

IN THE MATTER OF THE)	
)	
ARBITRATION)	ARBITRATOR'S
)	
BETWEEN)	OPINION
)	
Washington State Department of)	AND
Labor and Industries)	
(The Employer))	AWARD
)	
AND)	
)	
Washington Federation of State)	
Employees)	Patrick Delozier Grievance
(The Union))	AAA Case No.01-17-0004-4044

HEARING: September 13, 2018

HEARING CLOSED: November 12, 2018

ARBITRATOR:

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REPRESENTING THE EMPLOYER:

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APPEARING AS WITNESSES FOR THE EMPLOYER:

Billie Wright, Assistant Director of Human Resources

APPEARING AS WITNESSES FOR THE UNION:

Patrick DeLozier, Grievant

BACKGROUND

The State of Washington (hereafter “the Employer” or “the State”) and the Washington Federation of State Employees (WFSE) (hereafter “the Union”) are parties to a Collective Bargaining Agreement. (Ex. J6) On January 18, 2017 the Union filed a grievance on behalf of Mr. Patrick DeLozier (Grievant) as set forth in Article 29 of the Agreement. (Ex. J1) The grievance claimed “...a violation of Article 27.1 and 28.3 of the Collective Bargaining Agreement...” and requested as a specific remedy that “The one week suspension be rescinded and the Grievant be made whole. Any other mutually agreed to remedy”.

On July 12, 2018, the Employer in this matter through its attorneys, Robert W. Ferguson, Attorney General, and Gina L. Comeau, Assistant Attorney General, moved for an order dismissing the grievance. The Employer contended that it had revoked and rescinded the discipline that had been administered in January of 2017. The Employer’s contention that it had granted the remedy requested and therefore the grievance should not be allowed to proceed to arbitration was not supported by the evidence and the Motion to Dismiss was denied as set forth in Attachment A.

A hearing on the grievance was held before Arbitrator Sylvia Skratek in Olympia, Washington on September 13, 2018. At the beginning of the hearing the State objected to the Arbitrator hearing the matter because the disciplinary action had been rescinded and asked that the Arbitrator recuse herself because of her inability to be impartial. The parties were provided the opportunity to make oral arguments regarding the State’s objection and the State’s request for recusal. The State’s objection was not sustained and the State’s request for recusal was denied. (Tr. pp. 9-21)

At the hearing the parties had full opportunity to make opening statements, examine and cross examine witnesses, introduce documents, and make arguments in support of their positions. The proceedings were recorded by Ms. Kim L. Otis, CCR of Capitol Pacific Reporting, Inc.

The parties were provided the opportunity to submit their closing arguments in the form of post hearing briefs which were received in a timely manner. The record was closed as of November 12, 2018. The award in this case is based upon the evidence, testimony, and arguments put forward during the hearing and the arguments presented by the parties in their post hearing briefs.

STATEMENT OF THE FACTS

By letter dated January 9, 2017 the Grievant was notified by Victoria Kennedy, the Assistant Director for Insurance Services Division, of:

“...a one-week suspension without pay from your position as a Program Specialist 4, in the Legal Services Program, Insurance Services Division of the Department of Labor & Industries (L&I). In addition, you will also be restricted from engaging in structured settlement negotiations with non-represented workers for a period of one-year. Your one-week suspension without pay will be effective January 30-February 3, 2017. This disciplinary action is being taken pursuant to Article 27 of the Collective Bargaining Agreement (CBA) by and between the State of Washington and the Washington Federation of State Employees.” (Ex. J2)

Page one of the letter states that:

“Present at the pre-disciplinary meeting, besides me and you were Jonnita Thompson, Chief Administrative Officer, Michelle Valenzuela, Human Resource Consultant (HRC) and Perry Gordon, WFSE Council Representative.”

Ms. Kennedy further reviews “...the factual basis for the discipline, summarizes the information provided in your pre-disciplinary meeting, and identifies my findings and determination regarding your discipline.” At pages 2 and 3 of the letter, Ms. Kennedy summarizes and relies upon the Investigation that was conducted by Dixie Shaw, HR Liability Prevention Manager. Ms. Kennedy also references at page 3:

“... an anonymous voicemail message from an employee describing in detail, the specifics of your conviction. The employee expressed serious reservations having to work with or near you, due to the serious nature of your conviction. (Enclosure D) It was also reported that a Claim Manager, who was interested in a Developmental Job Assignment (DJA) in the Structured Settlement Unit, made it clear that she was not interested in the DJA if it involved working with you”.

The **Basis for Disciplinary Action** set forth by Ms. Kennedy beginning at page 3 states:

On April 18, 2016, you made a no contest plea of guilty to sexual abuse in the second degree which is a class C Felony in Oregon. ... You were sentenced to 36 months of probation... You were also required to register as a level 1 sex offender. The criminal background criteria of your Program Specialist position is designated as ‘sensitive’ and requires incumbents to be free from a history of criminal conviction for crimes involving, ‘money, currency, credit or credit granting, debt or debt reduction, identity theft or fraud or related subject, or for crimes of domestic or workplace violence, or **moral turpitude.**’(Enclosure 3) (emphasis in original)

The **Determination** made by Ms. Kennedy took into consideration the information available to her and the explanations provided by the Grievant. She reviewed the Grievant’s employment record and considered his service to the agency. She determined that the Grievant’s “...off-duty misconduct is detrimental to the program of the agency and contrary to the reputational values and core competencies of L&I, specifically:

- *Treating Others with Respect and Courtesy; at all times respects and values others.*
- *Exercising mature judgment and problem solving; draws sound, sensible conclusions, and makes informed decision to resolve issues.*
- *Accountability and dependability; performs duties in a way that reflects public service accountability. (Enclosure 4) (emphasis in original)*

Ms. Kennedy “...determined that a one-week suspension without pay as a Program Specialist 4 is the appropriate level of discipline to impose.” She further imposed a restriction that the Grievant “...only engage in structured settlement negotiations with injured workers who are represented by legal counsel for a period of one year”.

Ms. Kennedy enclosed the following attachments with the letter: 1) Pre-Disciplinary Letter dated November 8, 2016; 2) Multnomah County Indictment; 3) L&I Employee Policy and Procedure #3.02; 4) L&I Core Competencies.

Shortly thereafter the Grievant was informed that his previously approved request to telecommute (Ex. J14) had been denied and that he would need to return the telecommuting equipment. (Ex. J10, p. 3, Ins. 16-18)

By letter dated May 14, 2018 Ms. Kennedy advised the Grievant that:

“Effective immediately, the disciplinary action against you is revoked and you are being compensated for this week of pay.”

A check dated May 14, 2018 in the amount of \$931.91 was presented to the Grievant representing his gross pay minus appropriate deductions. (Exs. J3 and J4) As of the date of the hearing in this matter the Grievant had not cashed the check.

The Union maintains that the grievance that was filed on January 18, 2017 has not been fully and finally resolved. The State maintains that the rescission of the discipline coupled with the payment of the lost wages fulfills the requested remedy of the grievance. The parties were unable to resolve their differences.

STATEMENT OF THE ISSUE

After reviewing all of the evidence and testimony in this matter the issues to be resolved are as follows:

Was there just cause for the discipline of Mr. Delozier?

If not, what shall be the remedy?

Was the disciplinary suspension administered in January of 2017 final thereby precluding any further adverse employment actions by the Employer based on the same set of facts and evidence?

ANALYSIS

Applicable Contract Language

ARTICLE 27 DISCIPLINE

27.1 The Employer will not discipline any permanent employee without just cause.

ARTICLE 28

PRIVACY AND OFF-DUTY CONDUCT

28.3 The off-duty activities of an employee will not be grounds for disciplinary action unless said activities are a conflict of interest as set forth in RCW 42.52, or are detrimental to the employee's work performance or the program of the agency.

ARTICLE 29 GRIEVANCE PROCEDURE

29.1 The Union and the Employer agree that it is in the best interest of all parties to resolve disputes at the earliest opportunity and at the lowest level... In the event a dispute is not resolved in an informal manner, this Article provides a formal process for problem resolution.

29.2 Terms and Requirement

- A. Grievance Definition
- B. Filing a Grievance
- C. Computation of Time
- D. Failure to Meet Timelines
- E. Contents

The written grievance must include the following information:

1. A statement of the pertinent facts surrounding the nature of the grievance;
2. The date upon which the incident occurred;
3. The specific article and section of the Agreement violated;
4. The steps taken to informally resolve the grievance and the individuals involved in the attempted resolution;
5. The specific remedy requested;
6. The name of the grievant; and
7. The name and signature of the Union representative.

Failure by the Union to provide a copy of a grievance or the request for the next step with the Human Resources Office or to describe the steps taken to informally resolve the grievance at the time of filing will not be the basis for invalidating the grievance.

- F. Modifications
No newly alleged violations and/or remedies may be made after the initial written grievance is filed, except by written mutual agreement.
- G. Resolution
If the Employer provides the requested remedy or a mutually agreed-upon alternative, the grievance will be considered resolved and may not be moved to the next step.
- H. Withdrawal
- I. Resubmission
If terminated, resolved or withdrawn, a grievance cannot be resubmitted.
- J. Pay
- K. Group Grievances
- L. Consolidation
- M. Bypass
Any of the steps in this procedure may be bypassed with mutual written consent of the parties at the time the bypass is sought.
- N. Discipline
- O. Grievance Files
Written grievances and responses will be maintained separate from the personnel files of the employees.
- P. Alternative Resolution Methods
- Q. Steward Mentoring

29.3 Filing and processing

- A. Filing
- B. Processing
Step 1 – Responsible Supervisor, Manager or Designee:
Step 2 – Appointing Authority or Designee:
Step 3 – Agency Head or Designee:
Step 4 – Mediation or Pre-Arbitration Review Meetings:
Step 5 – Arbitration:
- C. Selecting an Arbitrator
The parties will select an arbitrator by mutual agreement or by alternately striking names supplied by the AAA, and will follow the Labor Arbitration Rules of the AAA unless they agree otherwise in writing.

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;
- b. Be limited in his or her decision to the grievance issue(s) set forth in the original written grievance unless the parties agree to modify it;
- c. Not make any award that provides an employee with compensation greater than would have resulted had there been no violation of this Agreement;
- d. Not have the authority to order the Employer to modify his or her staffing levels or to direct staff to work overtime.

2. The arbitrator will hear arguments on and decide issues of arbitrability before the first day of arbitration at a time convenient for the parties, through written briefs, immediately prior to hearing the case on its merits, or as part of the entire hearing and decision-making process. If the issue of arbitrability is argued prior to the first day of arbitration, it may be argued in writing or by telephone, at the discretion of the arbitrator. Although the decision may be made orally, it will be put in writing and provided to the parties.

3. The decision of the arbitrator will be final and binding upon the Union, the Employer and the grievant.

E. Arbitration Costs

Position of the Employer

The Employer contends that L&I has conferred all remedies that the Grievant requested in the grievance pertaining to his suspension. According to the Employer it is as if the suspension never existed. As provided in Article 29.3D of the Agreement the Arbitrator has no authority to rule contrary to, add to, subtract from, or modify any provisions of this Agreement and shall be limited in his or her decision to the grievance issue(s) set forth in the original written grievance unless the parties agree to modify it. Article 29.2G states that “If the Employer provides the requested remedy...the grievance will be considered resolved and may not be moved to the next step”. In this matter there is no dispute that L&I rescinded the Grievant’s one-week suspension and removed it from his personnel file. The Grievant received \$931.92 in back wages resulting from the one-week suspension. The claimed controversy that there was no just cause to issue the

discipline no longer exists. The matter is therefore moot and the grievance should be dismissed. The Arbitrator cannot decide whether just cause existed for a discipline that has been rescinded given that it would be in direct conflict with Article 29.3D(a). Such an action would also be contrary to provision 29.2G which states that once the remedy is provided the case may not move on to the next step in the grievance process. The suspension has been rescinded and resolved pursuant to the Agreement. There is no additional relief to be granted to the Grievant.

The Employer relies upon the U.S. Supreme Court's decision in *Steelworker v. Enterprise Wheel & Car Corp* which states that an arbitrator's remedy is legitimate as long as it draws its essence from the collective bargaining agreement. 363 U.S. at 597. The Employer further cites *Discipline and Discharge in Arbitration*, at page 473 which states that a make whole remedy attempts to place the employee in the same position he or she would have been in if the improper discipline had not occurred. One of the traditional components of the make whole remedy is back pay which is intended to put the employee in exactly the same position financially that they would have been if the suspension had not occurred. The Employer argues that the Grievant has received everything this Arbitrator could have awarded him as requested in this grievance and as Article 29.2G states "...if the Employer provides the requested remedy or mutually agreed-upon alternative, the grievance will be considered resolved..." The Grievant has received the removal of the one-week suspension, repayment of lost wages and a clean personnel file. Furthermore there is no dispute that the Grievant did not lose any money due to the one-year restriction on engaging in high value settlements with injured workers.

The Union's argument that the Grievant was deprived of a perceived right to telework from home thereby requiring reimbursement by L&I for the costs of commuting to and from work is without merit and should be dismissed. The Arbitrator cannot consider new remedies unless the parties have mutually agreed through a written agreement to modify the original grievance. No mutual agreement exists to modify the

grievance to included monetary reimbursement for the Grievant's commuting costs. Furthermore no L&I employee is entitled to compensation for the costs incurred when commuting to and from work. The ability for employees to telework from home is discretionary and must be approved by a supervisor. It is a privilege and not a right to telework from home or an alternate location. The Employer cites L&I's Administrative Policy No. 3.09 to support its arguments on telework. The Grievant was approved to work from home one day per week on March 31, 2017. There is nothing in his personnel file that ever rescinded the telework agreement. Even if it had been denied he would not have been entitled to reimbursement for gasoline expenses. To award the Grievant reimbursement of gas expenses would place him in a greater financial position than what he would have been had the suspension never occurred and would exceed the authority granted to this Arbitrator under the Agreement. Furthermore the alleged denial of the ability to telework from home is not a proximate cause of the suspension and the record is void of that tacit linkage from the Union. At no time did the Union grieve denial of the telework agreement. The Arbitrator should not make an award that is at best speculative and provides the Grievant with greater compensation than what he would have been entitled to had there been no suspension.

The Employer argues that the Arbitrator has no authority to fashion a remedy that includes reinstatement or to change L&I's business practices or its obligations to retain Public Records. The disqualification grievance is not properly before this Arbitrator and giving the Grievant anything more than what he has already received is entirely unsupported by the record. Additionally, as a public employer L&I is subject to record retention laws under the Public Records Act, RCW 42.56. State law mandates that any writing "relating to the conduct of government or the performance of any governmental or proprietary function prepared, owned, used or retained by any state or local agency" be retained for certain periods. RCW 42.56.010(3) and RCW 40.14.010. The Agreement at Article 31.6 also addresses when the State must remove documents from an employee's personnel file:

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 employee files. 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 or legal action, or as otherwise required by law.

There is no additional remedy that the Arbitrator can provide. There is no prejudice whatsoever to Mr. Delozier in L&I maintaining a copy of the discipline letter in a legal defense file, especially when his official personnel file is clean because it contains no discipline. The Agreement provides the Arbitrator with no authority to prescribe how L&I conducts its business in this regard.

The Employer concludes that the grievance must be denied in its entirety.

Position of the Union

The Union contends that an employer may not effectuate a rescission of a disciplinary action against an employee at the very last moment thereby allowing the employer to avoid arbitration of the dispute through a bare assertion that they have granted the relief requested and have made the grievant whole. Under collective bargaining agreements as the one between the parties in this matter the Union is responsible for the filing and advancing of a grievance. It is often stated that the Union “owns” the grievance, not an individual grievant. The Union however is not free to refuse to aid an employee that has been subjected to improper discipline or even wrongful termination in breach of the agreement where the breach could be remedied through the grievance process. *Vaca v. Sipes*, 386 U.S. 171, 185-186, 87 S. Ct. 903, 914, 17 L.Ed. 2d 842 (1967) For a union to abandon a wronged employee under these circumstances would constitute a union’s breach of its statutory duty of fair representation. Just as the Union has a duty to advocate for its member-employee, the employer has an obligation to engage in fair labor practices in their dealings with the Union and its members. Where a union has invested resources representing a grievant throughout the grievance process the employer cannot avoid the arbitration process by granting an illusory remedy that at best superficially grants some of the grievance’s requested remedies. After the expenditure of

Union resources and after the Grievant has long ago served out the discipline imposed, the basic notion of fairness dictates that a meaningless remedy cannot be deemed to be satisfactory.

The Union further contends that the Employer's reliance on Article 29.2G is misplaced. Beginning with the Employer's pre-hearing Motion to Dismiss and continuing through argument presented at the arbitration hearing the Employer has repeatedly argued that this matter must be dismissed because they have already granted the requested remedy. The Employer's argument fails to consider Article 29.2G in its entirety. The provision does not conclude with the clause "...the grievance will be considered resolved" and importantly continues with the final crucial clause "...and may not be moved to the next step". On May 14, 2018, the date the Employer claims they provided the requested remedy, the grievance had already been moved to the final step for approximately nine months. (Ex. J11, Attachment A to Declaration of Carly Gubser) The official grievance had already advanced to arbitration, an arbitrator had been selected through the American Arbitration Association and it is not possible to move a grievance beyond Step 5, Arbitration. Once a grievance has been advanced to Step 5, the language of Article 29.2G is no longer applicable. This is not an argument based on linguistics. The parties had incurred substantial costs once the grievance was advanced to arbitration including the AAA filing fee and the parties would be responsible for cancellation, scheduling and arbitrator fees even if the case never resulted in an arbitration hearing. (Ex. U8)

The Employer's removal of the disciplinary records from the Grievant's personnel file provided him with no benefit unless he continues working at L&I because his supervisors would not be able to consider the prior discipline when evaluating him for possible promotions or when considering an appropriate level of discipline if there were further misconduct. The record in this matter however demonstrates that on May 14, 2018, the same day that the discipline was rescinded and the discipline was removed from his personnel file, the employer terminated the Grievant. (Ex. J3 and J10, Attachment 2)

The State left the Grievant with little more than an empty gesture and a check for wages that he should have been able to earn and invest 16 months earlier.

The doctrine of industrial double jeopardy precludes the Employer from imposing a new, more severe discipline once the initial punishment became final. An employee should not be penalized twice for the same infraction. The Union provides legal citations to support these conclusions. The Union relies on the arguments presented in its Response to Motion to Dismiss which was admitted into evidence at the arbitration hearing on September 13, 2018 (Ex. J10) and further asserts that this Arbitrator's ruling issued on August 14, 2018 should stand as the proper analysis of issues and arguments fully briefed by both parties. Despite the protestations of the Employer's counsel during the arbitration hearing, it cannot be disputed that the "Grievant has not been made whole. He has not been returned to the status he would have enjoyed but for the Employer's disciplinary actions". (Ex. J12)

The Union argues that the labor law doctrines of "Waiver" and "Acquiescence" precludes the Employer from acting to punish the Grievant by pursuing a disqualification separation after the Employer specifically ruled in their Step 2 Response that the Grievant's off-duty conduct and conviction did not disqualify him from serving in his position. A waiver arises by tacit consent or by failure of a person for an unreasonable length of time to act on rights of which the person has full knowledge. The Employer's Step 2 decision provided its justification for the level of discipline based upon the following rationale:

"Mr. Delozier's off-duty conduct, a class C felony offense, and requirement to register as a sex offender did not disqualify him from performing the functions of his position as a Program Specialist 4 with the Structured Settlement Unit in Legal Services. However his off-duty conduct is not consistent with the reputational values and core competencies of our agency, and therefore detrimental to the program of the agency. It is for this reason that the requirement to refrain from engaging in direct contact with injured workers is limited for the next 12-month period, in addition to the imposed one-week suspension". (Ex. U5, pp. 2-3)

In conclusion the Union requests that the Arbitrator find that just cause has not been established for discipline since the Employer has abandoned their initial position. The Union requests that the Grievant be made whole by reinstating him to his previous position and repaying back wages. Additionally, the Union maintains that the doctrines of Industrial Double Jeopardy and Waiver and Acquiescence prevent the Employer from revisiting and imposing more severe punishments upon the Grievant. All actions that violated these doctrines should be declared nullified and an award should be issued restoring the Grievant to the position that he held prior to May 14, 2018.

Discussion

The first issue to be determined in this matter is whether or not there was just cause for the discipline issued to the Grievant by letter dated January 9, 2017. (Ex. J2) The State presented no evidence or testimony on this issue and in effect abandoned or vacated its position that it had stated throughout the processing of the grievance. In the Step 3 response to the grievance dated April 18, 2017 Labor Relations Manager Melanie Schwent stated that the "...suspension is more than justified...[the Grievant] was afforded all due process rights, and L&I has met the requirements of the CBA, appropriately following all policies and practices." (Ex. U6, p. 4) In the Step 2 response to the grievance dated February 27, 2017 Chief Administrative Officer Jonnita Thompson stated "...I do not agree that Article 27.2 Just Cause, was violated" (Ex. U5, p.2) The grievance was triggered by the letter from Assistant Director for Insurance Services Division Victoria Kennedy advising the Grievant of a one-week disciplinary suspension dated January 9, 2017. (Ex. J2) Approximately 16 months later Ms. Kennedy revoked the disciplinary action. (Ex. J3) The revocation coupled with the State's decision to present no evidence or testimony on this issue can lead to no other conclusion than the State has abandoned or vacated its position that it had just cause for the discipline that was administered to the Grievant on January 9, 2017. That conclusion must necessarily be coupled with a determination as to whether or not the Grievant has been made whole as requested in the grievance. The State asserts that its issuance of a payment to the Grievant in the amount of \$931.92 has made him whole. The Union disagrees with that

assertion. Not only does the payment not reflect the actual losses incurred by the Grievant but also it does not represent everything that traditionally encompasses a “make whole” remedy. The State cannot simply declare that it has made the Grievant whole. The Employer is determining its own version of “make whole” focusing on only one component, “wages”, with no consideration given to the lost opportunities to invest or any consideration given to the deprivation of professional advantage and/or privilege. The Union as the representative of the Grievant is in the best position to determine whether or not the Grievant has been made whole or if there has been a satisfactory resolution provided. The Union vehemently disagreed with the State’s declaration and has exercised its right to proceed with an arbitrator’s determination of the matter. While the State argues that the grievance procedure at Article 29.2G prohibits the grievance being moved to the next step that argument fails. Not only has the State not provided the requested remedy but also as the Union emphasizes, there is no next step. The grievance is, and has been, at the final step of the procedure, Step 5 Arbitration, for over one year. It was moved to Step 5 on July 26, 2017. (Ex. U8) The State is attempting to block the Union from exercising its contractual right to have the grievance reviewed by an arbitrator. It cannot do so by instituting its version of a make whole remedy. The Union is within its rights to go forward with Step 5, Arbitration.

The State has cited the commonly accepted principle of a make whole remedy that it is intended to place the employee in the same position he or she would have been in if the improper discipline had not occurred. The State further notes that a traditional component of the make whole remedy is back pay. That is however not the only component of a make whole remedy and it does not represent a “make whole” remedy as requested in the grievance.

The primary objective of a make whole remedy is to place an individual in the position that would have been held if the agreement had been performed or, alternatively, returning to the original position of the wronged party. The goal is to compensate

the injured grievant for disappointed expectations or detrimental reliance. A make whole remedy should restore a situation, as nearly as possible, to that which would have been obtained but for an employer's action. An arbitrator is tasked with bringing their informed judgment to bear in order to reach a fair solution of a problem. Flexibility is necessary to meet a wide variety of situations. The arbitrator's role is to award a remedy that the parties themselves would have reached if they had negotiated regarding the precise problem that is before the arbitrator. The Collective Bargaining Agreement in this matter provides for the parties to reach a mutually agreed upon remedy at Article 29.2G. No attempt has been made to do so however and the Arbitrator is tasked with providing the appropriate make whole remedy that is requested in the original written grievance (as required by Article 29.2E.5) and throughout the processing of the grievance. (Exs. J1, U5, U6, U8) The State reminds the Arbitrator that Article 29.3.D.(1)c provides that the arbitrator will "not make any award that provides an employee with compensation greater than would have resulted had there been no violation of this Agreement". In this matter if there had been no violation of the Agreement the Grievant: would have been able to invest the monies that were withheld due to the disciplinary suspension; would have enjoyed the privilege and benefits of telecommuting and; would not have been deprived of professional advantage/privilege.

In this matter nothing has been done to compensate the Grievant for the sixteen months that the State held the monies that he was due that, as stated by the Union, could have been invested by the Grievant. In this matter the Grievant has suffered a loss of the ability to invest the monies that he was deprived due to the one-week suspension. An employee has the right to be compensated or made whole for the delay in the payment of his or her lost wages. In this matter the Grievant was deprived of the monies for a period of sixteen months, an unreasonable period of time given the fact that the State has abandoned its position that it had just cause for the one-week suspension. While it is true that there is always a time gap between a disciplinary action and a determination by an arbitrator that the action was not warranted, in this case the State withheld these monies from the Grievant for sixteen months and then decided to revoke the disciplinary action

and reimburse him only for the monies that it had wrongfully withheld. The Grievant is entitled to be made whole for the lost ability to invest these monies. This is nothing more than compensating the Grievant for lost opportunities due to the State's actions. Money has a time value. It is more valuable today than it is tomorrow or in the next year. If justice were immediate there would never be an award of interest. Since 1962 the National Labor Relations Board (NLRB) has recognized that an award of interest is integral to achieving the make whole purpose of a backpay award. Interest is added to the original amount of monies owed to ensure that compensation is complete and to compensate the employee for the loss of use of his or her money. A reasonable manner in which to make an employee whole for lost investment opportunities has been set forth by the NLRB:

...with interest accrued to the date of payment as prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as set forth in *Kentucky River Medical Center*, 356 NLRB 6 (2010)

The rate used to calculate interest on backpay and other monetary remedies by the National Labor Relations Board is based on the "short-term Federal rate," that is, the rate assessed by the Internal Revenue Service on the underpayment of taxes. The rate for the time period of January 1, 2017 through March 31, 2018 is 4%; the rate for the time period of April 1, 2018 through September 30, 2018 is 5%. A make whole remedy for the Grievant would include a calculation of the monies owed to him plus the interest rate set forth by the NLRB for the time periods that he was without payment compounded on a daily basis until such time as he has received full payment for the one-week suspension.¹

Furthermore the letter revoking the suspension dated May 14, 2018 provides nothing more than a revocation of the disciplinary action and compensation for one week of pay. (Ex. J3) There is no effort to address the deprivation of professional advantage and/or privilege administered to the Grievant by "...imposing a one year restriction that you only engage in structured settlement negotiations with injured workers who are

¹ See also *Jackson Hospital Corporation d/b/a Kentucky River Medical Center and United Steel, Paper & Forestry, Rubber, Manufacturing, Energy, Allied Industrial & Service Workers International Union, AFL-CIO-CLC*. NLRB 356 No. 8.

represented by legal counsel for a period of one year”. (Ex. J2, p. 5) Deprivation of professional advantage/privilege affects the status of an employee within their respective work environment. It injures the employee’s standing among his or her colleagues. Employees are entitled to protection against this type of injury to their reputation, their standing, their dignity and their status. In this matter the State has done nothing to make the Grievant whole for its imposition of the one year restriction. To allow the State to impose a restriction on an employee without suffering any consequences if it has done so without cause would in effect give the State the ability and freedom to impose similar restrictions on other employees without cause. The failure to remedy a deprivation of professional advantage/privilege not only denies an employee his or her right to have their status, standing, dignity and reputation restored but also denies a union of its ability to protect employees from this type of injury thereby placing the union in a difficult position with its membership. In this matter the membership might ask “what good is the Union if the State can administer its own form of discipline through a deprivation of professional advantage/privilege and the Union cannot do anything about it?” While it is speculative to attempt to assess a financial component to the deprivation of professional advantage/privilege it is not unreasonable to order the publication of notice to the Grievant’s work group, at the Grievant’s request and after review by the Union, indicating that the disciplinary action taken against the Grievant has been revoked and that the accompanying deprivation of professional advantage/privilege was unwarranted.

The State further deprived the Grievant of professional advantage/privilege when it revoked the Telework Agreement that had been approved by his supervisor, Heather Lattin, the Program Manager, and the Appointing Authority’s Designee, Jonnita Thompson. The Telework Agreement had been approved in late March of 2017. (Ex. J14) As the Grievant testified:

Q Would you turn to Joint Exhibit 14, please. Do you recognize that document?

A Yes. It’s the telework agreement that I completed in April of 2017.

Q Is this your signature on the third page?

A Yes.

Q When is that dated?

A March 20, 2017.

Q Were you issued telework equipment in March of 2017?

A Yes, I was provided with all of the required equipment.

Q Did you then commence with telework at that time?

A No. Once I brought it home and set it up, the very next workday I was told that I was not allowed to telework and that I was to return all of the equipment back to the state.

Q And this was a couple months after the January 9, 2017, discipline had been imposed?

A Correct. The discipline had already been imposed.

Q Did you proceed with telework at that time?

A No, because I had to return all of the equipment back to the state.

Q Had you applied for one or two days of telework or something different?

A It was one day of telework was what I was told that I would be -- that I would receive.

Q And did there later come a time when you were allowed to telework?

A Yes. In 2018, my operations manager asked me if I wanted to telework. This was after my -- the restriction of one year had expired. (Tr. pp. 49-51)

The Telework Policy #3.09 (Ex. J13) at Section A.2. sets forth the Telework Criteria as follows:

- a) [Blank in original document]
- b) Telework agreement forms must go through the appropriate chain of command for final determination to be made by the appointing authority.
- c) All assigned work functions must be accomplished by the teleworker in the manner for which they are expected, as outlined by their supervisor.
- d) The telework agreement may be denied or terminated if:
 - a. business needs are not being met;
 - b. there are documented performance or attendance concerns; or
 - c. if the employee requests to terminate the agreement.
- e) Adequate notice that allows for preparation and/or return arrangements is required when terminating a telework agreement.

Sections D and E of the Telework Policy set forth the parameters for the termination of a telework agreement including "...if business and operational needs are not being met, or

if the employee has documented performance or attendance problems”. In this matter there was no evidence or testimony to support a conclusion that business and operational needs were not being met. In fact the Grievant had not even begun teleworking when the agreement was terminated. The agreement itself was entered into after the Grievant had been disciplined in January of 2017 and advised of that discipline by the same individual who signed as the Appointing Authority’s Designee on the Telework Agreement. (Exs. J2 and J14) The signature on these two documents appears to be the signature of Jonnita Thompson who also signed the Step 2 Grievance Response². (Ex. U5) It is only after the Step 3 Grievance Meeting is held on March 27, 2017 with Melanie Schwent (Ex. U6) that the Grievant’s Telework Agreement is terminated. There was no evidence or testimony that the Telework Agreement was terminated by the appointing authority as required by the agreement directly above the signatories nor was there any evidence that the appointing authority notified the Grievant that the Telework Agreement was terminated as required at the same section. (Ex. J14) The only testimony by a State’s witness regarding the termination of the Telework Agreement was by Ms. Billie Wright:

Q Now, Mr. Delozier was approved for telework; is that correct?

A That is correct.

Q Despite his prior disciplinary action.

A Correct.

Q So let's turn to what's been marked as State's Joint Exhibit 14. Are you familiar with this document?

A Yes.

Q What is it?

A It is Mr. Delozier's telework agreement.

Q And what is Mr. Delozier requesting in this agreement?

A He is requesting to work from home one to two days every week between the hours of 7:30 a.m. and 4 p.m.

Q And what is the start date of this agreement?

A This one is April 1st, 2017.

²Ms. Thompson’s signature on Union Exhibit 5 is identical to the signature above Ms. Kennedy’s name on Joint Exhibit 2. Ms. Kennedy’s signature appears on Joint Exhibit 3 and is considerably different than Ms. Thompson’s signature.

Q And when would it anticipate ending?

A March 31, 2018.

Q And if you turn to the last page of the document. Was this request to telework for Mr. Delozier approved?

A Yes.

Q By whom?

A It was approved by his supervisor, his supervisor's manager, and the appointing authority, or the division head.

Q And when was it approved?

A It was approved on March 31st. As it went through the chain of command, it was approved on March 31st, 2017.

Q To your knowledge, was this agreement ever rescinded by the employer?

A No.

(Tr. pp. 36-37)

Ms. Wright was not even an employee of the Department of Labor and Industries in 2017 and it is questionable as to what knowledge, if any, she would have regarding the rescission of the Telework Agreement. As she testified:

Q Please state your name and spell your last name for the record.

A Billie Wright, W-R-I-G-H-T.

Q And Ms. Wright, where are you currently employed?

A Department of Labor & Industries.

Q What is your position there?

A Assistant director for the Office of Human Resources.

Q How long have you been the assistant director for human resources?

A For the Department of Labor & Industries, since January 16, 2018.

Q And how would you -- what did you do prior to coming to Labor & Industries?

A I was the leadership development engagement and training manager for the Department of Employment Security.

(Tr. p. 23)

The State failed to provide any testimony from any of the signatories on the Telework Agreement who could have shed light on the approval and subsequent denial of the Agreement. It is disingenuous to suggest that because Ms. Wright had no knowledge of the rescission of the Grievant's 2017 Telework Agreement that therefore it had not been rescinded. The State's claim that it was never rescinded belies the fact that the Grievant was not allowed to Telework under the agreement signed in March of 2017. There was no evidence or testimony that he was given any explanation for the termination of the agreement. He was simply told to turn in the equipment that he had taken to his home office for the purpose of teleworking. His testimony previously cited shed some light onto the State's termination of the 2017 agreement and why a subsequent Telework Agreement was approved in 2018: *In 2018, my operations manager asked me if I wanted to telework. This was after my -- the restriction of one year had expired.* It is apparent from his testimony and the lack of testimony from any State witnesses who were party to the 2017 Telework Agreement that the termination of the 2017 Telework Agreement shortly after the Step 3 Grievance meeting was an additional disciplinary action taken by the State. The termination of the agreement taken so closely to the ongoing review of the disciplinary action undeniably links the two and the Grievant's unrebutted testimony that he was not allowed to telework until after "the restriction of one year had expired" clearly indicates that the State's action terminating his telework agreement was a direct consequence of the disciplinary suspension.

The State argues that any harm to the Grievant for the termination of the 2017 Telework Agreement is *de minimus*. Deprivation of a professional privilege is not trifling or minimal. The State itself refers to the ability to Telework as a privilege. It is a privilege that was granted to the Grievant in March of 2017. When the State terminated the Grievant's privilege it was a reflection on the Grievant's standing, status, dignity and reputation within his work environment. As previously discussed the failure to remedy a deprivation of professional advantage/privilege not only denies an employee his or her right to have their status, standing, dignity and reputation restored but also denies a union of its ability to protect employees from this type of injury thereby placing the union in a

difficult position with its membership. The State argues that reimbursement of the Grievant's commuting costs is unreasonable given the fact that no employees are reimbursed for their travel to and from work. That argument fails however when the entire picture is taken into consideration. It is much more than the monies expended on gasoline but rather also includes the time expended traveling to and from the work location as well as the costs of operating an automobile. If the Telework Agreement had not been terminated then the Grievant would not have incurred these costs. It is true that employees are not compensated for their regular commute to and from work however when they are denied a privilege, after it had been granted, they are being denied the accompanying benefits of that privilege, specifically a reduction of the costs of commuting to and from work on the days they were granted the privilege to telework. Furthermore the Grievant spent time and energy establishing a home office that would be acceptable to the State as required by the Telework Agreement. There are no tangible records to determine the time expended by the Grievant to establish his home office nor are there any tangible records to establish the additional time expended by the Grievant preparing for, and traveling to and from, his work location. It is however possible to establish the costs involved in his actual commute to and from his work location on the one day that he had been approved and then subsequently denied for teleworking. As the Grievant testified:

Q Do you know the distance of your commute from home to office?

A It is approximately 16 miles round trip, so eight miles each way.

(Tr. p. 51, lns. 22-25)

The Internal Revenue Service standard mileage rate for 2017 was 53.5 cents per mile; the standard mileage rate for 2018 is 54.5 cents per mile. If the Grievant drove 16 miles round trip, one day a week, for 36 weeks in 2017 then he would have driven a total amount of 576 miles. If he drove 16 miles round trip, one day a week, for 10 weeks in 2018 then he would have driven a total amount of 160 miles. The Grievant is entitled to reimbursement for the actual miles driven in 2017 at 53.5 cents per mile and for the actual miles driven in 2018 at 54.5 cents per mile.

As noted by the State the purpose of a make whole remedy is to place the employee in the same position he or she would have been in if the improper discipline had not occurred. That would include the purging of all documents, computer and/or paper, related to this matter. The disciplinary letter (Ex. J2 and incorporated herein as Attachment B) specifies the documents that served as the basis for the discipline:

As specified at page 1 of the disciplinary letter the **pre-disciplinary letter** dated November 8, 2016...incorporated herein, **Enclosure 1**;

As specified at pages 2 and 3 of the disciplinary letter under the heading **Investigation**. Including **Enclosures A, B, C, and D** referenced therein;

As specified at pages 3 and 4 of the disciplinary letter under the heading **Basis for Disciplinary Action** including **Enclosure 2**, the Multnomah County Indictment, and **Enclosure 3**, L&I Employee Policy and Procedure #3.02, referenced therein;

As specified at page 4 of the disciplinary letter under the heading **Summary of Pre-Disciplinary Meeting**;

As specified at pages 4 and 5 of the disciplinary letter under the heading **Determination** including **Enclosure 4**, L&I Core Competencies, referenced therein.

The State contends that as a public employer L&I is subject to record retention laws under the Public Records Act, RCW 42.56. State law mandates that any writing “relating to the conduct of government or the performance of any governmental or proprietary function prepared, owned, used or retained by any state or local agency” be retained for certain periods. RCW 42.56.010(3) and RCW 40.14.010. The Agreement at Article 31.6 also addresses when the State must remove documents from an employee’s personnel file:

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 employee files. 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 or legal action, or as otherwise required by law.

The State's contentions however fail to take into consideration the language of RCW 42.56.110 entitled **Destruction of information relating to employee misconduct**: *Nothing in this chapter prevents an agency from destroying information relating to employee misconduct, in accordance with RCW 41.06.450.* RCW 41.06.450 provides guidance regarding the:

Destruction or retention of information relating to employee misconduct.

- (1) The director shall adopt rules applicable to each agency to ensure that information relating to employee misconduct or alleged misconduct is destroyed or maintained as follows:
 - (a) All such information determined to be false and all such information in situations where the employee has been fully exonerated of wrongdoing, shall be promptly destroyed;
 - (b) All such information having no reasonable bearing on the employee's job performance or on the efficient and effective management of the agency, shall be promptly destroyed;
 - (c) All other information shall be retained only so long as it has a reasonable bearing on the employee's job performance or on the efficient and effective management of the agency.
- (2) Notwithstanding subsection (1) of this section, an agency may retain information relating to employee misconduct or alleged misconduct if:
 - (a) The employee requests that the information be retained; or
 - (b) The information is related to pending legal action or legal action may be reasonably expected to result.
- (3) In adopting rules under this section, the director shall consult with the public disclosure commission to ensure that the public policy of the state, as expressed in chapters *42.17 and 42.56 RCW, is adequately protected

The State by its action of rescinding the disciplinary letter and by its failure to present any testimony or evidence that it had just cause to issue the disciplinary letter has abandoned its determination that the Grievant had engaged in misconduct. The destruction of the documents related to the disciplinary suspension could conceivably be accomplished under RCW 42.56.110. There was also no evidence presented that there was any "pending legal action or legal action may be reasonably expected to result" that would require retention of the documents as set forth at Section (2) of RCW 41.06.450. Article 31.6 of the Agreement permits, but does not mandate that:

...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 or legal action, or as otherwise required by law. (Emphasis added)

The Union argues that the mere practice of removing the disciplinary letter from the personnel file and placing the letter into another file does not protect the Grievant from disclosure to members of the public including future prospective employers. The Arbitrator is not inclined to order the destruction of the disciplinary letter however she will adopt the Union's recommendation that the disciplinary letter that was moved to a legal defense file be labeled as "unsubstantiated".

The State cautioned the Arbitrator at the hearing that she was not privy to the facts that served as the basis for its termination of the Grievant's employment and that those facts would be presented at the arbitration of the termination grievance. The State vigorously argued that the Arbitrator had:

Already determined that the underlying basis for the disqualification and his current employment status was because of the same set of facts that base the suspension, and that shows that without hearing any evidence to the contrary, without being provided any opportunity to hear why the employer took the disqualification action, you automatically assumed that the union's position was proper... (Tr. p. 13)

The State was taking exception to the findings by the Arbitrator at page 2 in her ruling on the State's Motion to Dismiss (Attachment A):

It is clear from the parties' submissions that there has been no new behavior on which the Employer has relied to increase/replace the original penalty. Through an abuse of the process the Employer has subjected Mr. Delozier to a greater penalty for the exact same behavior based on the same set of facts that served as the basis for the original penalty that led to the grievance that is pending arbitration before me.

As noted in that ruling the termination of the Grievant occurred on the same day the State rescinded the disciplinary suspension. It is highly unlikely that the Grievant had engaged in additional misconduct on that one single day however if indeed there are additional facts underlying the termination of the Grievant then the State is within its rights to bring those forward at the termination hearing. What it may not do however is rely upon any of

the facts and evidence that served as the basis for the disciplinary suspension to support any further adverse employment actions against the Grievant. If the suspension never existed then all underlying matters related to the suspension and that served as the basis for the suspension must be removed from any and all files and may not be relied upon in any future proceeding. To do so would in effect be double jeopardy. It is well established that once a member of management with the requisite authority to discipline has assigned a penalty for a disciplinary offense, the incident is closed. Neither the same management representative nor anyone else in management who feels a more severe penalty is required may issue additional disciplinary measures. An employer is entitled to impose separate penalties in respect of the same event if they relate to different acts of misconduct that are qualitatively distinct from each other however the evidence must clearly indicate the existence of separate acts of misconduct rather than simply the use of different headings to justify multiple penalties for what is the same offense. The letter dated May 14, 2018 advising the Grievant that he was being separated or terminated from his position relies upon: Judgment Case No: 15CR41628; L&I policy 3.02; the requirement that the Grievant register as a sex offender; judicial supervised probation for a total of three years. (Ex. J10, Attachment 2) The disciplinary suspension letter dated January 9, 2017 relies upon the exact same information. (Ex. J2) The management personnel who were either involved in or fully informed of the disciplinary suspension determined at the Step 2 grievance meeting that:

Mr. Delozier's off-duty conduct, a class C felony offense, and requirement to register as a sex offender did not disqualify him from performing the functions of his position as a Program Specialist 4 with the Structured Settlement Unit in Legal Services. (Ex. U5, p. 2)

Management personnel, including Jonnita Thompson, Chief Administrative Officer, Michelle Valenzuela, Human Resource Consultant and Victoria Kennedy, Assistant Director for Insurance Services Division were at the pre-disciplinary meeting and were provided with a copy of the January 9th disciplinary suspension letter. (Ex. J2) Management personnel, including Michelle Valenzuela and Labor Relations Manager Melanie Schwent reviewed the disciplinary suspension at the Step 3 grievance meeting and determined that the "suspension is more than justified". These determinations by

management personnel relied on the previously cited facts and evidence that served as the basis for the disciplinary suspension and that are detailed within the disciplinary suspension letter. Their determinations regarding the level of discipline to be administered are final and the incident is closed. Unless there are different acts of misconduct that are qualitatively distinct from the misconduct addressed in this matter and the evidence clearly indicates the existence of separate acts of misconduct rather than simply the use of different headings to justify multiple penalties for what is the same offense then no further adverse employment actions may be taken against the Grievant.

The disciplinary action administered on January 9, 2017 and served on the dates of January 30 through February 3, 2017 was the final action for the alleged misconduct of the Grievant. As stated at page 2 in the Motion to Dismiss ruling:

At no time was the Grievant advised that the original penalty administered in January of 2017 was not final. At no time was the Grievant advised that the Employer was reserving judgment on the penalty to be imposed.

The Union is correct that the doctrines of Double Jeopardy, Waiver and Acquiescence prevent the State from revisiting and imposing more severe punishments upon the Grievant based upon the same set of facts and evidence that served as the basis for the disciplinary suspension.

CONCLUSION

Based on all of the foregoing and for the reasons set forth in the analysis above, the Arbitrator finds that the State has abandoned its claim that there was just cause for the discipline of Mr. Delozier. She further finds that the penalty administered in January of 2017 and rescinded sixteen months later is final. The State is precluded from taking any further adverse employment actions, disciplinary or otherwise, based on the same set of facts and evidence.

Mr. Delozier is entitled to a make whole remedy as if there had been no violation of the Agreement.

The Arbitrator will enter an award that is consistent with these findings.

IN THE MATTER OF THE)	
)	
ARBITRATION)	
)	
BETWEEN)	
)	ARBITRATOR’S
Washington State Department of)	
Labor and Industries)	AWARD
(The Employer))	
)	
AND)	
)	
Washington Federation of State)	
Employees)	Patrick Delozier Grievance
(The Union))	AAA Case No.01-17-0004-4044

After careful consideration of all arguments, testimony, and evidence, and for the reasons set forth in the opinion that accompanies this award, it is awarded that:

- 1) The State has abandoned its claim that there was just cause for the discipline of Mr. Delozier ;
- 2) No later than ten working days of the date of this Award Mr. Delozier shall be made whole in the following manner:
 - a. He shall be reimbursed for the monies withheld due to his disciplinary suspension January 30 through February 3, 2017. The reimbursement shall include interest for the time period of January 30, 2017 through March 31, 2018 at 4% and for the time period of April 1, 2018 through the date of the reimbursement at 5%. Interest shall be compounded daily.
 - b. At the request of Mr. Delozier and after a review by the Union, the State will publish notice to the Grievant’s workgroup indicating that the disciplinary action taken against the Grievant has been revoked and that the accompanying deprivation of professional advantage/privilege was unwarranted.
 - c. Mr. Delozier shall be reimbursed for the actual miles driven in 2017 at 53.5 cents per mile and in 2018 at 54.5 cents per mile for the one day a week that he had been approved for telework for the time period set forth at page 1 of Joint Exhibit 14: April 1, 2017 through March 31, 2018.
- 3) All records, computer and/or paper, related to this matter shall be purged from any and all files with the exception of the disciplinary letter dated January 9, 2017 which shall be labeled as “unsubstantiated” and may only be retained in a legal defense file. Mr. Delozier shall be provided a copy of that letter with the “unsubstantiated” label.
- 4) The documents that served as the basis for the disciplinary suspension may not be relied upon in any further adverse employment actions. Those documents include:
 - a. As specified at page 1 of the disciplinary letter the **pre-disciplinary letter** dated November 8, 2016...incorporated herein, **Enclosure 1**;

- b. As specified at pages 2 and 3 of the disciplinary letter under the heading **Investigation**. Including **Enclosures A, B, C, and D** referenced therein;
- c. As specified at pages 3 and 4 of the disciplinary letter under the heading **Basis for Disciplinary Action** including **Enclosure 2**, the Multnomah County Indictment, and **Enclosure 3**, L&I Employee Policy and Procedure #3.02, referenced therein;
- d. As specified at page 4 of the disciplinary letter under the heading **Summary of Pre-Disciplinary Meeting**;
- e. As specified at pages 4 and 5 of the disciplinary letter under the heading **Determination** including **Enclosure 4**, L&I Core Competencies, referenced therein.

Furthermore any statements within the disciplinary letter that served as a basis for the disciplinary action may not be relied upon in any further employment proceedings including but not limited to: the statements at paragraphs 3 and 4, at page 3.

- 5) Under the doctrines of Double Jeopardy, Waiver and Acquiescence, any other adverse employment actions taken by the State against Mr. Delozier based upon the same set of facts and evidence underlying the disciplinary action in this matter are hereby nullified and Mr. Delozier shall be made whole for any losses suffered in a manner similar to the make whole remedy in this matter.

Respectfully submitted on this 12th day of December 2018



*Sylvia P. Skratek,
Arbitrator*