

**IN ARBITRATION PURSUANT TO THE  
COLLECTIVE BARGAINING AGREEMENT**

In the matter of

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**Washington Federation of State Employees**

and

**Washington State Department of Agriculture  
(Zanol Grievance)**

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**Arbitrator John M. Caraway**  
AAA # 75-20-1400-0089

**Appearances**

**For the Union:**

Christopher John Coker, Esq.  
Younglove & Coker, P.L.L.C.

**For the Employer:**

Ohad Lowy, Esq.  
Assistant Attorney General

**Introduction**

The Grievant was a 23-year employee of the Washington State Department of Agriculture, classified as an Agricultural Inspector 4. In February of 2013, supervisors performed an annual audit of forms submitted by the inspector staff and noticed several with irregularities. The other three inspectors, averaging 20 years of employment, were counseled on correcting their inspecting and reporting procedures. After further investigation and a pre-disciplinary hearing, Mr. Zanol was terminated in September of

2013, for failing to comply with USDA and WSDA inspection requirements and for personal use of his State-issued tablet computer and his State-issued cell phone. The Union grieved, and after exhausting the contractual procedure the matter moved to arbitration. An evidentiary hearing was held in Wenatchee on October 22 and 23, 2014. There were no procedural or substantive objections to proceeding, and the Parties stipulated to my retaining jurisdiction for purposes of implementing the award to be issued. At this hearing the Parties were given full opportunity to present witnesses and other evidence, and they submitted post-hearing briefs on November 9, 2014, at which time the hearing record was closed.

#### The Issue

The Parties stipulated the issue to be, “Did the Department have just cause to terminate Richard Zanol? If not, what is the appropriate remedy?”

#### Position of the Department

Mr. Zanol purposely failed to follow established procedures, which potentially exposed the State to substantial risk to an essential part of its economy. Because he explained that his actions were deliberate and motivated by his disappointment at not having received an expected promotion, the Department can no longer trust him, and termination is its only option. Further, while he was on home assignment, the Department examined Zanol’s State-issued tablet computer and his phone, and found undeniable evidence of extensive personal usage of both devices, and both during working and non-working hours. The egregious nature of his offenses warrant discharge rather than lesser, progressive disciplinary steps.

#### Position of the Union

Mr. Zanol does not deny he made some mistakes, and that he entered bulk amounts of data from separate notes into his tablet computer. However, he contends that his use of the state-issued computer and cell phone was *de minimus*. A broad analysis of the principles of “just cause” will show the Department has not met its burden in this matter, and Mr. Zanol should be reinstated and made whole for his lost wages and benefits.

### Discussion

In their closing briefs the Parties disagreed over whether the Department should have to meet a “clear and convincing” standard of proof, or that of “a preponderance of the evidence.” The Department, not surprisingly, argued that in establishing its case, the preponderance of the evidence should be sufficient, while the Union quoted authority for the position that since Mr. Zanol was a 23-year employee with no prior disciplinary history the Department should be held to the higher *quantum* of proof. While I generally have no problem with using the catchy phrase, “the preponderance of the evidence,” it is self-evident that, without overly defining the exact *quantum* of evidence needed to persuade me that the Department’s actions were appropriate in this matter, I am mindful that Mr. Zanol is a 62 year old man with limited alternative career prospects, and that termination at this time in his career and his life is a much more serious matter than it would be for a short term employee who was a young adult. As for further discussion about exact *quanta* of evidence, I note that I am neither a judge nor a jury, and in this forum the appropriate standard to meet is whatever I finally find to be persuasive. And, of course, the Union has the burden of convincing me that the Department’s measure of discipline was not in accord with principles of just cause or acceptable within the usual parameters of progressive discipline—or that its exception from those principles is not warranted.

As to the specific allegations of misconduct, as noted above, Mr. Zanol does not contest them. He admitted under oath that he made some mistakes and that he did “data dumps,” entering large amounts of data at one time rather than doing so as he went along, and he testified credibly—as was also suggested by Ms. Buckmiller [Tr. p93]—that some mistakes are inevitable when processing large numbers of data sheets, over a long period of time. As to the matter of entering the results of a number of inspections into his computer at one time, I found his explanation that this was more expeditious when confronted with a large workload with no other inspectors to help, and in providing a service to the client, to be convincing. Both Buckmiller and Assistant Director Avey conceded that there was no proof of fraudulent behavior on Zanol’s part, not of falsifying

his paperwork, nor of not actually performing his inspections [ Tr. pp110, 173]. Witness Roche also testified that in her experience as both an Agricultural Inspector 4 and as an Area Supervisor, it was not an uncommon practice for Inspectors to use handwritten notes as they went along, and to enter the information from those notes into their computers at a later time [Tr. pp 88, 89]. Witness Schultze testified to the same thing [Tr Vol 2, p78]. Further, Ms Buckmiller testified that instruction not to do so was not communicated to staff in writing, but was a verbal one [Tr. p94]. I am not persuaded that this meets the just cause requirement that the Department had a clearly communicated policy with concomitant knowledge of the consequences of violating that policy. Although Mr. Avy testified that “at least a couple” of inspectors had been terminated for not following procedures [Tr. P 168], it is clear that those consequences were not in any way uniformly applied.

As to the allegations of inappropriate usage of both the computer and cell phone, the Department’s Information Technology Specialist, Ms Kunz, did not demonstrate that Mr. Zanol spent unusual amounts of time either on his computer or on his cell phone. Given her testimony it is still unclear what the effect of using another search engine had on the Department program, if any, and his cell phone usage was clearly minimal, with at most a few dollars worth of usage that could have been paid to the Department pursuant to its policy. The Union argues, I think correctly, “the best gauge to determine how Zanol did his job are clearly the multiple evaluations in the record and the testimony of the warehouse workers who personally observed Zanol.” The record is clear that his evaluations have been almost uniformly excellent, and the testimony of Witness Schultze was summarized as, “he is one of the top inspectors they have.” [Tr. Vol 2, p80]

The issue of the USDA suspending Mr. Zanol’s certification for one year is similarly dealt with. No only had it happened before several years ago without any loss of employment for him, but the same thing had happened to other inspectors. There is no indication in the record that a one-year suspension would necessarily have an adverse affect on his employment with the Department. Mr. Avy testified that there were other ways around the lack of certification [Tr. p167]. It is essentially a non-issue. What is

apparent is that the real, and underlying issue that was the determinant in the decision to terminate Mr. Zanol's employment was the issue of ongoing trust, as specified by Mr. Avy [Tr pp171, 172].

What seems clear is that this subtext issue was given great focus by the Department—to the point where it was made determinative of Mr. Zanol's continued employment. According to the summary of his meeting with Buckmiller and McDaniel on April 26, 2013 [Exhibit B] he stated at that time that he had been “deeply hurt” at not receiving a promotion. He repeated his remarks on being disappointed when questioned by Mr. Avy in the pre-disciplinary hearing on July 12, 2013. What the Department chose *not* to focus on is the context of Mr. Zanol's comments, nor did the various Management representatives pay any heed to what else he had to say, at least during the initial meeting of April 26. Mr. Zanol testified that he did not say “directly” that he behaved as he had because he was denied a promotion [Tr. Vol 2, p41].

Exhibit B has more than two pages of notes discussing the specifics of Mr. Zanol's errors and procedural lapses. Of his failure to enter samples, he stated, “I realize it's wrong and have gone back to my old way of writing every sample.” He also said, “I will do anything I can to redeem myself.” McDaniel's notes then say, “I asked Tim what he thought he needed to have to get him back on track and what that looks like. Tim said he needs “retraining” and suggested several staff he could work with him [*sic*] to accomplish this.” Further, at one point McDaniel notes, “Tim's eyes welled up, his voice was quaked and his hands were shaking.” This was clearly a man not in complete control of himself.

Rather than focusing only on the notion that Mr. Zanol was somehow retaliating against the Department for not promoting him, the Department could have seen his behavior as evidence of a general mid-life crisis, and Mr. Zanol as simply in need of more hands-on supervision for a time. In fact, McDaniel, Buckmiller and Avy recognized that after being confronted on this occasion, he did, in fact, follow Department protocols as he had done previously [Ex. B, att. 2; Tr. pp 65,82; p171]. In short, if the purpose of progressive discipline is to correct wayward behavior, the initial conference had the desired effect. If

Mr. Avy had chosen to underscore the seriousness with which the subject matter was regarded by the Department by imposing a substantial suspension, for example, the matter might have been concluded at that point, and that may have been a perhaps more appropriate discipline to impose. Instead, it seems the Department actions were driven by over-emphasizing Mr. Zanol's attempts to explain why he had slipped into wrongful work patterns.

In summary, I find the Department has not met its burden of proving that the action it took was in accord with principles of just cause. It could have taken lesser disciplinary action to achieve the goal of modifying Mr. Zanol's behavior as dictated by the conventions of progressive discipline. As for its concern about inspectors being largely in the field and not amenable to direct supervision, the Department had demonstrated it had the tool of auditing inspectors' paperwork, which would—and had—given indications that prescribed procedures were not being followed. Further, I recommend that the Department make efforts to clearly advise its inspector staff as to its expectations and requirements as to methods of correctly performing inspections and inputting data.

#### Decision and Order

To the stipulated question before me, my answer is that the Department did **not** have just cause to terminate Richard Zanol. The appropriate remedy is that he be reinstated and made whole for his loss of pay and benefits, except for a suspension of one month, which the records will show as the sole disciplinary penalty for his failure to observe prescribed protocols in performing his inspections. This order will also exclude any full-time earnings he may have made during the interim. Pursuant to the stipulation of the Parties, I will retain jurisdiction in this matter in case of any disputes arising in the implementation of this award.

/s/ John M. Caraway, Arbitrator

February 24, 2015

