

ARBITRATION AWARD

In the Matter of the Arbitration)
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between)
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WASHINGTON FEDERATION)
STATE EMPLOYEES)
(Union))
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and)
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)
DEPARTMENT OF HEALTH)
SOCIAL SERVICES)
(Employer))
)

Case 75-390-00174-12
Ralph Spilker
(Grievant)

BEFORE: Eduardo Escamilla, Arbitrator

APPEARANCES:

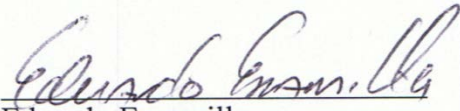
For the Employer: Donna Stambaugh, Attorney
For the Grievant: Christopher Coker, Attorney

Date of Hearing: May 21, 2013

Place of Hearing: Spokane, Washington

Date of Briefs: July 3, 2013

Date of Award: August 2, 2013


Eduardo Escamilla
Arbitrator

ISSUES

Did the Employer have just cause to discharge Ralph Spilker, the Grievant? If not, what is the appropriate remedy?

STATEMENT OF FACTS

DEPARTMENT OF HEALTH SOCIAL SERVICES, State of Washington (Employer) and WASHINGTON FEDERATION STATE EMPLOYEES (Union) share a collective bargaining with the most recent contract effective throughout the period this contract dispute arose. The contract contains a grievance/arbitration procedure that requires the parties to resolve their contract disputes through this process.

This matter involves the discharge of the Grievant on August 19, 2012. The Union filed the grievance on August 30, 2012, alleging that the Employer did not have just cause to discharge the Grievant. It requests that the Grievant be reinstated to his former position of employment and made whole for any loss he may have incurred. The parties did not raise any procedural grievance processing issues.

The Grievant was an Attendant Counselor 2 at the Lakeland Village facility. He was specifically employed in the unit known as the Rosewood Cottage. His duties are centered on direct care of residences that have a high need of attention. All residences at this particular cottage are dependent on attendants for basic hygiene assistance. The Grievant began his employment on March 14, 1984, and has an unblemished work history absent of any performance issues or disciplinary actions.

Attendant Counselors check the patients three times a night, the shift in which the Grievant worked. Rosewood Cottage actually functions as a hospital/nursing care facility for patients. There are usually two employees during the night shift. There is no supervisor during the night shift. The two night shift employees tend to six different patients each. They assist each other when lifting patients. Their supervisor reports to work in the morning just before night shift ends.

John Gilden is an intermittent NRC at the Lakewood Village facility. NRC is a residential service coordinator. He retired in October 2006 from the agency as an ACR manager who supervised the cottages. He worked for the agency for approximately 30 years. Currently, he is on call to work when needed.

He described the clients in the Rosewood Cottage as bedridden who have to be moved every several hours to avoid bedsores. He would frequent the Rosewood Cottage at least once a night as part of his duties. If necessary he will revisit the cottage when the need arises.

Gilden explained that the Attendant Counselors are required to use the internet for purposes of submitting their daily attendance reports. The employees also used the internet to check work related e-mails, ordering miscellaneous work items such as laundry supplies and food ordering. The employees also complete an online census report that is filled out around midnight every night to show the actual number of clients who are in the building for each day.

Gilden sent an e-mail to Diane Kilgore, superintendent, after it was reported to him that the Grievant was watching pornographic materials on the internet. This occurred on May 29, 2012, around 4:26 AM. This incident was reported by a staff employee who had floated into the Rosewood Cottage to temporarily work at the cottage. This is the first time he had heard about this type of incident.

He admits that he used the words "common knowledge" when describing the Grievant's use of state computers to visit prohibited websites in his e-mail because the employee who floated into the Rosewood Cottage and her supervisor knew about it. Therefore, he commented in his email that the Grievant's improper use of the internet was common knowledge. The fact however is that only one employee reported this conduct, who informed their supervisor who then informed Gilden.

Victoria Mauro is a detective with the Washington State Patrol stationed in Tacoma, Washington. She has been a detective for nine years in criminal investigations and has been employed by the WSP for approximately 16 years. She is specifically assigned to handle DSHS criminal and administrative investigations of employees for the past four years. She has conducted hundreds of similar investigations assigned to her by the agency.

She conducted the investigation per the request of DSHS regarding the Grievant's use of state computers to visit pornographic websites. She and her supervisor viewed the websites that were contained in the Grievant's browser history and concluded that the websites contained pornographic material and contained sexually explicit material. They randomly selected websites from the entire notebook of websites provided to them for examination. She defined pornography as nudity or sexual acts. She defines sexually explicit materials when buttocks are showing. She did not however find anything in the materials that were criminal in nature.

Mauro maintains that it was obvious to her that the Grievant spent a lot of time visiting the websites. She admits that she is not trained in computer forensics. She also admits that she does not really know how much time the Grievant spent on the websites.

With respect to the websites whose contents have been deleted, she also admits that she is unaware of whether the Grievant actually saw the video or the contents of those websites.

Diane Kilgore is the acting superintendant at the Lakeland Village facility. She has served in that role for approximately 5 years. She has worked with the agency since 1979. She is the appointing authority at the Lakeland Village for purposes of disciplinary actions pursuant to the collective bargaining agreement requirements. Lakeland Village facility has about 220 adult residences.

After reviewing the data of websites provided to her by Paul Landsverk, IT Specialist, she concluded the Grievant had been neglecting his clients based on the amount of websites contained in the investigation file. However, she admits that she does not have any definite information as to the amount of time the Grievant spent visiting those websites other than the voluminous report of 365 pages that indicated Grievant's internet browser's websites history. Kilgore never received any reports that the Grievant was in fact neglecting his clients.

During cross examination, Kilgore described three prior situations which the Union maintains show inconsistent application of its policies and inconsistent degree of discipline. Kilgore explains that it was brought to her attention that a number of employees had been visiting Facebook on their work computers. Several employees were identified as engaging in

this conduct, which is prohibited use of state resources. The Grievant was not one of those employees.

All employees who visited their Facebook accounts on state computers received a letter of reprimand for using state computers for personal use. The wording in the letters of reprimand was tempered by how often an employee visited their website. The more often an employee visited their websites, the more severe language was used in the letter of reprimand.

Kilgore also describes another incident involving an employee who sent to his work computer an e-mail with two hyperlinks. One link concerned animal cruelty and the other link was of a picture of a woman's breasts with holes in it. The link warned the readers to be careful when buying bras from Asia.

Kilgore eventually learned about this email. However, by the time she knew about this email, the employee's supervisor had already disciplined him with a verbal warning. Kilgore stated that if it was up to her, the employee would have received a letter of reprimand but because the supervisor had already disciplined the employee, she did not take any further actions because of double jeopardy concerns.

Kilgore accepted the employee's promise that he would follow the policy of not using computers for his personal use. The employee's assurance was good enough for her especially because that employee had already received a recitation of employee expectations and training on the subject matter.

Kilgore investigated another incident involving employees viewing TV while at work. The employees watched a movie that contained nudity and sexually explicit materials. She admits that the show contained nudity and also had sexual innuendos. The employees were issued a written reprimand. However she considered the movie as an action movie and determined that Policy 15.15 did not apply because it does not involve internet use.

Evelyn Perez is the Assistant Secretary for Development Disability. The purpose of her agency or department is to serve developmentally disabled individuals in the community or at home. The State maintains several rehabilitation centers for this purpose at the Lakeland location. There are two facilities; one is considered an intermediate center for those individuals

who are not bedridden and then the nursing center for those individuals that are in fact bedridden at the Rosewood Cottage.

Perez remembers that Kilgore called her about Gilden's e-mail concerning the Grievant's use of computers to visit pornographic websites. She admits that she did not make the decision to discharge. Rather Kilgore merely discussed the situation with her and Kilgore informed her that she was going to discharge the Grievant.

As part of the Employer's investigation process, she believed the Employer was required to send the investigation of this matter to the Washington State Patrol concerning employees visiting pornographic sites. The WSP conducted an investigation and issued a report. After reading the report management concluded that they had to conduct their own investigation about the websites.

Perez and Kilgore reviewed some of the websites and concluded that these websites were pornographic or sexually explicit websites. She also noted some of the websites that were mentioned in the WSP report were no longer active on the internet. When they tried to visit some of the sites, a message appeared stating that the particular website had been removed for inappropriate content.

Perez admits that none of the websites they were able to open depicted pictures of women's bare breast or women's private parts, or of sexual acts.

Administrative Policy 15.15 deals with the use of the internet. The policy specifically states that the Employer has a zero tolerance policy regarding pornographic materials in the workplace. She considers employees visiting pornographic materials an important issue because patients are not able to communicate with the Employer's representatives. She admits that she did not review the Grievant's work history, or the zero-tolerance policies for pornographic sites or sexually explicit materials.

Administrative Policy 15.15 states:

B.1. Permitted Business Use--Employees may use department provided electronic messaging systems and Internet access to conduct business that is reasonably related to official state duties, to include E.-Recruiting and Employee Service.

Employees represent DSHS when using electronic messaging systems and accessing the internet to conduct state business. Employees must use these tools in accordance with Administrative Policy 18.64, Standards of Ethical Conduct for Employees.

Definitions

Pornographic Materials: The explicit representation of the human body or sexual activity with the goal of sexual arousal and/or sexual relief. These materials connote the more direct, blunt, or excessive depiction of sexual acts, with little or no artistic value, and intended for mere entertainment.

Sexually Explicit Materials: Video, photography, creative writing, films, magazines, or other materials intended to primarily arouse sexual desire or cause sexual arousal.

B.3. Prohibited Uses—Employees are prohibited from using state-provided electronic messaging systems and the Internet in any of the following ways:

- d. Employees must not use state provided electronic messaging systems, faxing, scanning, or Internet access to create, access, post, send, or print any pornographic materials unless the material is necessary for the performance of the employee's job-related duties (e.g. when necessary for conducting an investigation). If any such use is necessary for the performance job-related duties, employees must get written permission from the supervisor authorizing such use...

E. Disciplinary Action for Noncompliance

1. Violations of this policy may result in disciplinary action, up to and including dismissal from employment. In addition, there may also be separate actions against an employee for violation of the state's ethics law such as letters of reprimand, fines, civil actions, and criminal prosecution.

2. Pornographic Materials: DSHS has a zero tolerance regarding pornographic material in the workplace. If, after an investigation, it is found that an employee used state resources to create access, post, transmit, print, or store pornographic materials not appropriate for the workplace, the most stringent disciplinary action will be taken.

3. Sexually Explicit Materials: If, after an investigation, it is found that an employee used state resources to create, access, post, transmit, print, or store sexually explicit materials not appropriate for the workplace, appropriate disciplinary action will be taken, up to and including termination from DSHS. The administration's highest-level appointing authority will consult with the Senior Director of DSHS Human Resources to determine the level of disciplinary action taken.

Perez admits the administrative policy refers to a zero tolerance policy, but they nevertheless look at each case on its own. She is not sure whether an individual who had visited just one prohibited site or had minimally visited these types of sites would be discharged.

Tana Martin has been the AC manager at the Rosewood Cottage for approximately 3 years. She reports directly to the Director of Nursing. She has been employed with the state for approximately 28 years. She was the Grievant's direct supervisor for approximately one year. She oversaw all three shifts at the Rosewood Cottage where she conducted evaluations to ensure the proper health care of the clients. Her work schedule was arranged in a manner to be able to cover all three shifts.

Rosewood Cottage is a very unique situation because it has the neediest clients. Their health is always of concern. It is the most nursing intense of all the cottages. The clients are not able to talk or walk and are bedridden. The ACs have to move the clients every two hours to make sure they are clean and provide personal care. ACs at night shifts work independent of each other. If the client is not turned over every two hours it can be noticed because of physical evidence on the client and because of the amount of products used for the client. If a client has

not been changed there will be physical evidence of the lack of care because of actual and visual physical residue indicating lack of care such as redness of the skin on the client.

Martin admits that there was no evidence brought to her attention about the Grievant's work performance or evidence of lack of patient care. She relies on other employees on the various shifts to tell her that other employees are not doing their job. She never received any such report about the Grievant. However, she formed the belief that the clients were being neglected because of the amount of time the Grievant was on the internet based on the WSP report concerning the numerous websites. Martin readily admits that she does not have any knowledge how much actual time the Grievant spent on the internet. She assumed that it was a great amount of time based on the WSP report.

Paul Landsverk, Information Technology Specialist, has been employed at the Lakeland Village since 2000. His job is to set up computers and servers and provide employees access to their e-mails and documents. He monitors that internet connection for each employee is running and also sets up the purse accounts for each employee.

He reviewed the Employer exhibits showing websites that were contained in the Grievant's computer history. He readily admits that his report does not indicate an accurate amount of time spent on these sites. He explains if the Grievant visited one website, when the Grievant moved the tracking mouse from one point to another on the same web page and it passes through a hyperlink, it might register in the individual's browsing history that the website was visited even though the employee did not go to that website. He admits there is no conclusive proof that the Grievant visited all the websites listed in the WSP report.

The Grievant began working on March 19, 1984, for the Employer. Most of his work with the Employer has dealt with taking care of one or more clients. He enjoys the work especially dealing with the clients.

The Grievant admits that he is familiar with the policies dealing with the use of state computers for personal and prohibition to visit pornographic or sexually explicit websites.

The Grievant also admits he visited some of the websites that the Employer pointed out at hearing but visited the websites during his down time at work. He never neglected any of his clients' needs and performed all of his duties.

The Grievant admits that going on the internet was a stupid thing to do. He states that he went to the objectionable websites simply because he was just curious. At his disciplinary interview, he apologized for his behavior and promised not to engage in such conduct in the future.

The Grievant stated that he should have reported himself to the supervisor for visiting the prohibited websites. Since his discharge, he has received counseling and states that he has learned his lesson.

The issue of Grievant's use of the internet was brought up in e-mail from John Gilden who stated that it was common knowledge that the Grievant had visited pornographic websites. The Grievant maintains that only one person did in fact see the Grievant viewing those websites. Gilden's report that it was common knowledge that the Grievant visited objectionable sites came from only one person, and therefore the Grievant denies that his use of the computer for prohibited purposes was common knowledge

ANALYSIS

The parties agree that the central issue in this case is whether the Employer had just cause to discipline the Grievant. Inherent in determining this issue, several well-recognized axioms of legal principles involving the determination of just cause are adopted. In disciplinary matters, it is the burden of the Employer to prove that it had just cause to discipline the employee. In order to establish just cause, many arbitrators have adopted well known, often cited and accepted analysis associated with this issue.

Firstly, Employers are endowed with the right to establish rules and policies under the general management rights provisions of the contract. They are generally within their managerial rights to establish these rules for the purpose of achieving business goals or

promote the health and welfare of the employees. These rules create expectations that employees must abide by in order for continued employment. Thus, the Employer must establish that the disciplined employee violated a well-known rule that was reasonably implemented to achieve the Employer's business goals and safety and welfare of employees.

Once establishing the Employer had such a rule, it must be shown that the disciplined employee was aware of the rule and was also aware that adverse consequences would ensue if the rule was violated. Thus, the groundwork for Employers to manage its workforce through disciplinary process of enforcing reasonable work rules must be established.

If an Employer believes an employee violated a work rule, it is incumbent upon the Employer to provide the employee with inherent due process rights that are incorporated in the just cause provisions of the contract. These due process rights include a fair and open investigation of the allegations against the employee; specificity of the allegations; and an opportunity for the employee to respond to the allegations. Additionally, many arbitrators also find that the timely investigation and disciplinary action by the Employer is also a requirement for due process.

Upon completion of the investigation and deliberation by the Employer of all the evidence, the Employer then has wide latitude of deciding whether or not it has a reasonable basis to conclude that it had just cause to discipline an employee. Normally, the Employer's discretion may not be usurped by arbitrators nor should an arbitrator's own judgment of the degree of punishment be substituted for that of the Employer's.

Other principles of due process and fair play apply in this latter analytical process. An employee's due process rights and the Employer's obligation of fair play also takes into consideration whether or not the Employer acted in a consistent manner in enforcing the rules and in arriving at the degree of discipline. If inconsistencies in either the enforcement of the rules, or the degree of discipline is established, then the Employer may be found to have violated this aspect of the just cause provision. Thus, arbitrators often will be asked to assess whether the punishment fits the nature of the offense in determining whether there was an abuse of managerial discretion in arriving at the degree of discipline.

After carefully reviewing the entire record and the parties' post-hearing briefs, I find that the Employer had just cause to discipline the Grievant. The Grievant admitted to using state computers for personal use to visit objectionable sites.

The substantive issue presented in this case is the whether the punishment satisfies the collective bargaining agreement requirement of the just cause standard of fair play. The Union maintains that the Employer violated the just cause standard because it failed to treat the Grievant in a fair manner. Specifically the Employer failed to consider the contract's progressive discipline process but chose to impose the ultimate disciplinary action of discharge despite the Grievant's long tenure and unblemished work history; citing, *Gutierrez v. DSHS* Case No. R-DISM-07-001 (Personnel Resources Board) as authority that zero tolerance policies do not invalidate the contract's just cause standards.

The Union points out that the Employer does not distinguish the difference between pornographic material and sexually explicit material. It argues that Administrative Policy 15.15 requires the most stringent discipline to be imposed on an employee who has use the state computer to view pornographic material. In the instant case, the Grievant at most is guilty of only viewing sexually explicit material. Therefore under Administrative Policy 15.15, Section E.3, the application of the "most stringent discipline" is not warranted because the evidence did not show that he visited pornographic websites. I agree.

I note that the Administrative Policy 15.15 dictates a zero tolerance policy for employees who violate the policy by viewing pornographic or sexually explicit materials. However, the policy does not state that an employee who violated this policy must be discharged. It only states that the discipline must be the most stringent. If the Employer wish to unequivocally mean discharge when describing the punishment for this violation, it would not have used the words most stringent. Therefore, I find that the Employer did in fact have an option to mete out disciplinary actions less than discharge.

I find the Union has made valid arguments regarding the inconsistent application of discipline of employees who have violated Administrative Policy 15.15 and who have also violated policies about misuse of state resources. Specifically, the Employer issued letters of reprimand when employees misused their work computers for personal use. The level of discipline issued to several employees was a letter of reprimand and depending on the amount

of the individual's misuse, the letter of warning contained harsher words for those who had committed the most offenses. Thus, it is clear that the Employer has treated the prohibited use of resources as a disciplinary action but one which does not merit discharge on its own.

With respect to instances where the Employer found that employees have violated its policies prohibiting viewing pornographic material or sexually explicit material, the evidence also shows an inconsistent application. In a recent situation, several employees were found to have violated the Employer's policy on pornographic materials by viewing a movie containing nudity while at work. The employee's were issued letters of warning for their conduct. The "most stringent discipline" standard was not applied to them even though under the Employer's definition they were in fact watching pornographic material.

I find that the evidence proved that the Grievant visited websites that contained sexually explicit materials, according to the definition of Detective Mauro and the definitions contained in the Administrative Policy 15.15. Based on the Employer's witness testimony and the documents submitted into evidence, the Grievant is guilty of viewing sexually explicit materials and not pornography.

Both pornographic and sexually explicit materials are prohibited. However, the Employer chose to define the Grievant's action as visiting pornographic websites, even though no nudity or sexual acts were contained therein. The employees watching actual nudity on TV would necessarily have to be defined as pornographic material. The Employer applied the most stringent discipline standard on the Grievant which is not supported by the evidence. At the same time, the Employer did not apply the most stringent discipline on employees who in fact were guilty of viewing pornographic materials.

The policy also describes that the process by which to discipline an employee when viewing sexually explicit materials. The appointing authority who initiates discipline must consult with management to determine the level of discipline. When Kilgore and Perez reviewed the material to determine the level of discipline, they were acting in accordance with this procedure. Consequently, the Employer misapplied its definitions when disciplining the Grievant and contrary to its position at hearing, adhered to the process of disciplining employees who had only visited sexually explicit materials, rather than pornographic materials

Based on the above described facts and reasoning, I find that the Employer violated the collective bargaining agreement's progressive disciplinary process in administering its policies against personal use of state resources and viewing pornographic or sexually explicit material.

The Employer's belief that the Grievant had spent an inordinate amount of time and state resources to view sexually explicit material is unsupported by the evidence. The Employer submitted a staggering amount of pages depicting the websites which the Grievant browser's history contained. The Employer's own computer technical expert was unable to determine how much time the Grievant actually spent viewing these materials. Of particular importance, the documentary evidence showed that the Grievant had visited three websites on precisely the same time, down to the second. It was physically impossible for the Grievant to have visited all those websites as admitted to by Employer's expert. The Employer's conclusion that the Grievant spent a great amount of time visiting these websites, to the neglect of patient care, was not established by probative evidence.

In conclusion, I find that the Employer had just cause to discipline the Grievant but it failed to meet the just cause standards of fair play by inconsistently applying its policies prohibiting the viewing of pornographic or sexually explicit materials, and by relying on the assumption that the Grievant spent an a great amount of time visiting prohibited websites at the expense of patient care. This evidence is simply insufficient to establish the latter point.


This arbitrator is reluctant to second-guess an Employer's view of the seriousness of the matter and corresponding degree of discipline. However, when the underlying factors provide for an objective basis to conclude that the Employer's history has shown inconsistent application of its policies or degree of punishment, I find there is sufficient cause to modify the discipline. Accordingly I shall modify the discipline from discharge to a letter of reprimand.

AWARD

The grievance is sustained in part and denied in part. The Employer had just cause to discipline the Grievant for misuse of state resources and violating the Employer's rules regarding pornographic and sexually explicit materials. However, base on the above reasoning, I shall modify the discipline from discharge to a letter of reprimand. The Employer is directed to

reinstate the Grievant to his former position of employment and make him whole for all loss of wages and benefits he may have incurred.

Dated this 2nd day of August 2013.



Eduardo Escamilla
Arbitrator