

IN THE MATTER OF THE)	
ARBITRATION)	ARBITRATOR'S
BETWEEN)	OPINION
STATE OF WASHINGTON-)	Labor Relations Office
EMPLOYMENT SECURITY)	JUL 24 2006
DEPARTMENT)	
(The Employer))	
AND)	
WASHINGTON FEDERATION)	Jeff Jaksich Grievance
OF STATE EMPLOYEES)	
(The Union))	AAA Case Number 75 390 00002 06

HEARING: June 29, 2006

HEARING CLOSED: June 29, 2006

ARBITRATOR:

Sylvia Skratek, Ph.D.
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REPRESENTING THE EMPLOYER:

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APPEARING AS WITNESSES FOR THE EMPLOYER:

Patrick Armstrong, IT Field Operations Architect
Greg Weeks, Director, Labor Market and Economic Analysis
William Pruett, IT Field Support

APPEARING AS WITNESSES FOR THE UNION:

Jeff Jaksich, Grievant

BACKGROUND

The State of Washington (hereafter “the Employer” or “the State”) and the Washington Federation of State Employees (hereafter “the Union”) agreed to submit a dispute to arbitration. A hearing was held before Arbitrator Sylvia Skratek in Olympia, Washington on June 29, 2006. During a pre-hearing conference the parties agreed that the issue was properly before the Arbitrator and should be decided on its merits.

At the hearing the parties had full opportunity to make opening statements, examine and cross examine witnesses, introduce documents, and make arguments in support of their positions. The Arbitrator made a recording of the hearing and advised the parties that the recording was being made to supplement her notes and should not be considered an official record of the hearing.

The parties were provided the opportunity to present oral closing arguments at the conclusion of the proceedings. The record was closed as of June 29, 2006. The award in this case is based upon the evidence, testimony, and arguments put forward during the hearing and the arguments presented by the parties in their oral closing arguments.

STATEMENT OF THE FACTS

Jeff Jaksich is a thirty year employee of the State of Washington without any prior disciplinary record. He currently holds the position of Senior Economic Analyst. In 2004 he assumed the position of Union shop steward in order to assist his fellow employees. According to Jaksich, major changes were occurring at the workplace and it was important that these changes be accomplished with minimal disruption to the workforce.

In mid-June 2005, Matt Grate contacted Mr. Jaksich to inquire about a request he had received from his supervisor, Patrick Armstrong. Dr. Armstrong had sent an email to Mr. Grate asking that Mr. Grate provide him with "...church doctrinal statements regarding the use of cell phones and pagers..." (Ex. U-4) Jaksich recognized Armstrong's request as being inappropriate and contacted Armstrong directly to discuss the matter with him. Armstrong felt threatened and intimidated during his conversation with Jaksich and reported the conversation to his manager, William Pruett. (Ex. E-H) Mr. Pruett approached Jaksich on June 24, 2005 to discuss the concerns raised by Armstrong. Pruett entered Jaksich's office, closed the door to the office, and began to talk about what had occurred between Armstrong and Jaksich. There was conflicting testimony as to what transpired between Jaksich and Pruett in Jaksich's office however there is no dispute that there was a disagreement between the two gentlemen as to what had actually occurred between Armstrong and Jaksich. For this proceeding however, it is not what occurred between Armstrong and Jaksich that is to be reviewed but rather what occurred between Jaksich and Pruett. According to Pruett, Jaksich became visibly upset, claimed that everything being said by Armstrong was a lie, and exhibited hostile behavior in Pruett's presence. Pruett stated that he did not consider Jaksich's behavior intimidating initially and attempted to calm him down. Pruett maintains however that Jaksich's behavior continued and included smacking his fist into his hands, shaking and pointing his finger at Pruett, and shaking hands in a dominant, aggressive manner. He found Jaksich's body language to be very aggressive and Pruett left Jaksich's office without ever raising the issues he had wanted to address. Jaksich claims that it was Pruett who exhibited a hostile demeanor through "...his verbal assault, false accusations, and hostile tone...accusations were false, extremely distorted, perverted and/or totally out of context." Jaksich maintains that he attempted to calm Pruett down and told him that they needed "...to work together in these stressful times of transition to minimize the negative impacts on fellow ESD employees..." (Ex. U-4)

Pruett summarized his version of the interaction with Jaksich and placed the summary into his Manager's note file. (Ex. U-2) The summary was forwarded to Pat Iyall-Barnes, Russ Widders and Donald Albright. A handwritten note on Pruett's

summary indicates that it was “provided to Greg Weeks for appropriate action”. (Ex. E-I)
The Employer was not certain if the summary was ever provided to Mr. Jaksich.

Weeks contacted Jaksich and asked him for an explanation of what had occurred with Pruett. After discussing the matter with Pruett and after reviewing Jaksich’s explanation, Weeks concluded that Jaksich had acted aggressively and inappropriately. He discussed the appropriate level of discipline with Human Resources and by memo dated July 18, 2005 he issued a written reprimand to Mr. Jaksich stating in part that:

It has recently been brought to my attention that you displayed behavior which was described as very aggressive, hostile and threatening toward Bill Pruett...Your actions consisted of shaking and pounding your fist into your other hand, pointing aggressively, and at one point, towering over Mr. Pruett as he sat in a chair. These types of actions are all physically aggressive, intimidating and threatening and will not be tolerated. (Ex. E-C)

On August 8, 2005 a grievance was filed on behalf of Mr. Jaksich claiming that:

Management is in violation of Article 27: Discipline and Article 2: Non-Discrimination. On July 18, 2005 disciplinary action, in the form of a written reprimand, was taken against Jeff Jaksich without just cause and in retaliation for his actions as a Union representative in response to a request for assistance from a fellow employee.

The Union requested that the reprimand and all related documents be removed and destroyed in the Grievant’s presence and that the Grievant be given copies of all related documents for his own files. (Ex. U-5)

The parties were unable to resolve their differences and the matter was submitted to arbitration.

STATEMENT OF THE ISSUE

The parties stipulated to the following statement of the issue:

Did the Employer have just cause to issue a letter of reprimand to Jeff Jaksich?
If not, what is the appropriate remedy?

ANALYSIS

Applicable Contract Language

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 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.
- 27.5 A. Upon request, an employee has the right to a union representative at an investigatory interview called by the Employer, if the employee reasonably believes discipline could result. An employee may also have a union representative at a pre-disciplinary meeting. If the requested representative is not reasonably available, the employee will select another representative who is available. Employees seeking representation are responsible for contacting their representative.
- B. The role of the union representative in regard to Employer-initiated investigations is to provide assistance and counsel to the employee and not interfere with the Employer's right to conduct the investigation. Every effort will be made to cooperate in the investigation.
- 27.6 Employees placed on an alternate assignment...
- 27.7 Prior to imposing discipline, except oral or written reprimands, the Employer will inform the employee in writing of the reasons for the contemplated discipline and an explanation of the evidence. The Employer will provide the Union with a

copy. The employee will be provided an opportunity to respond either at a meeting scheduled by the Employer, or in writing if the employee prefers. A pre-disciplinary meeting with the Employer will be considered time worked.

27.8 The Employer will provide an employee with fifteen (15) calendar days' written notice prior to the effective date of a reduction in pay or demotion.

27.9 The Employer has the authority to impose discipline, which is then subject to the grievance procedure set forth in Article 29...

Position of the Employer

The Employer emphasizes that civility and respect are critical components in the workplace. In this matter, two credible witnesses testified that they were intimidated by the behavior of the Grievant and they brought the behavior to the attention of higher authorities. An investigation was conducted in accordance with the labor agreement and a conclusion was properly reached that the Grievant's behavior was verbally aggressive. In determining the level of discipline to be administered, the Employer considered that the Grievant knew about the Employer's Workplace Violence Policy (Ex. E-F) and decided to issue a written reprimand in an effort to correct the Grievant's behavior. The Employer maintains that this was an appropriate level of discipline for the cited behavior and asks that the Arbitrator dismiss the grievance.

Position of the Union

The Union emphasizes that the Grievant is a thirty year employee with no prior disciplinary record. In this matter it is a question of perception as to what actually happened on June 24, 2005. The interaction between Pruett and the Grievant had as its basis a labor-management issue that the Grievant had rightfully brought to the attention of one of the supervisors reporting to Pruett. The Grievant was attempting to assist a supervisor who was inappropriately requesting church doctrinal statements. (Ex. U-4) The Grievant never verbally threatened anyone and his physical behavior of finger pointing and placing his fist into his hands is nothing more than his normal everyday behavior. The fact that the Grievant stands and walks around while conversing is directly related to his physical disability and should not be considered as threatening or intimidating. It is unclear exactly what happened in the meeting on June 24th however it is clear that Pruett could not have felt threatened as defined by the Workplace Violence

Policy which requires at Section A.2. immediate notification to a supervisor of “...any situations of assault, threat, or harassment.” (Ex. E-F) Pruett made no effort to notify a supervisor at the time of the alleged occurrence. Pruett even stated that he was not intimidated by Jaksich’s behavior. (Ex. E-I) Furthermore, the Union contends that the investigation was flawed in that the Grievant was never provided an opportunity to review Pruett’s written statement. Finally, the Union maintains that all events in this matter are directly related to the Grievant’s role as a shop steward and that the Employer’s behavior is nothing more than retaliatory action for the Grievant’s participation in Union activities. The Union asks that the Arbitrator grant the grievance.

Discussion

In making a final determination in discipline and discharge matters, arbitrators utilize the well-established two areas of proof: proof of wrongdoing, a responsibility that is allocated to the employer and; proof of whether the penalty assessed by management should be upheld or modified. Within the first area, compliance with contractual and fundamental due process rights is a consideration. The written reprimand of Mr. Jaksich will be discussed within this analytical framework.

Proof of Wrongdoing

The reason underlying the written reprimand is stated in the July 18, 2005 memo from Weeks to Jaksich as:

“...you displayed behavior which was described as very aggressive, hostile and threatening toward Bill Pruett...during a meeting between the two of you on Friday, June 24, 2005. Your actions consisted of shaking and pounding your fist into your other hand, pointing aggressively, and at one point, towering over Mr. Pruett as he sat in a chair. These types of actions are all physically aggressive, intimidating and threatening and will not be tolerated”. (Ex. E-C)

The Employer’s review of Mr. Jaksich’s behavior was conducted promptly. Mr. Pruett and Mr. Jaksich submitted written statements to Dr. Weeks. (Exs. U-2 and U-4) After reviewing their descriptions of the incident, Dr. Weeks determined that Jaksich had acted with aggression and inappropriately. The Arbitrator can find no reason to disagree with his determination.

The Union is quite correct that this is a case that has as its very basis the perceptions of the individuals who participated in the meeting on June 24, 2005. The Arbitrator found the testimony of Mr. Pruett and Mr. Jaksich to be credible and she is faced with making a determination as to whose testimony most likely represents what transpired between the two gentlemen. Pruett and Jaksich had different perceptions of the June 24th meeting however the Arbitrator must take into consideration the reality that there is a common tendency for a witness to put his best foot forward in an arbitration hearing. “This tendency either consciously or subconsciously, leads many witnesses to remember and express testimony in a way favorable to the result which they hope the Hearing will produce.”¹ Arbitrators traditionally give the most careful scrutiny to the witness who has the highest stake in the outcome of the proceeding, the grievant. In this matter, the Arbitrator finds that she must give greater weight to the testimony of Mr. Pruett. There was no evidence or testimony that Mr. Pruett had any motive to misrepresent what occurred in the meeting or that Mr. Pruett bore any ill will toward the Grievant. The Grievant however had a compelling reason to represent the meeting in a manner that would accomplish his goal to have the written reprimand removed from his file.

The Arbitrator notes that at no time did Mr. Pruett himself feel intimidated or threatened by Mr. Jaksich’s behavior however Mr. Jaksich is not being reprimanded for actually intimidating or threatening Mr. Pruett but rather is being reprimanded for displaying behavior that was “aggressive, hostile and threatening toward Bill Pruett...” The distinction is important. If Pruett had felt threatened or intimidated by Jaksich’s behavior it would have been reasonable to expect him to immediately report the behavior to a supervisor. As required by the Workplace Violence Policy (Ex. E-F) a Security Incident Report would have been filed. The fact that none of this was undertaken in this case does not render Jaksich’s behavior as meaningless. Workplace behavior that does not rise to the level of violence, perceived threats, or perceived intimidation but does rise to the level of disrespect is still inappropriate behavior. That is not to say that a forceful

¹ Elkouri and Elkouri, *How Arbitration Works*, 5th Edition, BNA Books, Inc., Washington D.C., 1997, p. 443.

style in the advocacy of union related matters is inappropriate however at the point that an individual belittles another employee and exhibits disrespectful body-language, that same forceful style begins to morph into bullying. An employer has an obligation to monitor behaviors that may not necessarily rise to the level of workplace violence but are nonetheless lacking in respect and civility. The Grievant's pounding of his fist into his hand, his vehement insistence in a belittling manner that Armstrong was lying and his attempt to show dominance through an aggressive handshake was disrespectful behavior that warranted discipline. The Grievant may not have violated the Workplace Violence Policy, and the Arbitrator notes that a policy violation is not cited in the letter of reprimand, however there is sufficient credible evidence to find that the Grievant's behavior was "aggressive, hostile and threatening toward Bill Pruett" which is inconsistent with the Employer's right to maintain a respectful work environment for all employees.

The Arbitrator is troubled by the fact that Mr. Jaksich was apparently never provided with a copy of Mr. Pruett's summary of the June 24th incident (Ex. U-2) however she notes that the parties have made an exception for written reprimands at Article 27 Section 27.7 of the Agreement and based on that exception the Employer, when issuing an oral or written reprimand, is not required to inform an employee in writing "...of the reasons for the contemplated discipline and an explanation of the evidence." That is not to say that the Employer in this matter never informed Mr. Jaksich that it was investigating his behavior. Mr. Weeks requested an overview of the incident from Mr. Jaksich and Mr. Jaksich provided the overview via an email dated July 11, 2005. (Ex. U-4) The Arbitrator finds that this communication between the Grievant and the Employer satisfies the stated language of Article 27 and fulfills the due process requirement that is inherent in all disciplinary proceedings that an employee be allowed to tell his side of the story before discipline is imposed. The language of Article 27.7 does not require anything more prior to the issuance of an oral or written reprimand and Under the specific language of Article 29, Section 29.3D.1.a the Arbitrator has no authority "...to rule contrary to, add to, subtract from, or modify any of the provisions of this Agreement."

While the Union argued that all of the events in this matter are directly related to properly exercised union activities, the Arbitrator notes that Mr. Jaksich was not disciplined for the efforts he rightfully undertook to correct a supervisor's error. There was no evidence or testimony to support a finding that his efforts on behalf of Mr. Grate, which would be considered protected conduct, led to the written reprimand. Rather it was his behavior during the meeting with Mr. Pruett that served as the basis for the reprimand. The Arbitrator carefully considered whether the Employer had mixed motives in its issuance of the reprimand but once the behavior is separated from the protected conduct, it becomes clear that the behavior in and of itself warranted further review. To prove discrimination based upon union activities some combination of four elements must normally be present: 1) evidence of union activity; 2) lack of good cause for discipline; 3) expressions of antagonism by management; and 4) close timing between the timing of the disciplinary action and the union activity.² In this matter, there is no evidence of expressions of antagonism by management, there is no evidence that union activity served as the basis for the discipline, and as previously discussed above, there was good cause for the discipline.

Based on all of the foregoing, the Arbitrator therefore finds that the Employer has met its burden of proof of wrongdoing.

Penalty

Having found that the Employer has met its burden of proof of wrongdoing, the Arbitrator reviewed the penalty assessed by the Employer. While the Arbitrator finds that the Employer sustained its burden of proof of wrongdoing, a final question remains unanswered: Was the degree of discipline administered appropriate?

To answer this question, the Arbitrator reviewed the philosophy enunciated initially by Arbitrator Whitley McCoy in 1945 (LA 160, 165):

² Koven, Adolph M., *Just Cause the Seven Tests*, 2nd edition, BNA Books, Inc., Washington D.C., 1992, p. 372.

“If management acts in good faith upon a fair investigation and fixes a penalty not inconsistent with that imposed in other like cases, an arbitrator should not disturb it...The only circumstances under which a penalty imposed by management can be rightfully set aside by an arbitrator are those where discrimination, unfairness, or capricious and arbitrary action are proved...”.

An arbitrator should not substitute his/her judgment for that of an employer unless the employer has acted unfairly given the circumstances of the case. Where that has happened, the Arbitrator has an obligation to modify the decision unless prohibited by the collective bargaining agreement from doing so. Failure to modify the decision would exempt all employer disciplinary decisions from review once all procedural requirements have been met.

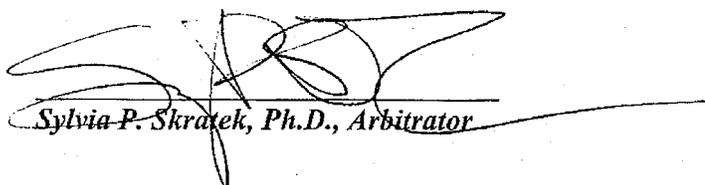
The principles of progressive discipline require that the discipline be administered in a manner that is intended to correct the employee's behavior. It is the goal of progressive discipline to stop the behavior. In all progressive discipline matters, there is an understanding that employees will be allowed to rehabilitate themselves.

In this particular case, the Employer has imposed a written reprimand that is designed to correct the Grievant's behavior. It serves as a warning to the Grievant that the behavior that he exhibited on June 24, 2005 will not be tolerated and provides suggestions to the Grievant to address the behaviors. The Arbitrator finds that the written reprimand is appropriate given the circumstances of this case and she will therefore not disturb the penalty.

CONCLUSION

For all of the reasons set forth in the discussion above, the Arbitrator finds that there was just cause to issue a letter of reprimand to Mr. Jaksich. The grievance is hereby denied and dismissed.

Respectfully submitted, this 21st day of July, 2006,



Sylvia P. Skratek, Ph.D., Arbitrator