

In Re the Arbitration of:

WASHINGTON FEDERATION OF)
STATE EMPLOYEES, and)
BRUCE WITHAM,)
Grievant,)

AAA No. 75 390 00540 06

and)

STATE OF WASHINGTON,)
DEPARTMENT OF SOCIAL AND)
HEALTH SERVICES,)
Respondent.)

OPINION and AWARD

Date: September 2, 2007

Arbitrator
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OPINION

Background

The Washington Federation of State Employees (“WFSE” or “Union”) filed a grievance on behalf of Bruce Witham (“Grievant”) alleging a violation of Article 2 and Article 5, Sections 5.1 and 5.2 of the 2005-2007 Collective Bargaining Agreement between the State of Washington and Washington Federation of State Employees (“CBA”). The parties were unable to resolve their dispute at the initial steps of the grievance procedure, and the grievance was submitted to arbitration pursuant to Article 29 of the CBA. The arbitrator was selected through the American Arbitration Association.

Prior to the hearing, the State of Washington (“the State” or “the Employer”) moved for an award and order denying relief and dismissing the grievance on arbitrability grounds. The State claimed the essence of the grievance is the content of the Grievant’s Performance and Development Plan (“PDP”), as opposed to the process leading up to it, and the content of a PDP is not arbitrable. The WFSE responded to the motion stating that it is not challenging the contents of the Grievant’s PDP but the evaluation process which led up to that PDP. The WFSE agreed that the contents of a PDP are not arbitrable. In an interim Opinion on Arbitrability dated April 25, 2007, this arbitrator determined that the grievance concerns the evaluation process leading up to the Grievant’s PDP for the period April 16, 2005, to April 16, 2006, and that the evaluation process is subject to the grievance procedure under Article 5, Section 5.2.D of the CBA. The grievance was found to be arbitrable and the State’s motion to dismiss was denied.

A hearing was held on July 12, 2007, at the State of Washington, Department of Social And Health Services in Tacoma, Washington. The WFSE was represented by attorney Gregory M. Rhodes of the law firm of Younglove Lyman & Coker, P.L.L.C., and the State was represented by Carol Nacht, Labor Relations Specialist, State of Washington, Department of Social and Health

Services. At the hearing, witnesses testified under oath and the parties presented documentary evidence. No formal record was made of the hearing and the arbitrator has relied on her notes. The parties submitted post-hearing briefs which were received by the arbitrator on August 4, 2007.

Exhibits¹

- G Exhibit 1 - Performance and Development Plan for 04/16/05 to 04/16/06
- G Exhibit 2 - April 3, 2006, e-mail from Grievant to Kim Song
- G Exhibit 3 - March 3, 2006, e-mail from Kim Song to Grievant and
March 20, 2006, e-mail from Grievant to Kim Song
- G Exhibit 4 - March 20, 2006, e-mails from Grievant to Kim Song and from
Kim Song to Grievant
- G Exhibit 5 - Grievant's Social Worker 4 Position Description
- G Exhibit 6 - March 2007 E-mails concerning performance evaluations
- G Exhibit 7 - March 24, 2006, memo from Grievant to Kim Song re: PDP
- G Exhibit 8 - March 27, 2006, memo from Grievant to Kim Song re: PDP
- G Exhibit 9 - 5/8/06 Vicky Gawlik Step 1 Response to Grievance
- G Exhibit 10- 6/14/06 Step 2 Response to Grievance by Kelly Rupert
- G Exhibit 11- Grievance dated April 7, 2006
- G Exhibit 12- Grievant's comments dated February 19, 2006

- R Exhibit 1 - Opinion on Arbitrability
- R Exhibit 2 - Step 2 Grievance Response
- R Exhibit 3 - Step 1 Grievance Response
- R Exhibit 4 - Grievance dated April 7, 2006
- R Exhibit 5 - Performance Expectations for 4/16/05 to 4/16/06 evaluation period
- R-Exhibit 6 - Performance Evaluation for 4/16/05 to 4/16/06 evaluation period.
- R Exhibit 7 - Grievant's Social Worker 4 Position Description
- R Exhibit 8 - March 6, 2006, e-mail from Kim Song to Grievant
- R Exhibit 9 - Kim Song's Calendar for April 2005 through April 2006
- R Exhibit 10- E-mails reviewed with Grievant during period April 2005 through
April 2006
- R Exhibit 11- E-mails regarding Quality Assurance Meetings/Training
- R Exhibit 12- Corrective Action Plan to Improve Proficiency Based on 2004/5
ADSA QA Monitoring Results
- R Exhibit 13- 2005-2007 Collective Bargaining Agreement

¹ "G Exhibit" plus a number refers to Union/Grievant exhibits and "R Exhibit" plus a number refers to Respondent/State Exhibits. All of the exhibits were admitted into evidence.

Witnesses

Kim Song, Grievant

Issues:

The parties were essentially in agreement as to the issues, although they worded them somewhat differently. The issues are as follows:

1. Did the Employer fail to follow the evaluation process set forth in Article 5 of the CBA in evaluating Grievant's performance for the period April 16, 2005, to April 16, 2006? If so, what is the appropriate remedy?

2. Did the Employer violate Article 2 of the CBA by reason of negative comments contained in Grievant's PDP? If so, what is the appropriate remedy?

Stipulation

The Union stipulated that the only evaluation processing step it and the Grievant are claiming the Employer failed to follow is the step set forth in Article 5, Section 5.1 requiring that performance problems be brought to the employee's attention in sufficient time for the employee to receive any needed additional training and to correct the problem before it is mentioned in an evaluation. The Union further stipulated that there were no other processing errors.

Burden of Proof

The grievance concerns a non-disciplinary performance evaluation. The State's alleged improper action is a failure to bring performance problems to the attention of Grievant and to give him an opportunity to improve his performance as required by Article 5, Section 5.1 of the CBA, and a violation of Article 2. Accordingly, I find the burden of proof is on the Union to establish a violation of the CBA. I further find that the appropriate standard of proof is a preponderance of the evidence.

Positions of the Parties

The Union conceded before hearing that any objection Grievant may have had regarding the veracity of the statements included in his PDP was not

arbitrable. The Union takes the position that Grievant was not given notice of the deficiencies highlighted in his performance evaluation and a chance to demonstrate improvement before the evaluation was finalized. The Union makes the following arguments:

- The employer has an affirmative duty to bring performance issues to the attention of the employee and give him an opportunity to receive any necessary training and to correct the problem before performance deficiencies are mentioned in an evaluation.
- With the exception of the issue of a failure to complete evaluations of four of his staff in a timely manner, Grievant was not notified that the other deficiencies were issues in need of correction before being set forth in his evaluation.
- Prior to receiving the evaluation, Grievant was not notified that his employer considered his aptitude in question.
- Grievant was not notified that his return rate of error for files transferred to other agencies was unacceptable before receiving the evaluation.
- The weekly meetings with his supervisor were for the purpose of Grievant keeping his supervisor informed of his unit's activities and not discussions of his performance deficiencies.
- A report Grievant had publicly disseminated describing "abusive" and "demeaning" behavior" on the part of a supervisor (not Ms. Song) may have contributed to the negative evaluation of Grievant's performance.

The State contends the Union has not met its burden of proving that the employer violated Article 2 and Article 5, Section 5.1 of the CBA in completing Grievant's performance evaluation for the period April 16, 2005 through April 16, 2006. The State makes the following arguments:

- There is no evidence of discrimination and no basis for a finding of retaliation.

- Grievant was made aware of his performance problems during the evaluation period and told his performance must improve.
- Grievant's supervisor held weekly meetings with Grievant to review e-mails regarding performance problems that needed to be corrected.
- Grievant's errors caused a strain with an outside agency, Pierce County Human Services ("PCHS") in that they complained they were doing Grievant's work.
- Grievant was told by his supervisor that his performance had to improve.
- Grievant was given training and an opportunity to improve during the evaluation period.
- The directives and/or conversations with Grievant mentioned by his supervisor in the evaluation were not the only times these problems were brought to Grievant's attention by his supervisor.
- Disciplinary action is not required to make an employee aware of a performance problem and to give him an opportunity to improve before mentioning the problem in an evaluation.
- His supervisor made a considerable effort to make Grievant aware of performance problems and to give him an opportunity to improve before his evaluation was completed.

Relevant Provisions of Collective Bargaining Agreement

ARTICLE 2
NON-DISCRIMINATION

- 2.1** Under this Agreement, neither party will discriminate against employees on the basis of religion, age, sex, marital status, race, color, creed, national origin, political affiliation, status as a disabled veteran or Vietnam era veteran, sexual orientation, any real or perceived sensory, mental or physical disability, or because of the participation or lack of participation in union activities. Bona fide occupational qualifications based on the above traits do not violate this Section.
- 2.2** Both parties agree that unlawful harassment will not be tolerated.

- 2.3** Employees who feel they have been the subjects of discrimination are encouraged to discuss such issues with their supervisor or other management staff, or file a complaint in accordance with agency policy. In cases where an employee files both a grievance and an internal complaint regarding the alleged discrimination, the grievance will be suspended until the internal complaint process has been completed
- 2.4** Both parties agree that nothing in this Agreement will prevent the implementation of an approved affirmative action plan..

ARTICLE 5 PERFORMANCE EVALUATION

5.1 Objective

The Employer will evaluate employee work performance. The performance evaluation process will include performance goals and expectations that reflect the organization's objectives.

The performance evaluation process gives supervisors and opportunity to discuss performance goals and expectations with their employees, assess and review their performance with regard to those goals and expectations, and provide support to employees in their professional development so that skills and abilities can be aligned with agency requirements.

To recognize employee accomplishments and address performance issues in a timely manner, discussions between the employee and the supervisor will occur throughout the evaluation period. Performance problems will be brought to the attention of the employee to give the employee the opportunity to receive any needed additional training and to correct the problem before it is mentioned in an evaluation.

5.2 Evaluation Process

- A. Employee work performance will be evaluated during probationary and trial service periods and at least annually thereafter. Immediate supervisors will meet with employees to discuss performance goals and expectations. Employees will receive copies of their performance goals and expectations as well as notification of any modifications made during the review period.

- B. The supervisor will discuss the evaluation with the employee. The employee will have the opportunity to provide feedback on the evaluation. The discussion may include such topics as:
1. Reviewing the employee's performance;
 2. Identifying ways the employee may improve his or her Performance;
 3. Updating the employee's position description, if necessary;
 4. Identifying performance goals and expectations for the next Appraisal period; and
 5. Identifying employee training and development needs.
- C. The performance evaluation process will include, but not be limited to, a written performance evaluation on forms used by the Employer, the employee's signature acknowledging receipt of the forms, and any comments by the employee. A copy of the performance evaluation will be provided to the employee at the time of the review. The original performance evaluation forms, including the employee's comments, will be maintained in the employee's personnel file.
- D. The evaluation process is subject to the grievance procedure. The specific content of performance evaluations are not subject to the grievance procedure.

Discussion

Grievant is a Social Worker 4 with the State of Washington, Department of Social and Health Services, Home and Community Services (HCS). His duties in this position include functioning as the first line supervisor of a unit of eight or nine Social Workers and three Community Nurse Consultants in the Community Assessment Unit.² G Ex. 5. He interprets policies, procedures, and rules regarding the Community Options Program Entry System (COPES), Medicaid Personal Care, Adult Family Home, Adult Residential Care, Enhanced Adult Residential Care and Nursing Home Programs. He also plans and implements the various programs in the unit, trains new staff, conducts individual conferences

² Grievant's Position Description showed the number of Social Workers supervised by Grievant as nine; his Performance Development Plan showed the number as eight. G Exs. 1, 5.

regarding job assignments, appraises the performance of his staff, keeps attendance records current, performs complete Quality Assurance (“QA”) and monitors cases, attends supervisors meetings and conferences, conducts regular unit meetings, staffs difficult cases, maintains statistical records, prepares complete reports on various programs, and hires new staff. G Ex. 5. Grievant’s unit performs initial assessments of persons needing services, arranges for the necessary services, and then transfers most of the cases to Pierce County Human Services (“PCHS”), and the remainder to other units in HCS for ongoing case management. Grievant testimony (“test.”). Grievant’s Performance and Development Plan (“PDP”) for 04/04 to 04/05 set forth the following particular performance expectations on which Grievant should focus for the period 04/05 to 04/06 and training: 1) “Continue to monitor the assigned cases to staff on a weekly basis to ensure compliance with LTC³ manual;” 2) “Continue to discuss staff problems and high profile cases with his supervisor;” 3) “Continue to consult with his supervisor or chain of command for clarification of policy and procedures;” 4) “Attend all training related to ADSA/HCS;” and 4) “Seek opportunity to increase knowledge and skills in organization training for management activities.” R Ex. 5.

On April 10, 2006, Grievant received a performance evaluation from his supervisor, Kim Song, which he claimed was not accurate. R. Ex. 6. As discussed above, the performance evaluation itself is not the subject of this arbitration. Rather, it is the evaluation process that is being arbitrated. Grievant contends that he was not given notice of the deficiencies highlighted in the PDP and a chance to demonstrate improvement before the evaluation was finalized. He and the Union stipulated that all other processing steps set forth in the contract were met.

Notice of Performance Problems

Section 5.1 of the CBA requires that “performance problems be brought to the attention of the employee to give the employee the opportunity to receive any

³ “LTC” means long term care. Song test.

needed additional training and to correct the problem before it is mentioned in an evaluation.” CBA, Article 5, Section 5.1. The performance problems mentioned in the PDP in question were: (1) Grievant failed to perform QA monitoring on all cases; (2) His errors seem to be consistent but he does not appear to acknowledge and prevent further errors in the future; (3) On occasion, he struggles to have returned cases completed and sent back to Pierce County Human Services within a reasonable time frame (example given of two returned cases held over 30 days); (4) He failed to complete annual evaluations for four of his staff; (5) He should communicate with his supervisor more on difficult cases; and (6) He does not respond well to constructive criticism and at times struggles to work well with his peers. R. Ex. 6. The Union argues that with the exception of the issue of a failure to complete evaluations of four of his staff in a timely manner, Grievant was not notified that the other deficiencies were issues in need of correction before being set forth in his evaluation.

Deputy Regional Administrator Kim Song, Grievant’s supervisor, testified that when a case is completed by his staff, it is Grievant’s duty to perform QA on the case, and if he finds any errors to send the file back to his staff for correction of the errors. She further testified that once the staff corrects the errors, then Grievant is required to do a second review and approve the file before it is transferred out to PCHS. She additionally testified that she expected Grievant to complete QA on all cases and also to do a final review before a file leaves the office. She testified that she had a verbal conversation with Grievant regarding this expectation. Also, supervisory QA review of CARE Assessment and case files was discussed and QA training provided during regular Supervisors’ QA Meetings throughout the evaluation period. R Ex. 11. During these meetings, the problem of errors in transferred files and the need to reduce the number of errors was also discussed. R Ex. 11, pp. 212, 222, 223, 241. Grievant was also specifically reminded of the policy to QA all files and CARE Assessments, and to do a final review after the correction of any errors before the file is transferred for

ongoing case management, by the QA manager, Tabo Mack, on October 13, 2005. R. Ex. 10, pages (“pp.”) 91, 132. The reminder by Mr. Mack came during a QA Monitoring Meeting after Grievant had stated that he was not doing any QA Monitoring and he was transferring out case files for ongoing case management. *Id.*

The record contains numerous e-mails regarding case problems and errors in cases transferred to an outside agency with the files being returned to Grievant for correction of the errors. R. Ex. 10. These e-mails reflect all of the problems mentioned in Grievant’s PDP. Ms. Song, testified that over the period April 2005 through April 2006, she met with Grievant approximately every week, with the exception of February 2006, to go over the returned files, to talk about the corrections and issues, to discuss her expectations, and to provide any necessary guidance and training. Her testimony regarding the meetings is supported by a copy of her calendar, which shows frequent meetings with Grievant over the course of the evaluation period. R. Ex. 9. During these meetings, Ms. Song discussed the e-mails and the specific problems reflected in them with Grievant. Song test. Ms. Song testified that she told Grievant she expected each case to be thoroughly reviewed and errors corrected before the case was transferred out of the office. She additionally testified that she told Grievant that the volume of problems reflected by the e-mails was unacceptable. Ms. Song explained that the number of returned files showed that the files were not being thoroughly reviewed and errors corrected before they were transferred to another other agency for case management.

The PDP mentions a March 3, 2006, e-mail that was sent to Grievant concerning QA expectations. R Ex. 6. Ms. Song testified that this was not the only time she brought her QA monitoring expectations to the attention of Grievant; she did so every time she went through the cases with him in their weekly meetings. Ms. Song stated that she had to meet with Grievant more frequently than other supervisors because of the numerous e-mails she received

about problems with files from Grievant's unit. She further stated that these problems adversely affected the care and assistance provided clients and the working relationship between HCS and PCHS. PCHS felt they were catching errors HCS should have caught before the files were transferred. According to Ms. Song, she discussed this with Grievant during their weekly meetings and told him his performance needed to improve.

Ms. Song's testimony regarding bringing problems to the attention of Grievant is supported not only by the fact that she received copies of most of the e-mails sent to Grievant regarding returned files for correction of errors or additional information, but also by a number of specific e-mails where Ms. Song showed interest in problems with the cases. R Ex. 10. For example, in responding to an inquiry from Ms. Song regarding a file returned on May 6, 2005, for correction of errors, Mark Tabo informed Ms. Song that Grievant had attempted to complete a QA Review "(only one review : May 2, 2005)," that he did not believe the supervisors were reviewing these cases, and that "there should be at a minimum 2 File Review SERs."⁴ R 10, p. 205. After receiving this information from Mr. Tabo in May 2005, in all probability Ms. Song discussed the matter with Grievant and emphasized the need for QA reviews on all cases and at least 2 QA reviews on cases with errors needing correction.⁵ Another example of Ms. Song bringing case concerns to the attention of Grievant is a series of e-mails on August 8, 2005. R 10, pp. 148-149. Even after Ms. Song had expressed concern about problems in a case and QA, Grievant appears to have allowed another error to slip by uncorrected. R 10, p. 147. On March 24, 2006, Ms. Song once again brought case concerns to the attention of Grievant by e-mail. R Ex. 10, p. 63.

The file contains an e-mail from Alice Johansen of PCHS to Grievant dated May 12, 2005, with copies to Dale Morris and Ms. Song, in which she inquires

⁴ The letters "SER" mean Service Episode Record, a case record which documents conversations, home visits, file reviews, etc. Song test.

⁵ Upon hearing of problems, Ms. Song appears to bring them to the attention of her subordinates promptly. *See example*, R-10, p. 201 (payment to providers for orientation).

about two files that were returned to him for corrections or additional information, and which he held for over thirty days. R 10, p. 202. Ms. Song immediately brought the delay in returning corrected files to the attention of Grievant, and told him they needed to pay close attention to such things, as potentially such cases could cause big problems. R 10, p. 191, 198. On May 26, 2005, Ms. Song sent Grievant another e-mail regarding failure to return corrected files to PCHS⁶ in a timely manner, and indicated that they would discuss the matter in their weekly meeting. R 10, p. 190. The record reflects that Ms. Song had another discussion with Grievant regarding delays in returning corrected files to PCHS in June 2005, to which Grievant responded that the cases she mentioned were not QA'd by him. R 10, p. 185.

By e-mail dated May 12, 2005, Ms. Song informed Grievant, and others, that they needed to pay more attention to cases involving payment to providers for orientation. R 10, p. 201.

To a great extent, Grievant's testimony was directed towards disagreeing with Ms. Song's assessment of his performance, and attempting to explain or justify the errors and missing information in the cases transferred back for corrections by PCHS. With respect to notice, Grievant testified that he never had a conversation with Ms. Song about what his error rate should be and that it was never put to him that way. It may well be true that Ms. Song never talked to Grievant in terms of what an acceptable error rate should be, as from her testimony and her e-mails of record it seems she was trying to make clear to Grievant that there should be no errors in the files transferred from HCS to other agencies, and that this was why he was required to QA all files and CARE assessments and to perform a second review on any files and CARE assessments sent back to the social worker for correction before the file was transferred out for case management.

⁶ "PCHS" is also referred to as "AAA" in the record. Grievant testimony.

Grievant also testified that the general tenor of his meetings with Ms. Song was that they were “kind of touching base meetings,” very informal, with no agenda and no sense of urgency. He further testified that his poor performance was never mentioned. According to Grievant, Ms. Song never told him that there were far too many cases being returned, and she never said he had too many errors or that his error rate was unacceptable.

Grievant admitted that in his almost weekly meetings with Ms. Song, they discussed the errors reflected in the e-mails regarding cases being returned for correction. Grievant also testified that there were times during these meeting that Ms. Song would ask him if he was doing QA monitoring on all cases and he would tell her that he did. Grievant further testified that he was under the impression that Ms. Song felt he was not doing QA monitoring because cases were being sent back.

Although Ms. Song may not have specifically told Grievant that there were far too many cases being returned or that his error rate was unacceptable, she clearly conveyed this message by reason of her regular meetings with Grievant to discuss the errors in the cases being returned to him, and her emphasis on QA review of all files and CARE Assessments to catch errors and make corrections before the cases were transferred to PCHS or other agencies. Furthermore, the concern over the number of files being returned for correction was also conveyed to Grievant in the regular Supervisors’ QA Monitoring Meetings that were held. R Ex. 11, pp. 212-213, 222, 223, 241. Grievant was notified that the volume of problems reflected by the e-mails regarding cases being returned for correction was unacceptable.

Grievant testified that prior to March 3, 2006, Ms. Song had never discussed the time it should take him to get a case returned to PCHS. *See* Ex. 10, p. 89. Yet, during a Supervisors’ QA Meeting on August 9, 2005, Grievant was informed of the management requirement that corrected files and CARE Assessments are to be returned to KCAAA (King County Area Agency on Aging)

and PCAA (Pierce County Area Agency on Aging) within 5 working days. Ex. 11, p. 230. Furthermore, as discussed above, Ms. Song addressed the matter of his delay in returning files to PCHS with Grievant in May and June of 2005.

Grievant testified that the errors reflected in the e-mails regarding cases returned for correction of errors were different and there were no errors recurring on a regular basis. Grievant's testimony is not supported by the e-mails themselves. *See* R Ex. 10. For example, the following errors kept recurring on a fairly consistent basis: scheduling; lack of information regarding informal support or care giver or one not identified where other information indicated there was one available; Support Screen and informal support; conflicting information; Support Screen indicated a paid care giver partially met the ADL needs but according to the assessment, these needs were also met by informal support but the support screen did not assign them to anyone. *Id.*

Grievant testified that prior to receiving his PDP, he was never told that he was not communicating well. The PDP states that Grievant should communicate more with his supervisor on difficult cases. This comment appears to be a connected to Ms. Song's concern over the number of errors in the transferred case files under Grievant's jurisdiction, and is a suggestion that might help to reduce those errors. Case communication problems are reflected in a series of e-mails on August 8, 2005, and March 24, 2006, where Ms. Song is seeking information from Grievant on cases. R Ex. 10, pp. 148-149, 150. The record also reflects that at times Grievant had trouble understanding an error or the adverse impact it had caused. For example, one of the social workers under Grievant's supervision made a major error in a case, and Grievant did not appear to have understood the situation fully. R Ex. 10, pp. 51-54. There is no indication that Grievant drew this problem to the attention of his supervisor before she was notified of it by someone else.

Grievant testified that Ms. Song never told him he did not respond well to constructive criticism. Yet, he further testified that at times she brought up

instances that were reported to her by a third party and asked for his response. He also testified that Ms. Song told him he was not working well with his peers and needed to improve. According to Grievant, these were situations where a third party came to Ms. Song with a complaint, she confronted Grievant with the complaint, and he gave his side of the story. Grievant did not appear to see these meetings as Ms. Song expressing her concern over his interaction with others.

The Grievant admits he was notified of his failure to provide annual evaluations for four of his staff in a timely manner. R Ex. 10, pp. 56-58. He testified that he completed the most current evaluations of the performance of these members of his staff before his 2005-2006 evaluation was completed. It does not appear, however, that Grievant completed the 2004-2005 evaluations that were missed with respect to at least three of the four staff members. R Ex. 10, p. 58.

The record reflects that Grievant was provided with training during the evaluation period. This training occurred both informally during his meetings with Ms. Song and Supervisors' QA Meetings and formally. *See* Song test.; R Exs. 11 and 12. In his testimony, Grievant indicated that he did not see the supervisors' meetings as training. Yet, a review of the summaries of the meetings shows that instructions on how certain things were to be done were clearly given during the supervisors' meetings. Also, Grievant testified that he attended the meeting for Patient Review and Restriction Program (PRR) to which he was invited during a supervisors' meeting. R. Ex. 11, p. 216. All unit supervisors also received training in April 2005 and throughout the 2005-2006 evaluation period. R. Ex. 12.

Violation of Article 2

It is undisputed that Grievant had an interaction with a supervisor (not Ms. Song) in February 2006 which he felt was highly inappropriate. He described this supervisor's behavior as "abusive" and "demeaning" in an account he wrote of the incident and publicly disseminated. G Ex. 12. Grievant claims that subsequent to

his reporting this incident, he was targeted by management and treated differently. He feels the negative comments in his evaluation were in retaliation for his report of the supervisor's conduct.

The Union admits Grievant cannot claim that he was retaliated against based on his status as one of the protected classes enumerated in state law, and under CBA Article 2.1. Grievant's Post-Hearing Brief, p. 9. The Union also admits that the prerequisites for a claim of retaliation based upon whistleblower status are not present in this record. Grievant's Post-Hearing Brief, p. 10.

There is no evidence in the record establishing unlawful discrimination or harassment in violation of Article 2 of the CBA.

Conclusion

In reaching my decision, I have carefully reviewed all of the evidence, both documentary and testamentary, and considered all of the arguments of the parties even if not mentioned in this decision. I find that a preponderance of the evidence shows that performance problems were brought to Grievant's attention during the evaluation period in sufficient time for him to receive any needed additional training and to correct the problems before they were mentioned in his evaluation. I also find that there is no evidence showing unlawful discrimination or unlawful harassment. The Union and Grievant have not established a violation of Article 2 or Article 5, Section 5.1 of the CBA.

In deciding this case, I make no finding on the accuracy or correctness of the actual evaluation of Grievant's performance during the period April 16, 2005, to April 16, 2006. As discussed above, this issue is beyond my authority.

AWARD

The grievance is DENIED.

September 2, 2007



Carol J. Teather
Arbitrator