

IN THE MATTER OF THE ARBITRATION

BETWEEN

WASHINGTON FEDERATION OF STATE
EMPLOYEES,

UNION,

and

STATE OF WASHINGTON,

EMPLOYER.

OPINION AND ORDER

Re: Grievance of Maria Pedersen

AAA No. 01-19-0001-3587

BEFORE

ERIC B. LINDAUER

ARBITRATOR

April 27, 2020

REPRESENTATION

FOR THE UNION:

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NATURE OF PROCEEDING

The Washington Federation of State Employees and State of Washington are parties to a 2017-2019 Collective Bargaining Agreement which provides that any disputes arising out of the interpretation or application of the terms of the Agreement that cannot be resolved through the grievance procedure are to be submitted to arbitration. On November 13, 2018, the Union filed a grievance contending the Employer violated the Agreement when it included information in an employee Performance and Development Plan Evaluation relating to the employee having been counseled. The Employer denied the grievance and the issue was submitted to arbitration.

The arbitration hearing was held on February 19, 2020, at the offices of the Washington Attorney General, in Tumwater, Washington. At the commencement of the hearing, the parties agreed the Arbitrator would retain jurisdiction for a period of 60 days to resolve any disputes arising out of the Order should the grievance be sustained. During the course of the hearing, each party had an opportunity to make opening statements, introduce exhibits, examine and cross-examine witnesses on all matters relevant to the issue in dispute. A court reporter was present during the hearing and prepared a transcript of the hearing, which was provided, to the parties and the Arbitrator.

At the conclusion of the hearing, the parties agreed to submit their respective positions to the Arbitrator in the form of written post-hearing briefs. Upon receipt of the post-hearing briefs, the hearing record was closed. The Arbitrator now renders this decision in response to the issue in dispute.

ISSUE

At the commencement of the hearing, the parties stipulated the issues to be decided by the Arbitrator in this matter to be as follows:

1. Is the grievance of Maria Pedersen arbitrable?
2. Did the Employer violate the terms of the parties' 2017-2019 Collective Bargaining Agreement when it included the following statement in Maria Pedersen's 2017-2018 Performance and Development Plan Evaluation:

"During this evaluation period there was an occurrence where you were counseled on the use of appropriate language with a customer. Since that time there have been no further occurrences."?
3. If so, what is the appropriate remedy?

RELEVANT CONTRACTUAL PROVISIONS

In the opinion of the Arbitrator, the following provisions of the 2017-2019 Collective Bargaining Agreement are relevant to determine the issues in dispute.

COLLECTIVE BARGAINING AGREEMENT

ARTICLE 5 PERFORMANCE EVALUATION

5.1 Objective

- A. The Employer will evaluate employee work performance. The performance evaluation process will include performance goals and expectations that reflect the organization's objectives.
- B. The performance evaluation process gives supervisors an opportunity to discuss performance goals and expectations with their employees, assess and review their performance with regard to those goals and expectations, and provide support to employees in their professional development, so that skills and abilities can be aligned with agency requirements.

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

5.2 Evaluation Process

- D. The evaluation process is subject to the grievance procedure. The specific content of performance evaluations are not subject to the grievance procedure.
- E. If an employee has been fully exonerated of misconduct in a disciplinary grievance by the Employer or an arbitrator or the Employer determines that allegations of misconduct are false, then references to the misconduct in the performance evaluation will be removed. If the Employer fails to remove the applicable portions of the performance evaluation, the failure to remove those references is subject to the grievance procedure. However, the Employer may retain this information in a legal defense file and it will only be used or released when required by a regulatory agency (acting in their regulatory capacity), in the defense of an appeal, legal action or as otherwise required by law.

ARTICLE 27 DISCIPLINE

- 27.1 The Employer will not discipline any permanent employee without just cause.
- 27.2 Discipline includes oral and written reprimands, reductions in pay, suspensions, demotions, and discharges. Oral reprimands will be identified as such.

ARTICLE 29 GRIEVANCE PROCEDURE

29.3 Filing and Processing

B. Processing

Step 5 – Arbitration:

If the grievance is not resolved at Step 4, or the LRS notifies the Union in writing that no pre-arbitration review meeting will be scheduled, the Union may file a request for arbitration. The demand to arbitrate the dispute must be filed with the American Arbitration Association (AAA) within thirty (30) days of the mediation session, pre-arbitration review meeting or receipt of the notice no pre-arbitration meeting will be scheduled.

D. Authority of the Arbitrator

1. The arbitrator will:
 - a. Have no authority to rule contrary to, add to, subtract from, or modify any of the provisions of this Agreement;
3. The decision of the arbitrator will be final and binding upon the Union, the Employer and the grievant.

E. Arbitrator Costs

1. The expenses and fees of the arbitrator, and the cost (if any) of the hearing room, will be shared equally by the parties.

SUMMARY OF FACTS

1. Background

The Washington State Health Care Authority ("Employer" or "HCA") purchases health care services for residents of Washington State. The HCA operates a call center to respond to clients' questions and requests for information. The call center is staffed by Medical Assistants who are represented by the Washington Federation of State Employees ("Union").

The HCA and the Union entered into a 2017-2019 Collective Bargaining Agreement ("Agreement"). (Jt. Exh. 1) Article 5, *Performance Evaluation*, governs the employee performance evaluation process. Section 5.2(d) states:

The evaluation process is subject to the grievance procedure. The specific content of performance evaluations are not subject to the grievance procedure. (Jt. Exh. 1)

On November 19, 2018, the Union filed a grievance on behalf of Maria Pedersen ("Grievant"), a Medical Assistant Specialist 3 ("MAS 3"). The Union's grievance asserts HCA violated the Agreement when it referenced a counseling in the Grievant's 2017-2018 Performance and Development Plan ("PDP"). (Jt. Exh. 2) The Union contends the reference to the Grievant being "counseled" on the use of appropriate language was disciplinary in nature and should not have been included in the Grievant's annual performance evaluation.

2. The Written Reprimand Grievance

The Grievant worked for HCA as an MAS 3 until she retired on July 31, 2019, after 32 years of service. As an MAS 3, the Grievant's job duties were to answer clients' phone calls and complete the paperwork associated with the calls.

Among the HCA's MEDS Work Expectations for Medical Assistant Specialists in dealing with clients phone calls was to "act in a professional manner at all times" and "be courteous to your coworkers and clients." (Emp. Exh. 1)

On October 16, 2017, the HCA issued a Written Reprimand to the Grievant for failing to act in a professional manner during a phone call with a customer. Specifically, HCA alleged the Grievant informed a customer he needed to submit additional paperwork in support of his benefits claim. The customer became upset and asked the Grievant "if he really needed to provide that crap to you." The Grievant responded by repeating back verbatim what the customer said. The customer again asked the Grievant if "really needed to provide that shit to her." Again, the Grievant repeated back verbatim that "yes. You really needed to provide the shit to us."¹ (Emp. Exh. 1)

Following this verbal phone exchange with a customer, the Grievant self-reported her give-and-take with the customer to Celia Moodenbaugh, her supervisor, indicating her use of inappropriate language was in response to the customer's attitude and "being caught up in the moment."

On October 16, 2017, HCA issued a Written Reprimand to Ms. Pedersen for her use of inappropriate language with a customer in violation of HCA Administrative Policy 1-25, *Personal Conduct*, her PDP "Expectations," and MEDS Work Expectations. (Emp. Exh. 1) Thereafter, the Union filed a grievance challenging the Written Reprimand.

¹ During the hearing, the Grievant testified that in repeating back to the client his comments, she spelled out the words "crap" and "shit" to the client. (Tr. 24)

3. The Settlement of the Written Reprimand Grievance

The Written Reprimand was initially denied by HCA at the Step 3 grievance meeting. However, subsequent to the Step 3 meeting, HCA, on its own initiative, reduced the Written Reprimand to an Oral Reprimand. Thereafter, the Union filed a second grievance contending the Oral Reprimand was a new disciplinary action against Ms. Pedersen.

On May 22, 2018, the parties entered into a Settlement Agreement which resolved the second grievance contesting the Oral Reprimand. (Jt. Exh. 4) The Settlement Agreement stipulated that HCA would withdraw the Grievant's Oral Reprimand and reissue it as a "Counseling Memo." (*Id.*)

4. The Performance Evaluation Grievance

HCA conducts annual performance evaluations of Medical Assistant Specialists. On October 26, 2018, the Grievant signed her annual Performance Evaluation for the period extending from September 1, 2017 to August 31, 2018. (Jt. Exh. 3) In the section entitled *Part 5: Performance Assessment*, her supervisor included this comment:

During this evaluation period there was an occurrence where you were counseled on the use of appropriate language with a customer. Since that time there have been no further occurrences. (Jt. Exh. 3)

On November 19, 2018, the Union filed a grievance on behalf of Ms. Pedersen, contending the reference to her being "counseled" violated the Agreement and should not have been included in the Performance Evaluation. (Jt. Exh. 2) As a remedy, the Union requested that HCA remove the reference to the Grievant being "counseled" from her PDP. (*Id.*)

On January 2, 2019, HCA denied the grievance contending:

The Grievant was counseled during the 2017-2018 evaluation year on the agency's expectations of appropriate communication with customers; mentioning this in the Grievant's performance evaluation is appropriate. I find it unreasonable to remove any and all language regarding counsel received during the Grievant's performance evaluation period, to make it appear as if the Grievant was providing exemplary performance.
(Jt. Exh. 5)

Although the parties met on January 29, 2019, for a Step 3 grievance meeting, they were unable to resolve the grievance. Thereafter, the parties submitted the issue to arbitration.

OPINION

The issues to be resolved in this arbitration, as stipulated by the parties, are both procedural and substantive in nature. The procedural issue is whether the Union's grievance is arbitrable. The substantive issues, if the grievance is found to be arbitrable, are two-fold. First, whether the Employer violated the parties' Agreement when it included language describing an employee's use of inappropriate language with a customer in her 2018 PDP pursuant to Article 5, Section 5.2(E) of the Agreement, and second, whether the Employer violated the parties' Agreement when it included that same language in her 2018 PDP under Article 5, Section 5.1(C) of the Agreement. If the Employer is found to have violated the Agreement through these actions, the remaining issue is a determination of the appropriate remedy.

In reaching a decision on these issues, the Arbitrator considered the evidence submitted during the hearing and the arguments the parties set forth in their comprehensive and well-argued post-hearing briefs.

Based on this record, the Arbitrator reached the following findings and conclusions as to procedural and substantive issues presented in this case.

I. THE PROCEDURAL ISSUE OF ARBITRABILITY

The threshold issue in this case is procedural in nature and focuses on whether the content of the PDP, as it relates to the Grievant being "counseled," is arbitrable. The relevant provisions of the grievance procedure are Article 5, Section 5.2(D) and Section 5.2(E) of the Agreement. They read in pertinent part:

Article 5.2(D): The Evaluation process is subject to the grievance procedure. The specific content of the performance evaluations are not subject to the grievance procedure.

Article 5.2(E): If an employee has been fully exonerated of misconduct in a disciplinary grievance by the Employer or an arbitrator or the Employer determines that the allegation of misconduct are false, then references to the misconduct in the performance evaluation will be removed. If the Employer fails to remove the applicable portions of the performance evaluation, the failure to remove those references is subject to the grievance procedure. (Jt. Exh. 1)

The Employer contends the Union's grievance is not arbitrable as the contents of a PDP are not subject to arbitration under Article 5, Section 5.2(D) of the Agreement as stated above. The Employer further contends that Article 5, Section 5.2(E) of the Agreement is not relevant as there has never been an exoneration of the Grievant's conduct raised in the PDP. As such, the Employer submits the Union's grievance is not arbitrable and should be dismissed.

A. The Union's Grievance is Arbitrable

The Arbitrator has considered the Employer's contentions regarding the arbitrability of the Union's grievance in the context of two underlying principles which guide arbitrators in resolving arbitrability issues.

First, the Employer's contention that the grievance is not arbitrable is necessarily an affirmative defense and, as such, the Employer has the burden of proof. Such proof must be established by a preponderance of the evidence. Second, it is a well-established principle of arbitral case law that where there is a doubt as to the arbitrability of the grievance, the presumption is that the grievance is arbitrable. The maxim that the 'law abhors a forfeiture' is equally applicable in arbitration cases in which the parties' interests are best served by a resolution of their dispute.

The U.S. Supreme Court in the *Steelworker Trilogy* cases, and later affirmed in *AT&T Technologies v. Communication Workers of America*, has consistently held that, in reviewing collective bargaining agreements that include a grievance procedure concluding with binding arbitration, any doubts regarding the processing of the grievance should be resolved in favor of arbitrability.

Based on the evidence submitted on the issue of arbitrability and in the context of the arbitral principles set forth above, the Arbitrator concludes the Union's grievance in this proceeding is arbitrable. The Arbitrator has reached this decision based on the following findings and conclusions.

In this case, the crux of the substantive issues are whether there was a full exoneration of the employee's conduct, and whether the Employer violated the Agreement by including mention of related conduct in a PDP. The evidence brought forth at hearing, and as argued in the parties' post-hearing briefs, calls into question the application of the evaluation process as applied to the Grievant in this case, resulting in the inclusion of the specific language of the PDP, not the specific language contained in the performance evaluation.

The parties, through testimony and assertions in their respective post-hearing briefs, agree the disputed issue originates from a Written Reprimand issued to the Grievant on October 16, 2017. This disciplinary reprimand was then converted to an Oral Reprimand and then, following a Settlement Agreement, to a Counseling Memo. The outcome of the process of the conversion of the disciplinary actions is the issue that determines the outcome in this case.

The Employer argues the plain language of Section 5.2(D) precludes the arbitration of the substantive issue presented in this case. The relevant contract language clearly states: "The specific content of performance evaluations are not subject to the grievance procedure." (Jt. Exh. 1) The Employer's contention is well taken. However, the Arbitrator is not convinced the specific language of the PDP is the central issue. Rather, the central question is whether the Employer has the contractual authority to include the language at issue in an employee's performance evaluation.

The Employer argues the resolution of the Grievant's Written Reprimand ultimately into a Settlement Agreement is fundamental to a finding the grievance is not arbitrable. HCA concedes that, had the Written Reprimand or Oral Reprimand been the conduct referenced in the Grievant's performance evaluation, then it would constitute an arbitrable issue.

The Union takes the position that agreeing to the Settlement Agreement would result in the complete resolution of the disciplinary issue and that mention of the Grievant's conduct would not appear anywhere in her Grievant's employment record if she met the conditions of the Settlement Agreement.

The purpose of the grievance procedure in a labor agreement is to establish a process whereby the parties can resolve their disputes in an orderly manner without proceeding to arbitration as set forth in Section 29.1 of the parties' Agreement. Although the plain language of Article 5 lends itself to an interpretation that would preclude arbitration of the language of an employee's performance evaluation, where a collective bargaining agreement includes a grievance procedure concluding with binding arbitration, any doubts regarding the processing of the grievance should be resolved in favor of arbitrability.

Conscious of the Employer's burden of proof, as well as the strong presumption of arbitrability, there remains sufficient doubt as to the effect of the Settlement Agreement on the evaluation procedure in this case. Finally, the grievance procedure, where it may potentially end in binding arbitration, should not be so inflexible that it results in forfeiture by either party of its right to utilize the process to reach resolution.

B. Conclusion

The Arbitrator understands the Employer's contentions regarding the issue of arbitrability, and they are well taken. A narrow, stand-alone reading of Section 5.2(D) would result in a different outcome. However, if the Arbitrator is to err in this finding, he should do so on the side of finding the matter is arbitrable. Such a finding is consistent with the long line of arbitration cases dating back to the *Steelworker Trilogy* cases which clearly articulate the view that any doubts regarding whether the grievance is properly before the arbitrator should be resolved in finding in favor of arbitrability. This is such a case.

Accordingly, for the reasons set forth above, the Arbitrator concludes the Union's grievance in this matter is arbitrable. Therefore, the substantive contractual issues are properly before the Arbitrator.

II. THE SUBSTANTIVE CONTRACTUAL ISSUES.

The remaining issues in this case are matters of contract interpretation. At issue is whether the Employer violated the parties' Agreement when it included language indicating the Grievant had been counseled for use of inappropriate language with a customer in her 2017-2018 Performance evaluation.

A. The Employer did not Violate Article 5, Section 5.2(E) When it Included the Language at Issue in the Grievant's PDP

The Union contends conversion of the Grievant's Written Reprimand into an Oral Reprimand and then finally into a Counseling Memo constituted a full exoneration of her misconduct.

Misconduct is defined in Article 27, *Discipline*, of the Agreement and does not include a Counseling Memo. Because a Counseling Memo is not defined as discipline, the Union argues HCA's agreement to convert the original Written Reprimand into a Counseling Memo constituted a "full exoneration" of the Grievant's misconduct under Section 5.2(E).

The Employer contends that no such exoneration was made. The Employer argues conversion of the Written Reprimand into a Counseling Memo does not exonerate the Grievant of her misconduct. The Employer argues the Settlement Agreement implies an agreement that the facts of the alleged misconduct took place,

but that the HCA would not treat it as misconduct under the Agreement. As such, it is the Employer's position that it was permitted to address the conduct as a performance issue in the Grievant's Performance Evaluation.

B. The Union's Burden of Proof

This being a contract interpretation issue, the Union has the burden of proof in establishing that the Employer violated the parties' Agreement when it included language describing the Grievant's use of inappropriate language with a customer in her 2017-2018.

The well-recognized standard of proof in contract interpretation cases is by a preponderance of the evidence. Therefore, in order to prevail in this proceeding, the Union must prove by a preponderance of the evidence that there had been an exoneration of Grievant's misconduct and the Employer's reference in her Performance Evaluation to being counseled for inappropriate language violated Section 5.2(E).

1. The Contract Language is Clear and Unambiguous

In contract interpretation cases, the Arbitrator's first task is to determine whether the contract terms in dispute are clear and unambiguous. If the language is found to be clear, then the Arbitrator must give such language its plain meaning. In this case, the Arbitrator concludes the terms of Section 5.2(E) are clear and unambiguous. The dispute centers on the language of Article 5, Section 5.2(E), which, in relevant part, states:

If an Employee has been fully exonerated of misconduct in a disciplinary grievance by the Employer or an arbitrator or the Employer determines that allegations of misconduct are false, then references to the misconduct in the performance evaluation will be removed. If the Employer fails to remove the applicable portions of the performance evaluation, the failure to remove those references is subject to the grievance procedure. (Jt. Exh. 1)

The issue under this provision focuses squarely on whether "an Employee has been fully exonerated of misconduct in a disciplinary grievance by the Employer...then references to the misconduct in the performance evaluation will be removed," and, in particular, the term "fully exonerated." (*Id.*) In the Arbitrator's view, the language of Section 5.2(E) reflecting the parties' clear intent to preclude misconduct that has been "fully exonerated" or misconduct that is found to have not occurred from an employee's Performance Evaluation is unambiguous.

2. The Grievant was not Exonerated and Mention of the Language at Issue in the PDP was Appropriate

"Exonerated" is not defined in the parties' Agreement. In a contract interpretation case, the Arbitrator must give words their ordinary meaning absent evidence the parties intended another definition. In this case, the Agreement contains no bargained-for definition of "exonerated," as used in Section 5.2(E). *Black's Law Dictionary* defines "Exonerated" as, "The removal of a burden, charge, responsibility, or duty." (*Black's Law Dictionary*, 8th ed. 2004).

The Union argues that because the disciplinary actions issued to the Grievant were withdrawn and ultimately replaced by a Counseling Memo, HCA exonerated the Grievant of any discipline. While this argument is well taken, as the Employer clearly sought to significantly mitigate the disciplinary action taken, the plain meaning of the word "exonerate" necessarily precludes this outcome. The very issuance of the Counseling Memo is inconsistent with the plain meaning of the word. Exonerate is more than mitigation, it is a removal of the assertion of wrongdoing. The Counseling Memo evidences a lesser wrongdoing, not an absence of wrongdoing. The parties could have

agreed to simply withdraw the Oral Reprimand. They did not. The Settlement Agreement states its intent was: "To withdraw Maria Pedersen's Oral Reprimand and reissue it as a Counseling Memo." (Emphasis added) (Jt. Ex. 4). The operative word is "it," referencing the underlying disciplinary action. The form of Grievant's discipline changed; however the substance related to the Grievant's misconduct remains.

3. Conclusion

For the reasons set forth above, the Arbitrator concludes HCA did not violate Section 5.2(E) when it included language in the Grievant's 2017-2018 Performance Evaluation that she was counseled for use of inappropriate language with a customer.

C. The Employer did not Violate Section 5.1(C) When it Included the Language at Issue in the Grievant's PDP

1. The Contract Language

The final issue in this contract interpretation case is whether the Employer violated Section 5.1(C) of the Agreement, as it related to the Grievant being counseled, when her conduct had been corrected. The relevant language of Section 5.1(C) states:

...Performance problems will be brought to the attention of the employee to give the employee the opportunity to receive any needed additional training and/or to correct the problem before it is mentioned in an evaluation. (Jt. Exh. 1)

The Union contends that Section 5.1(C) provides a process by which employees are notified of performance problems which, if corrected, are not to be included in performance evaluations. In this case, the Union contends the Grievant was notified of a performance problem, it was corrected, and that the process afforded under Section 5.1(C) precludes any mention of the language at issue in her PDP. The Union argues the Grievant was notified of a performance problem, namely using inappropriate

language on a call with a customer, that after notification and counseling on the issue, such conduct was corrected and it never occurred again and therefore should not have been referenced in her 2017-2018 Performance Evaluation.

HCA contends Section 5.1(C) makes no such assurances. Rather, it argues that Section 5.1(C) more narrowly provides that, first the employee be notified of the misconduct issue and, second, that they are afforded the opportunity to correct the issue but that the underlying issue may be included in the employee's Performance Evaluation. In this instance, the Employer argues the Grievant was made aware of concerning misconduct, allowed to correct it, and that both her issue and the resolution were then permissibly and accurately documented in her PDP. Thus there was no violation of Section 5.1(C).

2. The Application of the Term "Before" as Used in Section 5.1(C)

The dispute centers on that portion of Section 5.1(C) which references the employee being given an opportunity to correct the misconduct "...before it is mentioned in an evaluation." Each party contends a different application of the word "before."

The Union argues the use of the word "before" is intended to provide exclusion of performance problems that have been corrected in an evaluation. While this point is well taken, there is no evidence that supports such a reading of the word "before." The Employer properly reads "before" to mean, prior to inclusion in an employee's Performance Evaluation.

The word "before," when used as a preposition, means, "forward of: in front of." (Merriam Webster 11th ed. 2016). There is nothing in Section 5.1(C) that precludes the Employer from referencing an employee's performance issues, corrected or otherwise,

as long as there is no reference to any disciplinary action. The word "before" merely indicates what must be done prior to the Employer including the language in an employee's Performance Evaluation.

Finally, Section 5.2(D) expressly precludes the Arbitrator from examining the specific contents of an employee's Performance Evaluation:

The evaluation process is subject to the grievance procedure. The specific content of performance evaluations are not subject to the grievance procedure. (Jt. Exh. 1)

In this case the process must be separated from the specific content of the PDP. The Arbitrator finds that the described process was followed. As previously discussed, the Grievant was first issued a Written Reprimand for using inappropriate language during a phone call with a customer. The Written Reprimand was reduced by HCA to an Oral Reprimand. Thereafter, a Settlement Agreement was entered into reducing the Oral Reprimand to a Counseling Memo. The Grievant testified she was notified of the Employer's position that her conduct was inappropriate, that she was given the opportunity to correct the issue, and it did not occur again. (Tr. 30-31). The Grievant testified:

Q: So in your mind at the time the Settlement Agreement was reached, what was the purpose of a counseling memorandum?

A: It's – counseling memo is to – in regards to my performance.

Q: Okay.

A: And not to, you know do—what and improve and make sure that, you know, I don't do or repeat the profanity to a customer.

(TR at 30:4-12)

The parties agree the Grievant was notified of the performance problem and afforded the opportunity to correct the problem prior to its inclusion in her PDP. The language of the Agreement provides a procedure to address performance problems and that procedure was followed.

3. Conclusion

Therefore, the Arbitrator concludes the HCA did not violate Section 5.1(C) of the Agreement when it referenced in the Grievant's 2017-2018 Performance Evaluation that she had been counseled for use of inappropriate language with a customer, when such conduct had been corrected.

CONCLUSION

For the reasons set forth above, to the extent that the performance evaluation *process* is subject to the grievance procedure, the Arbitrator concludes the HCA did not violate the parties' Agreement when it included a reference in Maria Pedersen's 2017-2018 Performance and Development Plan Evaluation that she had been counseled for use of inappropriate language with a customer.

The Arbitrator reached this conclusion after finding that the Agreement permits examination of the issue when there has been a potential exoneration of misconduct under Article 5, Section 5.2(E), and when the language is framed as a performance problem that has been addressed under Article 5, Section 5.1(C). The Arbitrator found in both instances the language of the Agreement is clear and unambiguous. The plain meaning of the disputed words in each section clearly establishes the language at issue was properly included in Ms. Pederson's 2017-2018 Performance Evaluation.

Accordingly, the Arbitrator concludes HCA's inclusion in the Grievant's 2017-2018 Performance Evaluation of being counseled for her use of inappropriate language during a phone call with a customer, and corrected that issue, did not violate the parties' Agreement. Therefore, the Arbitrator shall Order that the Union's grievance be denied.

IN THE MATTER OF THE ARBITRATION

BETWEEN

WASHINGTON FEDERATION OF STATE
EMPLOYEES,

UNION,

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STATE OF WASHINGTON,

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ORDER

Re: Grievance of Maria Pedersen

AAA No. 01-19-0001-3587

The Arbitrator, in arriving at this decision, has reviewed the hearing transcript, exhibits, hearing notes and considered the arguments of the parties as set forth in their post-hearing briefs. In view of all the evidence and for the reasons set forth in this Opinion, it is the decision of the Arbitrator the grievance of Maria Pedersen is arbitrable. The Arbitrator further concluded the Employer did not violate the Agreement when it included a reference in Maria Pedersen's 2017-2018 Performance Evaluation to being counseled for use of inappropriate language during a phone call with a customer. Accordingly, the Union's grievance is DENIED.

Pursuant to Article 29, Section 29.3(E) of the Agreement, the costs of the Arbitration shall be shared equally by the parties.


Eric B. Lindauer,
Arbitrator

April 27, 2020