to both the State and the Union in this first Agreement. Also there is no definition of just cause in the Agreement which typically means that the Arbitrator must supply his/her own definition of just cause and apply it to the grievance being considered. I have adopted the basic structure of just cause as originally laid out by Arbitrator Daugherty to assist me in determining whether the just cause component of an agreement has been implemented properly. The test I apply is to ask the "seven steps/questions" in regard to

[6] Koven, Adolph M. and Susan L. Smith "Just Cause: The Seven Tests" Pg. 10, Coloracre Publication Inc., San Francisco, CA 1985

the procedure that the Employer followed in terminating the grievant. If the answer to any one of the just cause questions is no, then that is an indication the employer did not follow just cause in applying their discipline/discharge.

Mr. Wilson testified he did not apply just cause in the instant case because the Grievant's pleading guilty to harassment - domestic violence, which was on the Secretary's List of disqualifying crimes and he had no choice but to terminate the Grievant. (Tr. Pp. 62 – 65) In other words the Employer's argument is that if a crime has been placed on a disqualifying list, regardless of any mitigating circumstances, the employee is not to be trusted in his work; the employer does not need to meet the standards of just cause. We have agreement by the parties during the hearing that Policy 532 (Ex. #17) disappeared when the Agreement took effect on July 1, 2005. Mr. Wilson used as his authority to terminate the Grievant the Secretary's List (Ex. #16), this list, however, was Attachment A to the Policy 532 and disappeared with it (see footnote #5).

The DSHS shift in 2001-2002 to background checks on personnel who deal with vulnerable persons was an effort to protect the persons in its care. This effort is commendable. There is no conflict with the background checks conducted by BCCU and just cause. As a matter of fact if one looks at the quote from the BCCU Guidebook one will see that the suggestion is that the background check should be only one factor in determining the suitability of an employee to supervise vulnerable adults. Other factors should include the seven steps to just cause.

> *Notice: Did the Employer give to the employee forewarning or foreknowledge of the possible or probable consequences of the employee's disciplinary conduct?

The Employer argued that the Grievant knew of his fate when he pled guilty to a crime. He was familiar with the Policy 532 and Attachment A. The Employer went on to argue that the Grievant's knowledge of the possible consequences (termination) was spotlighted by his timely reporting about his legal problems to his superiors as the now defunct policy outlined. However, this Employer's argument becomes problematic when we consider that both the employees and management were aware that Policy 532 had gone away. Also, Article 28.3 requires similar or the same reporting as was outlined in Policy 532. In Mr. Wilson's testimony cited above on page 7, he responded to a direct question of whether the Grievant was aware of what

might happen to him if he pled guilty to the criminal charge was, "No, he was not" (Tr. P. 85) Based on Mr. Wilson's testimony the answer to the above question was no. It appears therefore, that just cause was denied to the Grievant.

*Equal Treatment: "Has the employer applied its rules, orders and penalties even-handedly and without discrimination to all employees?"

The Employer argued vigorously that he was not guilty of disparate treatment. The only example offered by the Employer of an employee who was found guilty of a disqualifying crime and was retained was Mr. Pennybaker, the employee the Union introduced during the hearing. The Union said that Mr. Pennybaker had been found to have a disqualifying crime on his record when the first background checks were initiated. He was one of the employees whose crime was submitted to BART and he was then allowed to retain his position. Subsequently, Mr. Pennybaker applied for a promotion and again his background check showed the disqualifying crime, "Vehicular homicide," that was found prior to the BART assessment (Tr. P. 103). Mr. Wilson said Mr. Pennybaker was not the in the same category as the Grievant; he had been previously cleared to maintain his position by BART. There was no BART or any review at the time the Grievant pled guilty to his crime, therefore, he had no choice except to terminate him. The Employer argued that he had been consistent in his implementation of failure to pass background checks (Emp. Br. P. 10), but no other specific cases than Mr. Pennybaker, a case originally introduced by the Union, was put forth. Further complicating and compromising the Employer's case is Mr. Wilson's testimony about how he checks out people with records and determines whether they can be employed. One of the examples Mr. Wilson offered as to that he can make decisions regarding the BCCU's disqualifying checks was "shoplifting". On the "Secretary's List" is found "theft", shoplifting is definitely theft. As theft is a crime on the list, the same as the crime of harassment — domestic violence, they should both carry the same weight on the scales of justice. Mr. Wilson obviously had the authority to investigate the Grievant and make some other decision than to fire him. After all, he said at the beginning of his testimony that he had the ultimate authority to terminate Eastern Washington State employees. That authority should also extend to not terminating employees.

While the only specific information about persons involved with disqualifying crimes were the Grievant and Mr. Pennybaker. According to

the Employer there were others. Mr. Wilson's testified that there were six other persons besides Mr. Pennybaker on the Hospital staff who were reviewed by BART and were allowed to retain there positions. No other specific or non-specific cases were offered. It appears that the only employee terminated from the Hospital, since the implementation of background checks, is the Grievant. The pattern starting with the seven persons who were allowed to keep their positions by BART is that no one was fired because of a background check. The Employer, by not providing specific information about other employees with disqualifying crimes on their background checks, if there is such information, has severely weakened his case for terminating the Grievant.

*Proof: "At the investigation, did the "judge" obtain substantial evidence or proof that the employee was guilty as charged?"

The Employer decided that if the Grievant had a disqualifying crime he had violated the Agreement, Article 28.3. He said that the Grievant's guilty plea to "harassment — domestic violence" was "detrimental to your work performance and the program (Eastern State Hospital) mission of the agency." (Ex. #6) The Employer decided prospectively that this was true without an investigation. (Tr. Pp. 82 – 84) The Employer knew for several months prior to the Grievant's termination that the he had been charged with the crime and that he was subsequently arrested; yet he maintained the Grievant's assignment until shortly before termination when he had him work at home.

The letter by the Employer terminating the Grievant states that the Hospital was in jeopardy due to his conviction; this analysis was made without an investigation of the Grievant's records. The Hospital had seventeen (17) years of records to review and see if their assertion was true. It has already been noted that Mr. Wilson testified that he did not review the Grievant's file prior to the termination. The Employer said that some of the Hospitals patients are violent and the Hospital was fearful that if the Grievant could not control his personal emotions, he might over react with a violent patient. The record shows that the Grievant was attacked by a patient in September, 2005. There was no testimony or other information that he acted other than professionally. The record before the Arbitrator clearly indicates that there is nothing in the Grievant's seventeen (17) years of files and evaluations that would support the Hospitals concerns about how the Grievant would perform in the future with patients. (Tr. P. 114) Just the

contrary is true. Had the Employer reviewed the Grievant's record he might have found nothing to indicate that Grievant would again verbally threaten a person as he did his former wife in what he described as a very emotional situation. Perhaps the Employer would have found something different, some information that would support his claim that the Grievant was in fact a violent person, however, we will never know as no investigation was done. For the Employer to simply use the guilty plea of the Grievant, in a matter totally unrelated to his work at the Hospital, and to use that information as the basis of his termination does not reach the standard of proof needed to sustain a termination. The BCCU Guidebook compliments the above statement; it stated that the disqualifying charge should not be the only basis for termination.

The purpose of a just clause standard in a contract is to be certain that the employees will be disciplined appropriately. The inclusion of the just cause language (Art. 27.1) in the Agreement and then to find in the same article language that eliminated the prior method of discipline and investigation (Art. 27.4) makes it very clear that just cause must be used when the Hospital is disciplining of one of its employees. It can no longer follow a unilaterally developed policy such as 532 and it's Attachment A. Again, a no answer to any one of the just cause questions will mean that the Employer either did not have just cause for the discipline or that his charge was seriously weakened.

*Fair Investigation: "Was the Employer's investigation conducted fairly and objectively?"

Q. (Mr. Coker) "Did you do any analysis as to whether or not (Grievant's) plea to the misdemeanor harassment affected his work performance?
A. (Mr. Wilson) "I did not take that into account because of the fact he had received a disqualifying background check."(Tr. P. 83)

Mr. Wilson answered this question in his testimony above. The answer is no. There was no investigation.

The record indicates that of the four just cause questions applied to the Grievant's termination, three are no and the fourth casts doubt on the validity of the termination.

SUMMARY

The Employer's description of this matter as a simple case is obviously incorrect. We find the parties, the State and the Union, dealing with a new contract and an all new way of disciplining employees. We find that the discipline article in the Agreement calls for just cause in all discipline; just cause by the Employer's own admission was not extended to the Grievant in this disciplinary action. We find that the previous method of discharge; the administration fired employees if there was a disqualifying charge from BCCU was eliminated by language in the Agreement.[7] While no figures were presented as to the number of covered positions in DSHS and how many times the BCCU check caused a termination, from the information presented in the Arbitration, the Grievant was the only employee terminated for having a disqualifying background check. The Employer followed the procedural legal hurdles prior to terminating the Grievant. However, the opportunity for the Grievant to clear himself during these meetings, according to the testimony of the Employer, was non-existent. The only way he could have retained his position was to demonstrate to the Employer that the conviction had been removed. This was not possible. There were several instances in the hearing where Mr. Wilson said that the Grievant did not put forth and reasons why the termination should not take place. It was not the job of the Union to prove the Grievant was culpable; it was the duty of the Employer to prove he was guilty as charged. The Employer failed to do so. This discharge cannot be sustained by the Arbitrator as the Employer did not establish just cause to terminate the grievant.

[7] A review of the BCCU Guidebook which states that the disqualifying check should not be the only basis for termination makes one wonder if a disqualifying check ever was supposed to be the only support for the termination of a DSHS employee.

AWARD

Jeffery D. Steele is to be restored to his position, MHT 1, at Eastern State Hospital as though his employment had been unbroken.

All salary, benefits and rights are to be restored to Jeffery D. Steele from the date of his last paid workday to the date of his reinstatement. He is to be made whole in all regards. Any earnings or benefits that he received during the time between his termination and the time of his reinstatement shall be divulged to the Employer and shall be used to mitigate the amount owed by the Employer.

Within five days from the receipt of this award by the parties, Jeffery D. Steele, Union representatives and the Employer shall meet to implement this award.

Richard W. Croll — March 26, 2007

Richard W. Croll, Arbitrator — March 26, 2007