In the Matter of the Arbitration	)	
	)	
between	)	
	)	
WASHINGTON PUBLIC EMPLOYEES ASSOCIATION	)	
(Union or WPEA)	)	OPINION AND AWARD
	)	MICHAEL WILLIAMS
	)	GRIEVANCE
and	)	
WASHINGTON STATE DEPARTMENT OF NATURAL RESOURCES	)	
(Employer or DNR)	)	

BEFORE: Kathryn T. Whalen, Arbitrator

APPEARANCES:

For the Union:

Frank D. Prochaska
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140 Percival Street
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For the Employer:

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HEARING: March 9 & 10, 2022

RECORD CLOSED: April 26, 2022

AWARD ISSUED: May 16, 2022

I. INTRODUCTION

The Union filed a grievance claiming that the Employer violated several provisions of the parties' current Collective Bargaining Agreement (CBA) when it put an allegedly false oral reprimand and investigative report in the personnel file of Michael Williams (Grievant) and denied him overtime opportunities. The Employer denied the grievance. The parties were unable to resolve this dispute and the Union submitted it to arbitration.

The parties agreed to a remote hearing via the Zoom platform provided by Buell Realtime Reporting. That hearing was held on March 9 and 10, 2022. The parties were accorded a full opportunity to present evidence and argument in support of their respective positions. The Employer raised arbitrability issues concerning the Union's grievance. I address those issues below after the factual summary.[1] The parties agreed that if I order a remedy, I will retain jurisdiction for 60 days to resolve disputes, if any, concerning the awarded remedy.

The parties agreed to file post-hearing briefs. I closed the record upon receipt of those briefs.

II. ISSUE

The parties did not agree on a statement of the issues. They agreed I would frame the issues based upon the evidence and their submissions. The Union stated the issues as:

> Did the Department of Natural Resources violate the collective bargaining agreement when it denied Michael Williams assignments with overtime opportunities for which he was qualified as well as when it placed an oral reprimand and investigatory report in his personnel file?

[1] The Employer sought a ruling on arbitrability prior to hearing. I denied the Employer's request. I elected to conduct one entire hearing and to decide the issue of arbitrability first in my written decision. This option is allowed under the parties' CBA. Article 32.2 (D) (2).

And, if so, what is the appropriate remedy?

The Employer offered the following issue statements:

Is the Union's grievance arbitrable?

Based on the contents of the written grievance should the claims of violations of Article 7.3 (A) and (B) and Article 32.4 of the collective bargaining agreement be dismissed?

Did the Employer correctly exercise its management rights as outlined in Article 36 of the collective bargaining agreement?

I determine the issues are:

Is the Union's grievance arbitrable?

If the Union's grievance is arbitrable:

Did the Employer violate the CBA when it placed an oral reprimand and investigatory report in Grievant's personnel file?

Did the Employer violate the CBA when it failed to provide overtime opportunities to Grievant for which he was qualified?

If so, what is an appropriate remedy?

III. CONTRACT PROVISIONS

ARTICLE 7
OVERTIME

7.3 General Provisions

A. The Employer will determine whether work will be performed on regular work time or overtime, the number, the skills and abilities of employees required to perform the work, and the duration of the work. The Employer will first attempt to meet its overtime requirements on a voluntary basis with qualified employees who are on duty. In the event there are not enough employees volunteering to do the work, the supervisor may require employees to work overtime.

B. If an employee was not offered overtime for which they were qualified, the employee will be offered the next available overtime opportunity for which they are qualified. Under no circumstances shall an employee be compensated for overtime that was not worked. There will be no pyramiding overtime.

ARTICLE 28
DISCIPLINE

28.10 The Employer has the authority to impose discipline, which is then subject to the grievance procedure set forth in Article 30. Oral reprimands, however, may be processed only through the Agency Head step of the grievance procedure.

ARTICLE 30
GRIEVANCE PROCEDURE

30.1 Terms and Requirements

A. Grievance Definition
A grievance is an allegation by an employee or group of employees that there has been a violation, misapplication, or misinterpretation of this Agreement, which occurred during the term of this Agreement. The term "grievant" as used in this Article includes the term "grievants."

ARTICLE 32
PERSONNEL RECORDS AND OTHER EMPLOYEE INFORMATION

32.4 Adverse material or information related to alleged misconduct that is determined to be false, and all such information in situations where the employee has been fully exonerated of wrongdoing will be removed from all of the employee's files, except files kept by WSP Office of Professional Standards (OPS). The Employer may retain this information in a legal defense file and will only be used or released when required by regulatory agency (acting in their regulatory capacity), in the defense of an appeal or legal action, or otherwise required by law.

32.6 Immediate supervisors may keep a working file (supervisory file) of documentation relevant to employee performance. The previous year's job performance information will be removed from the supervisor's working file following the completion of the annual performance evaluation, unless circumstances warrant otherwise. Supervisors who keep working files will ensure that they are maintained in a manner that preserves the confidentiality and security of the information consistent with Article 26, Section 26.2.

32.7 Removal of Documents

A. Written Reprimands will be removed from an employee's personnel file or WSP Office of Professional Standards file after three (3) years if:

1. Circumstances do not warrant a longer retention period;
2. There has been no subsequent discipline; and

3. The employee, or Union representative with written authorization from the employee, submits a written request for its removal.

B. Records of disciplinary actions involving reductions-in-pay, reductions in accrued annual leave, suspensions, or demotions, and written reprimands not removed after three (3) years will be removed after six (6) years if:

1. Circumstances do not warrant a longer retention period;
2. There has been no subsequent discipline; and
3. The employee, or a Union representative with written authorization from the employee, submits a written request for its removal.

ARTICLE 36
MANAGEMENT RIGHTS

36.1 The Employer retains all rights of management, which in addition to all powers, duties and rights established by constitutional provision or statute, shall include but not be limited to, the right to:

C. Direct and supervise employees;

F. Develop, enforce, modify or terminate any policy, procedure, manual or work method associated with the operations of the Employer;

M. Determine the need for and the method of scheduling, assigning, authorizing and approving overtime;

ARTICLE 41
COMPENSATION

41.28 Fire Duty Compensation – Department of Natural Resources

A. Compensation for Typical Fire Suppression Duties

Department of Natural Resources (DNR) employees performing fire suppression duties or other emergency duties when they are working under the incident command system will be compensated as follows:

1. While performing emergency work under the incident command system an employee's work is not exempt from the Fair Labor Standards Act. Emergency work performed under the incident command system will be compensated in compliance with federal law and the terms of this Article.

2. For those hours worked under the incident command system, two dollars ($2.00)* is added to an employee's regular rate in lieu of all other forms of additional compensation including, but not limited to call-back, standby, stand down, shift differential, split shift differential, assignment pay and schedule change, and pay for rest periods less than five (5) hours.

> Employees will be paid at one and one-half (1 ½) times the sum of their regular hourly rate plus two dollars ($2.00)* for those hours worked in excess of forty (40) hours in a workweek as a result of wild fire suppression and/or other emergency duties performed under the incident command system. For purposes of this Subsection, the regular hourly rate does not include any allowable exclusion specified in Section 7.1. D of Article 7, Overtime.
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> *Note: If any other labor organization representing DNR employees negotiates the same practice but at an amount greater than two dollars ($2.00), then this amount will be increased to equal the greater amount.

Union Exhibit 1 (U-1); Employer Exhibit 1 (E-1).

IV. FACTUAL SUMMARY

A. Grievant

Grievant has been employed by DNR for 30 years. He holds the position of Natural Resource Specialist 3 (NRS 3). In that job, he manages recreation in 14 counties in eastern Washington encompassing approximately 800,000 acres. His responsibilities include such things as seeking out and applying for construction grants, and managing those grants and their staff. He further manages volunteer groups, campgrounds, trailheads and trails; and trains and supervises staff.

In addition to his regular position, for 37 fire seasons Grievant has served as a wildland firefighter for DNR. Grievant started that work in 1985 when he was 17 years old. He worked up through the ranks and held various positions: strike team leader, task force leader, heavy equipment boss, crew boss for the fire line explosives crew, wildland fire investigator, and single-engine airtanker (SEAT) base manager. At the time this dispute arose, Grievant was a SEAT base manager. In that capacity he managed contracted aircraft and staff.

In order to hold the above positions in wildland fire, Grievant had to be qualified and certified. Certification is based upon the standards of the Northwest Coordination Group (NWCG), specifically NWCG 310-1. Grievant began as a trainee and had to complete classes and trainee assignments with a qualified trainer. He then was certified to hold a red card, which is the qualification card. At all times relevant, Grievant has held that red card. U-13.

Amanda Hacker is the Union's Contract Administration Director. Formerly, she was a staff representative for the Union. According to Hacker, wildland firefighting at DNR is important to the Union's bargaining unit as a lot of members cannot afford to work for DNR without participating in wildland firefighting.

Wildfire response is voluntary and typically subject to approval of an employee's chain of command. Hacker described that when Union members are dispatched for a fire under the incident command system they are out for extended period of time, often 14 to 21 days. They work 14 to 16 hours a day.

Hacker explained that members use wildland fire fighting to make up for a lack of prevailing wage in their year-around day job, as they get paid overtime (time and a half) for work over 40 hours in a week. Even if an employee is FLSA exempt in their normal job, for emergency fire work performed under incident command they are not exempt and receive overtime.

Grievant's NSR 3 position is an overtime exempt position. In his capacity as a wildland firefighter, however, he routinely has received a fire duty overtime premium for all hours worked in excess of 40 hours; that is time and one-half the base of his regular

pay. There is a $2.00 premium for standard hours and $3.00 for any hours of overtime. Ryan Cloud; U-6.

B. Oral Reprimand

In July of 2020, Grievant was working at the SEAT base in Omak, Washington. A staff person walked in and advised Grievant that he needed to talk to him outside. At the time, Grievant did not know him. He found out later the person was Miguel Marlowe, the new fixed-wing aircraft coordinator.

Marlowe told Grievant that he needed to pack up his stuff and leave immediately. When Grievant asked what this was about, Marlowe told him that he would find out later. According to Grievant, Marlowe began yelling for him to leave now and said that Grievant would not be working any more DNR bases ever again; that he was done.[2] Grievant grabbed his belongings, loaded his truck and left.

Days later, Southeast Region Manager Todd Welker notified Grievant by telephone that he was under investigation. Grievant contacted the Union to advise them of the matter. By letter date July 21, 2020, Welker formally notified Grievant of the investigation and that he was no longer on fire assignment.[3] U-5. A trainee at Omak had alleged inappropriate treatment (harassment) by Grievant. U-4. The Employer assigned employee Helen Harpel to conduct an investigation. [4]

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[2] Marlowe did not testify in these proceedings. He is no longer with DNR. The Employer objected to Grievant's testimony about Marlowe's statements on hearsay grounds. I admitted Grievant's testimony. Division Manager Russ Lane also testified about Marlowe's alleged statements. The Union objected to Lane's testimony on hearsay grounds. I admitted that testimony, too. To the extent necessary, this testimony will be addressed later in my decision.

[3] Grievant's regular duties as NRS 3 were not changed. Tr. 74.

[4] Grievant had concerns with Harpel as the assigned investigator. Harpel had been the investigator in a different investigation years earlier that concerned an accident at a recreation site. During the course of that investigation, Grievant was asked to forward certain insurance documents for review. Grievant was unable to find the requested documents. He then became a subject of investigation for not having proper documents. He received a letter in his file over it. Grievant, doing his own investigation, discovered that

Grievant did not hear anything further about the investigation for several months. After inquiries from Grievant and the Union about the status of the investigation, Harpel interviewed Grievant in early January, 2021. She issued her investigative report on February 21, 2021.

On March 24, 2021, Welker issued Grievant an oral reprimand for violation of DNR's Harassment Prevention Policy and certain core competencies. The oral reprimand indicated Grievant had treated the trainee inappropriately; shown a lack of respect; and failed to maintain professional boundaries.

Grievant was directed to take two classes (harassment/respect in the workplace), which he did. One, or possibly both, he had already taken but he took both of them again.

Grievant does not feel he treated the trainee any differently than he treated others or different from the way he, himself, had been treated at SEAT bases. Grievant and the Union, however, did not grieve the merits of the oral reprimand under the CBA's discipline article.

Welker made the decision to issue the oral reprimand to Grievant after consulting with HR. Welker explained that there were a lot of accusations in the investigative report; some witnesses corroborated one side of the story and others corroborated the other side of the story and some were not corroborated. Welker did not believe that Grievant did everything he was accused of, but concluded there were some things that Grievant could have done differently. Welker laid out such things in the oral reprimand.

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he was not the person that issued the land-use license in the first place and he had nothing to do with insurance for the site; it was another person. As a result, the Employer (after a grievance) removed the letter from his file.

HR made the decision that the oral reprimand would be placed in Grievant's personnel file. Welker understood it was placed there in case there was a need for progressive discipline.

C. This Dispute

Grievant's normal base salary as a NRS 3 is about $70,000 a year. Recently, for the two years he worked full-time at SEAT bases, he was paid just over $89,000. He also received $2,000 to $4,000 per diem for expenses while on wildland fires.

Grievant explained that after he completed the two courses required of him, he notified management that he had done so. On April 22, 2021, Welker, in an email, informed Grievant that he was "good to go" for working fires. Tr. 165; U-9.

Since the oral reprimand, however, Grievant has not been called to work a SEAT base manager assignment, despite the availability of that work. Grievant provided examples of SEAT assignments that were offered to others rather than him. U-11. He also submitted an August 2021 email communication from Marlowe seeking help for a last-minute opening for a SEAT manager. Grievant was omitted from the email distribution list. U-12.

Welker confirmed that the restrictions on Grievant for fire assignments were lifted after he completed the required classes. Welker reported that when he informed Grievant that he was "good to go" for fire assignments, he also informed Wildfire Division Manager Chuck Turley. According to Welker, he told Turley to include Grievant on any processes for setting up assignments at the seat base. Tr. 264.

At hearing, when asked if he had any knowledge why, to date, Grievant still had not been assigned as a SEAT base manager, Welker said "No." Gr. 272.

Hacker inherited Grievant's case from another Union staff representative, Stacie Leanos, after the oral reprimand was issued. Hacker filed the instant grievance.

The grievance alleges that DNR violated specific articles of the CBA: overtime [Article 7 (3) (A) (B], personnel records [Article 32, Section 4], and management rights [Article 36 (1) (C) (F) (M)]. U-2; E-2.

The grievance describes the alleged violations as ongoing. As a remedy, the grievance requests the removal of inaccurate and false information from Grievant's personnel file; lost wages and benefits; an order to cease and desist; and that Grievant not suffer retaliation for participating in the grievance process. U-2; E-2.

At hearing, Hacker explained that the Union cited the overtime article in its grievance because it believed that Grievant was denied overtime for which he was qualified. The Union also cited the management rights clause. It did so because although management has the right to do the things listed in that article, it must do so fairly and equitably. The Union believed that management's actions were arbitrary and capricious in this case.

Hacker further explained that Article 32 (Personnel Records) was cited because management informed the Union that the oral reprimand and attached investigated report were going into Grievant's personnel file. The Union was concerned about the accuracy of the investigative report; and with the oral reprimand being placed in the personnel file. According to Hacker, oral reprimands go into the supervisory file and then are purged after a year, unless there is an ongoing concern and then it is retained for two years.

Hacker acknowledged that oral reprimand retention is not explicitly mentioned in the CBA, but said that there are explicit contractual retention standards for other

discipline, for example, written reprimands. As described by Hacker, the Union believes it does not make sense to have higher level discipline purged after an explicit amount of time, but not an oral reprimand.

During the processing of the grievance, Hacker told management that the Union was not grieving the merits of the oral reprimand because it did not care about it and believed it would be purged from the file soon.

The Employer denied the Union's grievance at each step of the grievance process. With respect to Article 7, Overtime, DNR responded that Grievant's position is overtime exempt and so that article does not apply to him.

With respect to Article 32, DNR countered: the investigation of Grievant showed misconduct and an oral reprimand was appropriate discipline; and the Union's belief that the investigation did not show misconduct does not equate to the allegations being false or to Grievant being exonerated. According to the Employer, it was appropriate to put the oral reprimand in Grievant's personnel file. DNR also concluded that it fairly and equitably exercised its management rights. E-3 to E-5.

At hearing, Division Manager Russ Lane addressed the evidence that Grievant was not on the distribution list for an August 21 SEAT assignment. Lane reported that when he asked Marlowe about it, Marlowe advised that it was an oversight because he (Marlowe) did not have Grievant on his normal distribution list for that season because Grievant had been unavailable. Tr. 240. Lane denied that there was any effort by DNR to prohibit Grievant from receiving another SEAT-based assignment.

Lane described that the schedule for SEAT bases is pre-populated in the early spring so that they know the staffing schedule throughout the summer. According to

Lane, because Grievant was not available when the 2021 schedule was pre-populated, he was not on the distribution list. Lane was told by Marlowe it was by oversight that he had not been added back to it.

V. ARBITRABILITY

1. Oral Reprimand

Parties' Positions

The Employer argues that the instant grievance is not arbitrable because Article 28.10 does not permit the oral reprimand to be subject to arbitration, either on its merits or with respect to its inclusion in Grievant's personnel file. DNR contends that WPEA has attempted to circumvent the CBA's clear prohibition on grieving oral reprimands to arbitration by casting this grievance as a challenge under Article 32.4. According to the Employer, permitting an oral reprimand grievance to proceed to arbitration under these circumstances would allow WPEA to obtain something it did not obtain through bargaining.[5]

The Union counters that it did not grieve the merits of the oral reprimand and made that clear to the Employer in the grievance process. At hearing, the Union presented a stipulation that its alleged violation of Article 32. 4 concerns: the accuracy of things placed into a personnel file and is limited to the name of the Union representative and date of the investigative interview; and that the oral reprimand should have been placed in the

[5] The Union argues that Article 28.10 is an illegal subject of bargaining under Washington law which requires a dispute resolution process ending in final and binding arbitration for all disputes arising out of the contract. The Employer counters that pursuant to Washington precedent, grievance procedures are mandatory subjects of bargaining and here the parties placed a limitation for processing of oral reprimands. I do not address this argument about the legality of Article 28.10 because it is neither appropriate nor necessary that I do so.

supervisory file and not the personnel file. Tr. 214, 215. The Employer accepted that stipulation.

Analysis and Ruling

There is a well-established presumption in favor of arbitrability. That is, a grievance is arbitrable unless it "may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." Elkouri & Elkouri, *How Arbitration Works,* 6-7 (7th Ed. 2012) citing *Steelworkers v. Warrior Gulf Navigation Co.*, 363 U.S. 574 (1960).

According to Article 30.1(A) of the parties' CBA, a grievance is defined as "an allegation by an employee or group of employees that there has been a violation, misapplication, or misinterpretation of this Agreement, which occurred during the term of this Agreement." Such disputes ultimately may be submitted to arbitration if not resolved in the prior steps of the grievance procedure.

On its face, the Union's grievance does not allege a violation of Article 28, Discipline. Rather, the Union's challenge to the oral reprimand is pursuant to Article 32.4, Personnel Records. As such, the Union's grievance falls within the definition of a grievance and the arbitration clause is susceptible to an interpretation which covers it.

Further, at hearing, the Union presented the above stipulation to clarify that its challenge to the oral reprimand is not to the merits of it as discipline; rather it is limited as set forth above and solely pursuant to Article 32.4.

As a result, the Employer's arguments about circumvention of the CBA do not overcome the presumption in favor of arbitrability. I will address the issue of the oral reprimand consistent with Union's stipulation.

2. Overtime

Parties' Positions

The Employer also challenges the arbitrability of the Union's overtime claim. DNR claims that the issue of pay for overtime assignments is not properly before me because Grievant's position as an NRS 3 is an overtime exempt position. As a result, Grievant is not an overtime eligible employee and Article 7 is inapplicable.

According to the Employer, the Union did not cite on its grievance either Article 20 or Article 41.28 which concern wildfire suppression and fire pay; nor does the grievance mention fire pay. It is those provisions, argues the Employer, which govern fire suppression assignments and compensation; and WPEA's position conflicts with the plain language of those contract articles.

The Employer further argues that the Union's "fire pay" grievance is untimely regardless of which article is applied. According to the Employer, under the parties' CBA a grievance must be filed within 30 days of the occurrence giving rise to the grievance or the date the Grievant knew or should have known of the occurrence, whichever is later. DNR contends the record shows that Grievant knew that he would miss fire opportunities as early as July 21, 2020 when he received his alternate assignment letter. The Union's grievance was filed on April 22, 2021 and so it is untimely.

The Union contends that the Employer's attempt to direct my attention to Article 41.28 instead of Article 7 is an attempt to confuse the issue. The Union argues that it appropriately cited Article 7 on its grievance because that is the overtime article which applies to these circumstances. According to the Union, Article 41.28 dictates the way the Employer is to pay employees to perform wildland fire work and it is not the article that

DNR violated here. In this instance Grievant was not assigned wildland fire work at all. He was not paid under Article 41.28, so nothing in that article was violated.

Similarly, the Union responds that it found no violations of Article 20 (Wildfire Suppression and Other Emergency Duty) so it did not cite that contract article on its grievance. Article 20 did not apply to the situation.

The Union acknowledges that Grievant's regular NRS 3 job duties are not overtime eligible. The Union contends, however, that the plain language of Article 41.28, federal and state law, and longstanding past practice all show that wildland fire work is overtime eligible. And, argues the Union, overtime is governed here by Article 7.

With respect to DNR's claim that the grievance is untimely, the Union responds that there were continuing violations for each instance in which the Employer failed to offer overtime work. The Union offers that its grievance filing only covers violations from March 21, 2021 forward, consistent with CBA time lines.

Analysis and Ruling

As set forth before, there is a presumption in favor of arbitrability. Here, the parties' CBA defines a grievance as an alleged violation, misapplication or misinterpretation of the Agreement which occurred during its term. On its face, the Union's grievance squarely falls within that definition. It alleges violation of specific sections of the parties' CBA, including sections of the overtime article. It also specifically requests lost wages and benefits as a remedy.

The substantive arguments raised by the Employer concern the interpretation and application of Article 7 and other sections of the CBA as applied to Grievant and the situation at hand. As such, these arguments do not overcome the presumption in favor

of arbitrability. Rather, such arguments are appropriately addressed in the context of evaluating the merits of the Union's alleged contract violations, and as necessary, issues of remedy.

With respect to DNR's timeliness claim, I find the grievance is timely for alleged overtime violations that occurred within applicable time lines of the grievance procedure. I agree with the Union that the circumstances here allow for allegations of a continuing violation.

I conclude the Union's overtime claims are arbitrable.

VI. MERITS

The basic goal of contract interpretation is to determine its meaning in light of all relevant circumstances and to give effect to the intent of the parties as expressed in the written contract. *See generally* Elkouri & Elkouri, *How Arbitration Works*, 9-5 to 9-8 (7th Ed. 2012). The Union carries the burden of proving a contract violation by a preponderance of the evidence.

A. Personnel Records

1. Parties' Positions

Union

The Union claims that the Company violated Article 32.4 because the Employer put the oral reprimand in Grievant's personnel file. According to the Union, it should have been placed in the supervisory file and then removed after a year, on the date of Grievant's annual evaluation. WPEA emphasizes that Hacker's testimony about this matter was unrebutted by Employer witnesses and her testimony demonstrated a longstanding and bona fide practice.

The Union also argues that the provisions of record retention in Article 32 make no mention of oral reprimands because they are to be placed in the supervisory file. It makes no sense, argues the Union, that the parties would adopt strict retention standards for higher levels of discipline in personnel files and yet have no meeting of the minds on oral reprimands which is the lowest possible disciplinary level.

The Union further claims that Article 32.4 provides that false information is not to be placed in personnel files. The Union contends that the most blatant example of false information in the investigative report (attached to the oral reprimand) is that the investigator did not record the name of the Union representative correctly in the investigative interview. Had the Employer put the oral reprimand in the supervisory file and purged it at Grievant's next performance review, this Article would not have been cited on the grievance.

Employer

The Employer claims that contrary to WPEA's assertions, there is nothing in the parties' contract that either directs that oral reprimands be placed in the supervisory file or prohibits them from being placed in the personnel file. The CBA, in Article 28.4, allows documentation to be maintained in a personnel file or supervisory file to establish a history of progressive discipline. According to the Employer, based on Article 28.4 together with the absence of other language, it is logical that Grievant's discipline would be placed in his personnel file for reference in the event future discipline is warranted.

2. Analysis

As the Employer points out, there is no language that specifically addresses the removal of oral reprimand or investigative reports from the personnel file. The Union

acknowledges that Article 32 does not speak directly to the retention/removal of oral reprimands.

Rather, the Union claims that there is a past practice of placing oral reprimands in the supervisory file and removing them after a year, at the time of an employee's annual evaluation.

Strong evidence is required to establish a binding past practice absent contract language. The evidence must show that the practice is clear, consistent and accepted by both parties (mutuality). Sporadic occurrences do not establish a binding past practice; rather, the practice must occur over a reasonable period of time. Elkouri & Elkouri at 12-4, 12-5.

The only evidence about practice is from Hacker. Her testimony was as follows:

> Q. What is your understanding of the record retention standards for oral reprimands?
>
> A. So they go into the supervisory file and then are purged out within a year. It depends on when the employee's evaluation period is and how that runs, but, essentially, the entire supervisory file gets purged unless there's some ongoing concern and then they may keep it for, you know, another year, but that would be documented if there was an ongoing concern.
>
> Q. Okay. Is the record retention standard for the oral reprimand explicitly listed in the contract somewhere?
>
> A. No.
>
> Q. Are there explicit record retention standards for other levels of discipline in the contract?
>
> A. Yes.
>
> Q. So, what is it for a written reprimand, for example?
>
> A. Do you want to test my memory? I believe it is three years for a written reprimand.

Q. But it is listed in the CBA?

A. Yes, in the personnel file article.

Q. Would it make sense to you, Amanda, that a written reprimand or a higher-level discipline would explicitly be purged from a personnel file, but if an oral reprimand was put in a personnel file instead of a supervisory file it could last forever?

A. No.
Transcript (Tr.) 65, 66.

There is no specific evidence that shows the frequency of oral reprimands and which establishes their retention/removal with clarity and consistency over a reasonable period of time. The above general testimony from Hacker about her understanding is insufficient to meet the elements of a binding past practice.

The Union argues that it is illogical that the parties would adopt strict standards for higher level discipline in personnel files but have no meeting of minds on oral reprimands, the lowest possible discipline. According to the Union, by implication from the language of Article 32.6 and Article 32.7, the contract should be interpreted consistent with its position.

As mentioned above, Article 32.7 does not mention oral reprimands at all. Article 32.6 addresses removal of job performance information from supervisory files. Job performance issues, however, are not necessarily the same as employee misconduct; the latter of which is the subject of Grievant's oral reprimand. In addition, Article 32.6 includes a broad caveat to removal of information; namely, "unless circumstances warrant otherwise."

Further, as the Employer argues, Article 28.4 specifically allows documentation to be maintained in a personnel file or supervisory file to establish a history of progressive discipline.

As explained above, the parties' CBA provides exceptions to removal of documents from employee files in both Article 32.6 and in Article 28.4. Grievant's oral reprimand was discipline for misconduct, albeit the lowest level of discipline. Under these circumstances, the Union has not convinced me that its interpretation of the CBA is more plausible than the Employer's interpretation.

The Union further claims that Article 32.4 provides that false information is not to be placed in personnel files. According to the Union, the investigator here did not record the name of the Union representative correctly in the investigative report that is attached to the oral reprimand. The Union claims that this is a blatant example of false information.

The mistake in Union representative is not a substantive error in information pertaining to the investigation. I also am not convinced that such a mistake falls within the gamut of "false" information. Further, there was no demonstrable harm to Grievant from such an inaccuracy. As a result, I am not persuaded that this error establishes a violation of Article 32.4.

For all the above reasons, I find the evidence is insufficient to establish the Employer violated Article 32.4.

In addition to the above arguments, the Union lodges complaints about delays in the interview of Grievant and completion of the investigatory report. The Union also contends that Harpel was biased because of her involvement and errors in a prior

investigation of Grievant. According to the Union, DNR has not exercised its management rights in a fair and equitable manner.

With respect to alleged bias of Harpel, the evidence fails to show that Harpel's prior investigation was a factor, or influenced, her investigation/report concerning the oral reprimand here at issue. The fact that she conducted a prior investigation in which an error was made is insufficient, in itself, to establish bias or that the investigative report was false. In addition, Union argument and evidence about the Employer's delay in the investigative process is too little, and it is too late.

B. <u>Overtime</u>

Applicability of Article 7

The Employer claims that no relief can be provided to Grievant because Article 7 is not applicable to Grievant since his position (NRS 3) is not overtime eligible. The Employer contends that Article 20 and Article 41.28 govern fire suppression assignments and compensation – not Article 7.

The Union acknowledges that for purposes of his normal day job (NRS 3), Grievant performs FLSA-exempt work. The Union contends, however, that for wildland firefighting duties, Grievant is not overtime exempt. According to the Union, overtime exempt/eligible status is tied to work performed. The Union relies upon the language of Article 41.28 in conjunction with Article 7 for its responsive argument to the Employer's FLSA-exempt claim. The Union also emphasizes that DNR has paid Grievant overtime pay for his wildland firefighting duties routinely, to the tune of thousands of dollars a year.

Article 41.28 provides:

> **Fire Duty Compensation – Department of Natural Resources**
>
> A. Compensation for Typical Fire Suppression Duties
> Department of Natural Resources (DNR) employees performing fire suppression duties or other emergency duties when they are working under the incident command system will be compensated as follows:
>
> 1. While performing emergency work under the incident command system an employee's work is not exempt from the Fair Labor Standards Act. Emergency work performed under the incident command system will be compensated in compliance with federal law and the terms of this Article.
>
> 2.For those hours worked under the incident command system, two dollars ($2.00)*is added to an employee's regular rate in lieu of all other forms of additional compensation including, but not limited to call-back, standby, stand down, shift differential, split shift differential, assignment pay and schedule change, and pay for rest periods less than five (5) hours.
>
> Employees will be paid at one and one-half (1 ½) times the sum of their regular hourly rate plus two dollars ($2.00)* for those hours worked in excess of forty (40) hours in a workweek as a result of wild fire suppression and/or other emergency duties performed under the incident command system. For purposes of this Subsection, the regular hourly rate does not include any allowable exclusion specified in Section 7.1. D of Article 7, Overtime.

The above language applies to fire duty compensation for DNR employees when they are performing such duties under the incident command system. Article 41.28(A)(1) explicitly states that while performing such emergency work the employee's work is not exempt under the FLSA. That provision further details the compensation that will be received by employees while performing such work, including overtime for hours in excess of 40 hours in a workweek.

I agree with the Union that the contract language is plain: Grievant is entitled to overtime when he is engaged in fire duty work as defined in Article 48 and when such

work exceeds 40 hours in a workweek. Grievant credibly testified about his consistent receipt of overtime compensation in the past for such work. That evidence further buttresses this interpretation of the parties' CBA.

The Employer also relies on Article 20 for its claim that Article 7 does not apply here. According to the Employer, provisions of Article 20 directly conflict with the Union's position concerning Article 7.

The Union responds that it did not mention Article 20 in its grievance because it found no Employer violations of Article 20 and it had no obligation to cite it.

Article 20 is entitled Wildfire Suppression and Other Emergency Duty. By its terms, it applies to all DNR employees who perform such duties under the incident command system. As such, it applies to Grievant when he is engaged in those duties.

The Employer relies specifically on Article 20.2 which concerns work schedules. According to that section, while the fire season is in effect, wildfire suppression employees may be assigned to schedules other than Monday through Friday and 8:00 a.m. to 4:30 p.m. Also, Article 20.2 provides that fire season schedules shall provide for equitable rotation if requested by a majority of the affected employees.

The Union relies upon Section 7.3 (B) here. That section addresses the particular situation when a qualified employee is bypassed for overtime and as a result, is to be offered the next available overtime opportunity. In essence, this specific overtime language ensures equitable distribution of work in connection with overtime. I find nothing in the general language of Article 20.2 that directly conflicts with Article 7.3 (B).

Further, I note that there is no evidence that a majority of affected employees have requested fire season schedules that would conflict with the overtime provisions of Article

7. In this instance, Article 7, Article 20 and Article 41.28 may, and should be, read together and harmoniously.

For the foregoing reasons, I reject the Employer's claims that Article 20 and Article 41.28 govern this dispute rather than Article 7.

Application of Article 7

The Union claims that DNR wrongfully denied Grievant overtime opportunities in violation of Article 7.3 (B). This claim goes to the heart of the dispute.

The Union acknowledges that DNR has the right to determine if overtime work will be performed. According to the Union, however, management may not assign or fail to assign overtime work in an arbitrary, capricious, or discriminatory manner. In this instance, the Union claims management has violated Article 7.3 (B) because Grievant was not offered available overtime for which he was qualified consistent with the language of that provision.

The Employer counters that Grievant is not entitled overtime because its management rights include the right to determine the need for and method of scheduling authorizing and approving overtime. Similarly, argues DNR, Article 7.3 (A) provides that DNR is responsible for determining whether work will be performed on regular work time or overtime; as well as the number, skills and the abilities required to perform that work and its duration.

There is no dispute that although Grievant was and is qualified for firefighting duties, he has not been assigned to SEAT-based work since he was removed from those duties and since he was cleared to return to those duties in April of 2021.

The evidence clearly established, that SEAT-based assignments - like those worked by Grievant for years - were available and filled by others after Grievant was cleared to return to such work. Tr. 169 – 172; U-11, U-12.

On April 22, 2021, the Union filed the instant grievance about the issue. Grievant further notified management of overtime opportunities which he was denied in early July. Then, in August 2021, there was a last-minute opening in Omak. Marlowe sent an email seeking someone to fill it but left Grievant off the distribution list. U-12.

I agree with the Union and I am convinced by the above evidence that DNR violated Article 7.3 (B). Grievant was qualified to work overtime in 2021 and was not offered that opportunity. The Union and Grievant notified management of the problem, but it was not corrected. U-11. He was not provided with the next available overtime opportunity.

I am not persuaded by Employer arguments that the general language of the management rights clause and Article 7.3 (A) allow it to determine the method for scheduling overtime. Article 7.3 (B) contains specific language that controls over these more general provisions. Elkouri & Elkouri at 9-41.

There is debate about why Grievant was not offered overtime opportunities. As mentioned before, according to Grievant, Marlowe told him that he would not be working at any more DNR bases – that he was done. According to management, Marlowe denied making such a statement and said that even if he did, he did not have the authority to do such a thing.[6]

[6] This reported denial from Marlowe does not inspire confidence. It was qualified and appeared to be an attempt to hedge one's bets. In addition, as the Union noted, Marlowe did, in fact, deprive Grievant of an August overtime opportunity by omitting him from the email distribution list.

There was objection from both parties, respectively, on hearsay grounds to Marlowe's comments. I admitted testimony about his comments from each party over the other party's objections. I considered this evidence in evaluating the totality of the circumstances, but it was not determinative to the outcome.

Regardless of whether Marlowe's actions were deliberate or an oversight, Grievant should have been offered overtime or the next available opportunity to work overtime. Management knew that Grievant was not receiving available fire opportunities. DNR should have taken action to promptly correct the problem in order to avoid a contract violation of Article 7.3 (B).

DNR's continued failure to fully address these overtime problems is disturbing. At hearing, when Welker was asked if he had any knowledge why, to date, why Grievant still had not been assigned to a SEAT base manager assignment in wildfire, Welker said "No." Tr. 272.

DNR's continued failure to act under these circumstances is unreasonable and inconsistent with the express language of Article 7.3 (B).

DNR points out that after Grievant was released for SEAT assignments on or about April 22, 2021, the SEAT-based schedule for the 2021 fire season had already been developed.[7] The Employer argues Grievant was not prevented from pursuing the many other types of fire assignments, and in fact, received at least one as investigator.

[7] The Employer also argued that Grievant was properly limited from fire assignments while under investigation. The Union is not pursuing relief for the time period that Grievant was under investigation. Rather, as made clear in its post-hearing brief, it seeks to hold DNR accountable consistent with time lines of the grievance procedure and for the 2021 fire season. As a result, I do not address to what extent, if any, the Employer violated Article 7.3 (B) for the period prior to the grievance. It is neither necessary nor appropriate that I address that time period.

According to DNR, the fact that Grievant did not receive his preferred assignment at a SEAT base does not equate to a denial of overtime opportunities.

I am not convinced by this argument. The language of Article 7.3. (B) places an explicit obligation on the Employer to offer employees overtime for which they were qualified. If any employee is not offered such overtime, they must be offered the next available overtime opportunity.

The fact that a SEAT schedule already had been developed for the 2021 does not excuse the Employer from its contract obligation. As explained above, the Union and Grievant notified the Employer well in advance of scheduled assignments for the summer of 2021. The Employer could have modified the schedule and/or taken affirmative action to correct the problem, but it did not.

Management Rights

The Union contends that in numerous ways the Employer has failed exercise its management rights to staff and assign in a fair, reasonable and equitable manner.

I have considered all of the Union's arguments in connection with this claim. Many of those arguments overlap with similar arguments made in connection with Article 7. Article 7.3 (B) most directly governs the claims made by the Union and I have determined that the Employer violated that article. As a result, I find it unnecessary to resolve the Union's related management rights claims.

To the extent the Union's arguments do not coincide with those it made under Article 7, I also do not address them. For example, the Union contends conduct of Employer counsel leading up to and during this proceeding violated the management

rights clause. It is neither necessary nor appropriate for me address this argument in connection with the issues presented here.

VII. REMEDY AND CONCLUSION

For the foregoing reasons, I conclude the Union's grievance is arbitrable. The Employer did not violate the CBA when it placed an oral reprimand and investigatory report in Grievant's personnel file. The Employer did violate the CBA when it failed to provide overtime opportunities to Grievant for which he was qualified. The Union's grievance is sustained in part and denied in part.

Parties' Positions

As a remedy for the overtime violation, Grievant requests a cease-and-desist order as well as make whole relief. According to the Union, make whole relief should be for earnings lost due to the contract violation for the whole of the 2021 fire season. The Union acknowledges that this could be difficult because the variability of fire seasons and staffing levels.

The Union relies upon Grievant's testimony and pay stubs submitted for Grievant for recent years. Exhibit 14, 15. The Union argues that 2019 should be utilized for make-whole calculations because it is the last year he worked a full fire season due to his removal in 2020.

According to WPEA, a reasonable make whole remedy should take into account hours worked by Grievant in the 2019 fire season, and then be paid for those hours for the 2021 season at the then current NSR 3 pay rates. The limited amount Grievant earned on wildland fire assignments in 2021 should be subtracted from this amount.

The Union also argues that a reasonable amount for per diem meal

reimbursements should be awarded to Grievant because per diem would have been paid to him.

The Employer argues that if I address the issue of remedy, the appropriate compensatory relief should be limited to compensation for actual opportunities lost. According to the Employer, the Union's evidence indicates that he lost approximately $20,000 to 25,000 in 2020 and 2021. DNR argues, however, that given the unpredictable nature of fire duty, it is completely speculative that Grievant would have earned that much in fire pay.

The Employer further argues that per diem travel payments are not income and should not be awarded because Grievant did not travel and incur travel expenses.

Findings

I find it neither necessary nor appropriate to issue a cease-and-desist order based upon the nature and scope of these proceedings.

Having determined that the Employer committed a contract violation, pursuant to the Article 30.2 (D) (1) (d) of the CBA, it is appropriate to award make-whole monetary relief to place Grievant in the position he would have been had there been no violation. *Also see*: Elkouri & Elkouri, 18-16. Here, the time period for which relief is appropriate and owed is the 2021 fire season since Grievant was continually deprived of overtime opportunities.

Grievant testified about his earnings history in addition to providing example pay stubs. He reported that his typical base salary is around $70,000. For the two years he was full-time at SEAT bases, he reported typical earnings of $89,000 and change. Tr. 173. I credit Grievant's testimony and the supporting evidence that was submitted by

him.

The parties are in the best position to determine the amount owed to Grievant in order to make him whole. Rather than relying on one year, I find that available information for the fire seasons of 2019, 2020 and 2021 in particular should be used to determine the amount owed to Grievant for 2021. For the remainder of 2020 and for 2021, there should be - at the least- available information about the duration of the fire season and actual SEAT base manager assignments that were available.

I will order the parties to meet immediately following this award to determine the amount owed to Grievant. If they are unable to reach agreement, I will retain jurisdiction for 60 days (as agreed) to decide any disputes about the amount owed to Grievant.

In arriving at the amount owed, amounts Grievant earned in 2021 while on wildland assignments should be subtracted from the amount owed. I am not convinced that that amounts for per diem meal expenses are appropriate. I will not order them.

Pursuant to Article 30.2 (E) (1) of the CBA, I will order the parties to share equally my fees and expenses.

In arriving at my decision, I have carefully reviewed all testimonial and documentary evidence. Even if not mentioned, I have considered all of the facts, arguments and authorities submitted by the parties. I have focused my opinion on matters that I believe needed to be addressed and those which were crucial to my decision.

In the Matter of the Arbitration	)	
	)	
between	)	
	)	
WASHINGTON PUBLIC EMPLOYEES	)	
ASSOCIATION	)	
(Union or WPEA)	)	AWARD
	)	MICHAEL WILLIAMS
	)	GRIEVANCE
and	)	
WASHINGTON STATE DEPARTMENT	)	
OF NATURAL RESOURCES	)	
(Employer or DNR)	)	

Having carefully considered all evidence and arguments submitted by the parties, I conclude that:

1. The Union's grievance is arbitrable.

2. The Employer did not violate the CBA when it placed an oral reprimand and attached investigatory report in Grievant's personnel file.

3. The Employer violated the CBA when it failed to provide overtime opportunities to Grievant for which he was qualified for the 2021 fire season.

4. The Union's grievance is sustained in part and denied in part.

5. The parties shall meet immediately following the date of this award to determine make-whole compensatory relief due to Grievant for the 2021 fire season. The parties shall utilize available information, especially for the fire seasons of 2019, 2020 and 2021, in order to determine the amount owed to Grievant. Amounts Grievant earned in 2021 while on wildland assignments shall be subtracted from the amount owed. Amounts for per diem meal expenses shall be excluded.

6. I retain jurisdiction for sixty (60) days to resolve disputes, if any, about this awarded remedy.

7. Pursuant to Article 30.2 (E) (1) of the CBA, the parties will share equally my fees and expenses.

Respectfully submitted,

Kathryn T. Whalen
Arbitrator
Dated: May 16, 2022