Washington Federation of State Employees (WFSE), Union, **Vs.** **Washington State Employment Security Department (ESD), Employer**	**ARBITRATOR'S DECISION AND AWARD** **AAA Case 01-22-0005-0520 Grievance of Jacob Rainey** **Arbitrator: Donna E. Lurie**

SENT ELECTRONICALLY TO THE AMERICAN ARBITRATION ASSOCIATION:

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INTRODUCTION

This matter came before Arbitrator Donna E. Lurie upon request by the Washington Federation of State Employees (WFSE) (hereafter "Union") and the Washington State Employment Security Department/Office of Attorney General (hereafter "Employer") to complete an arbitration case that had originally been submitted to Arbitrator Richard Humphreys. Arbitrator Humphreys was unable to render a Decision. The parties sent the Hearing Transcript, Exhibits, and Post-Hearing briefs in electronic form to Arbitrator Lurie on November 6, 2023 to render a Decision and Award as a "desk arbitration".

The parties had engaged in a two-day videoconference evidentiary hearing on July 12 and 13 of 2023. Both parties were given full opportunity to provide evidence through witnesses and exhibits, direct examination, cross-examination, and rebuttal testimony. All exhibits were accepted into evidence by Arbitrator Humphreys (Day 1: Tr. 5). Seven (7) Joint Exhibits were submitted, with three (3) exhibits noted on the Exhibit Index as admitted. Both parties referred to an earlier arbitration decision involving

the Grievant, and that decision is part of the record (Joint Exhibit 2). Similarly, both parties referred to grievance documents and those grievance documents are accepted as part of the record (Joint Exhibits 4, 6, and 7). The Union submitted thirteen (13) exhibits, with twelve (12) noted on the Exhibit Index as admitted into evidence. The Employer submitted thirty-eight (38) exhibits, with twenty-six (26) noted on the Exhibit Index as admitted into evidence, (three were offered and accepted at the close of the evidentiary hearing). The Employer presented testimony of three witnesses – Supervisor Debra Livie-Brown, Lead Worker Glen Wolverton, and Lacey Claims Center Operations Manager Ginger Bernethy. The Union presented the testimony of co-worker Freda Williams and Jacob Rainey (hereafter "Grievant"). No rebuttal testimony was offered. After receipt of post-hearing briefs, the hearing record was closed to any additional evidence and arguments as of September 1, 2023.

This arbitration is governed by the parties' Collective Bargaining Agreement (hereafter "Contract") in effect from July 1, 2021 through June 30, 2023 (Joint Exhibit 1). In addition, the parties negotiated an Expectations Agreement (Joint Exhibit 3) to govern the conditions for reinstating the Grievant to his previous position with ESD and implementing the arbitration decision and award of Arbitrator Richard Ahearn (Joint Exhibit 2).

ISSUE STATEMENT AS PROPOSED BY THE PARTIES AT THE OUTSET OF THE ARBITRATION HEARING:

Did the Employer violate Articles 7, 7.2, 7.4, and/or 8 of the Contract in its treatment of the Grievant and did the Employer reprimand the Grievant without just cause in violation of Article 27 of the Contract?

If so, what is the appropriate remedy or remedies?

APPLICABLE CONTRACT PROVISIONS

7.2 Overtime – Eligibility and Compensation

Employees are eligible for overtime compensation under the following circumstances:

A. Full-time overtime-eligible employees who have prior approval and work more than forty (40) hours in a workweek will be compensated at the overtime rate….

7.4 General Provisions

A. The Employer will determine whether work will be performed on regular work time or Overtime, the number of employees, the skills and abilities of the employees required to perform the work, and the duration of the work. The Employer will first attempt to meet its overtime requirements on a voluntary basis with qualified employees who are currently on duty…

B. If an employee was not offered overtime for which they were qualified, the employee will be offered the next available overtime opportunity for which they are qualified.

Under no circumstances will an employee be compensated for overtime that was not worked…

8.1 The Employer and the Union recognize the value and benefits of education and training designed to enhance employees' abilities to perform their job duties.

8.5 Education and Training Requests

All education and training requests will be approved or disapproved within thirty (30) calendar days from the submission of a properly completed request. If a request is denied, the Employer will provide a reason for the denial to the employee. Upon request, the Employer will provide the reason for the denial in writing.

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.

27.4 … A traditional element of just cause requires discipline to be imposed in a timely manner in light of the need for thorough investigations.

(2021-2023 Collective Bargaining Agreement, Joint Exhibit 1)

NEGOTIATED EXPECTATIONS AGREEMENT FOR JACOB RAINEY – Joint Exhibit 3

In addition to the expectations of all applicable ESD policies and procedures, Joint Exhibit 3 sets forth eight (8) specific expectations for the Grievant to abide by. The specific expectations require Mr. Rainey to notify his manager by email when he begins his workday, when he begins his lunch break, when he returns from lunch, and when he finishes his workday.

Mr. Rainey must provide a list of the claim numbers that he works on each day.

He must ensure that his work status is current and accurate each day. These expectations are required for regularly scheduled hours, as well as any approved overtime hours.

Mr. Rainey must accurately and timely report all time worked in ESD's timekeeping system in compliance with ESD policies and procedures.

Failure to abide by the cited ESD expectations will result in discipline, up to and including termination from employment with ESD.

The Expectations Agreement remains in effect for three years from May 10, 2021. The Employer representative failed to date her signature on the document.

The Expectations Agreement permitted grievances to be filed for any disciplinary actions.

The Agreement is admissible in evidence in any legal proceeding contesting the discipline and may be considered by the arbitrator for any purpose.

APPLICABLE EMPLOYER POLICIES

Employment Security Department Policy 1016 – Employer Exhibit 1

3. **Agency Services**
   Employees shall not provide or involve themselves in any aspect of the Unemployment Insurance benefit, Employer tax, Employment Service systems, or other agency services, for their friends, relatives, and/or coworkers… Further, employees shall not review, approve, initiate, or complete any actions similar in nature to those described above in client services or administrative office services involving friends, relatives, and/or co-workers… (p.4)

Employment Security Department Policy 3010 – Employer Exhibit 2

Roles and Responsibilities
Employees are responsible for adhering to assigned work schedules and keeping management informed of deviations. Responsible for monitoring their own leave balances so leave balances are not exceeded and requesting leave in advance whenever possible. Responsible for accurately documenting time worked and leave taken. Responsible for working overtime at management request should it be necessary and for confirming pre-approval has been granted to work overtime. Pre-approval can be assumed where management has made the request to work overtime… (p.3 of Employer Exhibit 2)

Time Worked
Employees are to record the actual hours worked each day on the timesheet, using the lines identified as Org Index/Master Index, distributing the hours among the accounting codes that reasonably represent the work performed… Additional hours worked (overtime, compensatory time earned, etc.) are to be recorded in the Additional Hours section of the timesheet… (p. 4 of Employer Exhibit 2)

Leave
Paid leave will only be allowed on [during] regularly scheduled work hours.
Employees are to accurately document leave taken on their timesheets and ensure they have completed a leave request for each instance of leave… Before taking leave, employees are to confirm the leave has been approved… (p.4 of Employer Exhibit 2)

Overtime
When Overtime Can Be Anticipated: When the need to work overtime occurs, the number of employees required to perform the work shall be detailed in writing along with a brief explanation of the need. If prepared by [someone] other than the Designated Approver (DA), it is submitted to the DA for approval. The DA notifies the requestor of the approval or disapproval… (p. 5 of Employer Exhibit 2)

BACKGROUND OF CASE

Jacob Rainey, the Grievant, began his employment with the Employment Security Department (ESD) on January 29, 2016. He was hired as an Intake Trainee in the Lacey Claims Center and worked his way through various training sessions (Exhibit E-3) and promotions to Unemployment Insurance Specialist (UIS) 2 as an adjudicator in training. In 2017, the Grievant was promoted to UIS 4, which is considered a journey-level adjudicator position (Day 2:Tr. 255-256). A UIS-4 is responsible for reviewing unemployment claims, contacting and interviewing claimants and their employers, and issuing a preliminary determination on whether each claimant is eligible for unemployment benefits (Day 1: Tr. 33:1-12; Employer Exhibit 5; Day 2: Tr. 256-258).

On March 21, 2019, the Grievant was terminated by ESD for allegedly submitting overtime hours for time not worked on June 2 and June 30, 2018 (Joint Exhibit 2). In addition, the Grievant was found to have misused the Employer's Internet, scanner, Skype, and email resources to submit a personal mortgage application (Joint Exhibit 2). The Union filed a grievance to challenge the termination and the grievance was heard by Arbitrator Richard Ahearn (Joint Exhibit 2). Arbitrator Ahearn upheld the charge of misusing State resources to file a personal mortgage application (p. 18 of Joint Exhibit 2). Arbitrator Ahearn recognized the Employer's lack of confidence in the accuracy of the Grievant's time records, but he concluded that the circumstantial evidence in the UTAB electronic record-keeping system was insufficiently reliable to prove falsification of time records and support a termination for just cause (pp.22-24 of Joint Exhibit 2). Arbitrator Ahearn reinstated the Grievant with a written reprimand and a one-week unpaid suspension (p. 26 of Joint Exhibit 2). In addition, Arbitrator Ahearn directed the parties to develop "an agreement that would provide assurance that the Grievant's documentation of his actual hours worked is accurate and truthful" going forward (Ibid., p. 26).

The Union and ESD negotiated an Expectations Agreement that set forth eight (8) specific conditions for Mr. Rainey's reinstatement and the consequences of any failure to abide by these expectations (Joint Exhibit 3; Day 2: Tr. 343-344). During the course of the grievance-arbitration process, the Grievant had been absent from his position for two years (March of 2019 to March of 2021). The Grievant was reinstated to his UIS-4 position with ESD (Employer Exhibit 5; Tr. 260:20 – 262:14). Upon his return to the Lacey Claims Center, the Grievant was assigned to Supervisor Debra Livie-Brown, a supervisor who had no involvement in the earlier termination decision (Day 1: Tr. 34-35). Ms. Livie-Brown testified that she was happy to have the Grievant on her team (Day 1:Tr. 35). Due to the continuing Pandemic, the Grievant was provided with a laptop and allowed to work from home (Day 2 : Tr. 262).

Initially, the Grievant was assigned to low-level intake work and basic intake training (Day 1: Tr. 45; Day 2: Tr. 263). The Grievant objected to re-taking basic intake training and the trainer agreed that such training was unnecessary (Day 2: Tr. 272-273; Day 1: Tr. 151). Due to his two-year absence and several changes in departmental rules and policies during the Pandemic, the Grievant was required to retake several training courses before being permitted to resume journey level adjudication work (Day 1: Tr. 36-37, 150). A meeting was held on March 5, 2021 to determine the adjudication training needed to update the Grievant on changes in law, policies, and procedures (Joint Exhibit 5). The Grievant expressed that he felt refresher training was a waste of his time (Day 1: Tr. 99; Day 2: Tr. 272-274).

The Union claimed that ESD did not schedule any required training until June of 2021, but the Grievant's training records show training sessions in early May of 2021 (Employer Exhibit 3; Union Exhibit 1). After receiving training on discharge cases, the Grievant was assigned to perform adjudication work in June of 2021 (Day 2: Tr. 278-279). The Grievant shared that he was assigned five different lead workers and trainers with different styles and conflicting directives (Day 2: Tr. 264-266); however, Glen Wolverton served as his primary Lead Worker in Adjudication (Day 1: Tr. 94-96). The Employer placed the Grievant in Training Quality Review (TQR) in June of 2021 – a status that required producing work that was at least 80 percent error free with heightened scrutiny over a rolling four-week period (Day 1: Tr. 39-40; Employer Exhibit 35). The Grievant was told that 3-4 weeks was the usual time period for TQR; however, the Grievant remained in TQR up until the time of the arbitration hearing in late July of 2023 – a period of 2+ years (Day 1: Tr. 40; Day 2: Tr. 294-296, 356). Debra Livie-Brown, the Grievant's immediate supervisor, informed the Grievant that he was ineligible for overtime work while he remained in TQR status – a period of 2+ years and counting (Union Exhibit 3). Operations Manager Ginger Bernethy made the decision to place the Grievant in TQR status and find him ineligible for overtime work (Employer Exhibit 35; Union Exhibit 5).

The Grievant asserted that he received disparate treatment and heightened scrutiny of his adjudication work beginning in June of 2021. He testified that lead worker requests for additional information and for rewrites of his reports made it difficult for him to progress through the caseload (Day 2: Tr. 290-292). The Employer maintains that the Grievant became resistant in June of 2021 to following ESD policies, procedures, and the Expectations Agreement for reinstatement. Specifically, the Employer discovered some discrepancies in the Grievant's timesheets for April and May of 2021. In addition, the Employer questioned whether the Grievant was following "standard work processes", i.e., a series of steps that

adjudicators were required to follow in reviewing and processing cases from beginning to end (Employer Exhibit 35).

A meeting was held on June 10, 2021 between the Grievant, a Union representative, immediate supervisor Livie-Brown, and Lacey Claims Center Operations Manager Bernethy to discuss discrepancies between the timesheets submitted by the Grievant and the documentation compiled by Supervisor Livie-Brown. The Grievant agreed that he had over-reported his overtime hours four times in April of 2021 to his supervisor and was overpaid (Tr. At 165:5 – 168:11; Exhibits E-8 and E-9). The Grievant contended that these errors were due to confusion over how to report his half-hour lunch period and that his supervisor approved each of his timesheet entries. The Grievant acknowledged that he placed himself on lunch status and continued working on May 1, 2021 because he planned to leave early that day (Day 1: Tr. 197:9-198:6; Joint Exhibit 5). He did not file a request to adjust his work schedule.

Operations Manager Bernethy directed the Grievant on June 10, 2021 to follow the standard work process of pulling one case at a time and working through that case until it could not be processed any further (Day 1: Tr. 164:3-22). The Employer maintains that the Grievant continued to pull multiple cases and multiple issues at a time in violation of the standard work process policy (Joint Exhibit 5 and Employer Exhibit 5). The Grievant explained that intake cases of timely claims were straightforward and simple to adjudicate, making it easy for adjudication staff to work on several cases at the same time. Pulling one case at a time made it difficult to meet the production quota expectations of ESD for each adjudicator. The Grievant felt comfortable pulling multiple adjudication cases instead of following the standard work process for each case (Day 2: Tr. 285-292, 329).

During the course of the Employer's 2021 investigation of the Grievant's time records, the Employer discovered that the Grievant accessed internal Department records on May 9, 2021 regarding an unemployment insurance claim filed on behalf of his wife (Employer Exhibit 17; Day 1: Tr. 182). The Grievant sought to determine if someone had stolen his wife's identity to file a false claim (Day 2: Tr. 300-332). He testified that he reported the fraudulent claim to the ESD fraud unit (Day 2: Tr. 331:12-22), but no verification of this report was provided at the arbitration hearing. The Grievant acknowledged that he was familiar with Employer Policy 1016; however, he didn't feel that his actions were a violation of that policy (Day 2: Tr.346:14-347:14; 349:19-351:5).

The parties provided conflicting information on the telephone call logs and case records. Lead Worker Wolverton had concerns over the Grievant's alleged failure to update a claimant's address (Employer

Exhibit 33) and the Grievant leaving the wrong telephone number in voicemail messages to claimants and employers (Employer Exhibit 31; Tr. 171:24-172:19). The Grievant testified that he had at least two different telephone numbers and inadvertently used his old number in his email signature line (Day 2: Tr. 339). The Grievant testified that he experienced intermittent access to the OAH portal telephone system and had reported problems with his access (Union Exhibit 13; Employer Exhibits 34 and 35). Lead Worker Wolverton relayed his concerns regarding the Grievant's reports on efforts to update a claimant's address (Employer Exhibit 33).

A meeting was held on August 27, 2021 to discuss concerns about logging calls in the case records that had not actually been made at the time that they were logged (Employer Exhibit 6-a; Day 2:Tr. 381). The Grievant responded that the calls had been completed by the time of the August 27 meeting (Employer Exhibit 6-a).

On September 7, 2021, the Grievant filed a grievance over his indefinite TQR status, alleged targeted attention, perceived redundant training, and being denied the opportunity to earn overtime (Joint Exhibit 4). The Grievant contended that the Employer's treatment was in retaliation for the Union's success in overturning the 2019 dismissal and having the Grievant reinstated to the UIS Adjudicator 4 – Journey Level position (Joint Exhibit 4; Day 2: Tr. 379-380).

The Grievant's timesheets were reviewed on September 13, 2021 and these timesheets were pre-filled (i.e., marking work hours and leave taken in advance of the actual dates in the pay period) (Joint Exhibit 5). Discrepancies were discovered in the amount of work and leave hours recorded for September 10, 2021 (Joint Exhibit 5).

The Employer issued a written reprimand on September 20, 2021 for the concerns that were summarized above regarding timekeeping, work completed, departmental policies, and standard work process procedures, as well as the Grievant's unauthorized review of internal records on the unemployment claim filed in his wife's name (Joint Exhibit 5). The Union filed another grievance on October 11, 2021 contending that the Written Reprimand was discipline without just cause and a continuation of the retaliation and targeted attention alleged by the Grievant (Joint Exhibit 6). The Union and the Employer processed both grievances and were unable to resolve them. The parties consolidated the two grievances and moved them to arbitration. No objections or challenges were made with respect to procedural or other questions of arbitrability. This Decision and Award is issued in accordance with the American Arbitration Association (AAA) Labor Arbitration Rules.

DISCUSSION

The proposed Issue Statement combines the two grievances. For purposes of clarity, the Arbitrator has separated the issues into two distinct questions to analyze the Union's contract and discipline concerns. The first issue covers the disciplinary action of the written reprimand issued on September 20, 2021. Here, the Employer has the burden of proof to show that the reprimand met just cause requirements in Article 27 of the Contract. The second issue covers a contract interpretation claim regarding the Grievant's rights to overtime and appropriate and timely training opportunities. Here, the Union has the burden of proof in showing differential and improper treatment of the Grievant.

I. DID THE EMPLOYER REPRIMAND THE GRIVANT WITHOUT JUST CAUSE IN VIOLATION OF ARTICLE 27 OF THE CONTRACT?

The Employer has the burden to show that it met the requirements of just cause in imposing discipline on the Grievant. Modern Arbitrators have increasingly rejected a mechanistic application of the seven tests of just cause that were expressed in *Enterprise Wire Co*., 46 LA 359 (1966). In the instant case, this Arbitrator will review the following:

- Whether the Employer's evidence demonstrated notice of rules/policies to be followed,
- Whether the Grievant violated rules/policies and engaged in misconduct,
- Whether the offenses were repetitive or isolated in nature,
- Whether the Employer engaged in a fair and sufficient investigation;
- Whether the penalty imposed was reasonable in light of the misconduct, the employee's service record, and treatment of similar offenses

The overtime entries listed in Joint Exhibit 5 showed multiple discrepancies of 0.5 hours, resulting in overpayments to the Grievant (Joint Exhibit 5). Changes were made to the ESD timekeeping system during the Grievant's 2-year absence, so there may have been some confusion about how to use the reporting system. Once the Grievant was advised of the proper timekeeping process at the June 10, 2021 meeting, the Grievant no longer had justification for misreporting his time worked and/or leave taken. The Employer provided documentation that leave was incorrectly reported for June 17, August 11, August 12, September 10, and September 13 of 2021 (Joint Exhibit 5). The Grievant acknowledged that he had adjusted his work schedule and misrepresented his work status on June 10, 2021 without seeking prior supervisor approval (Joint Exhibit 5).

The evidence demonstrates that the Grievant was provided with adequate notice of the Employer's specific expectation for timely and accurate reporting of all time worked (Expectations Agreement - Joint Exhibit 3, Department Policy 3010 -Employer Exhibit 2, supervisor communications, and the June

10, 2021 meeting with his supervisors -summarized in Joint Exhibit 5). The Expectations Agreement is quite detailed on the Grievant's timekeeping and reporting responsibilities (Joint Exhibit 3). Due to the previous arbitration case, the Grievant was well aware of the Employer's expectations for accurate timekeeping and the Employer's concerns regarding the Grievant's lack of accurate timekeeping and reporting (Joint Exhibit 2).

In most situations, it is the employee's responsibility to accurately record his time on the job and any leave hours taken (*Discipline and Discharge*, 3rd Ed. 2015, p. 7-8). Even small discrepancies will subject an employee to some form of discipline (*Alofs Mfg. Co.,* 89 LA 5, Daniel, 1987 – written reprimand upheld for inaccurate timekeeping records). By signing and dating the Expectations Agreement, the Grievant accepted personal responsibility for timely and accurately reporting of all time worked in ESD's timekeeping system in compliance with ESD policies and procedures (Joint Exhibit 3). The Grievant cannot rely on his supervisor to catch his errors as an excuse for carelessness or taking shortcuts in timekeeping and reporting. Furthermore, the Grievant accepted the prospect of discipline for violations of the Expectations Agreement (Joint Exhibit 3).

At the June 10, 2021 meeting, the Employer questioned whether the Grievant was actively working each day. Adjudicators are monitored by their keystrokes to reflect work activity in the Teams software program. Both the Grievant and his coworker testified that an adjudicator would spend time on non-keystroke activities that included reading emails and policies, reviewing case lists, conducting research, making phone calls, strategizing how to approach a case, and reflecting on the case record, as well as taking a biology break (Day 2: Tr. 232-234; 324-325). The absence of keystrokes serves as circumstantial evidence and does not prove the lack of work activity. At the same time, the Grievant could not claim to be using the Office of Administrative Hearings (OAH) Prism portal for reviewing appeals during the time period that the Grievant reported he did not have access to the OAH portal (March of 2021 to at least July of 2021) (Employer Exhibits 34 and 35; Union Exhibit 13). More concerning to the Arbitrator was the charge of logging telephone calls that had not been made by the Grievant at the time that he logged these calls (Employer Exhibit 6-a). The discussion on August 27, 2021 between the Grievant, Bernethy, and Livie-Brown uncovered information from the Grievant that the phone calls in question were made later after the discrepancies were brought to the Grievant's attention (Employer Exhibit 6-a).

Lead worker Wolverton acknowledged that there were problems with the telephone numbers assigned to the Grievant; however, Wolverton verified concerns over accurate reporting of efforts to gain required information from claimants and employers (Day 1: Tr. 110-123). For example, the Grievant

represented to Wolverton that a claimant was uncommunicative, but the records show that the Grievant did not ask for the information that was needed and requested by his Lead Worker (Employer Exhibits 21-30; Day 1:Tr. 110-123). The Grievant's conduct raises trust and credibility issues when he reports that he has tried to get specific information, but there are no records of his attempts to obtain this information (Employer Exhibit 33).

On June 10, 2021 the Grievant was provided verbal notice that he was expected to follow the standard work process and pull one case at a time (Joint Exhibit 5). The June conversation was a reiteration of the Employer's ongoing policy since 2017. Supervisor Livie-Brown had explained standard work process in an earlier email to the Grievant (Employer Exhibit 35). After the Grievant received definitive notice in June, 2021 of Department expectations for all adjudicators to follow standard work process, he could not argue that he misunderstood the application of this policy and believed that it affected only new adjudicators. He was expected to adhere to the standard work policy and not treat it as a suggestion.

On May 9, 2021, the Grievant accessed several internal Department screens to investigate an unemployment claim filed in the name of his wife (Employer Exhibit 17; Day 1: Tr. 182). The Arbitrator understands why the Grievant was alarmed about possible identity theft and a fraudulent claim; however, the Grievant had no authority to access internal Department records regarding the unemployment insurance claim filed in his wife's name. His actions clearly violated Policy 1016 (Employer Exhibit 1). The Grievant was prohibited from involving himself "in any aspect of the Unemployment Insurance benefit, Employer tax, Employment Service systems, or other agency services, for their friends, relatives, and/or coworkers…" (Employer Exhibit 1). The Grievant could have reported the information received by his wife to the appropriate ESD office and left the investigation to be conducted by the Employer. Instead, the Grievant gained unauthorized access to several department screens to conduct his own investigation.

The Employer raised concerns over the Grievant volunteering for overtime work while he was stuck in TQR status. The Grievant appeared to be frustrated by the Employer's refusal to authorize his access to overtime and the Employer's insistence that continuing TQR status prohibited overtime. The Arbitrator understands the Grievant's frustration with his Employer; however, he cannot engage in self-help. Department policy required prior supervisor approval for an employee to work overtime (Policy 3010 – Employer Exhibit 2). The Grievant misrepresented his eligibility for overtime and stated that he was seeking access to the WG035 system "per the request of my supervisor and the intake supervisor" (Employer Exhibit 12). This was not the case, and his access was later denied.

The Grievant properly filed a grievance on September 7, 2021 to challenge the decision of the Employer to keep the Grievant in TQR indefinitely and deny him any access to overtime work (Joint Exhibit 4). Department policies, however unfair and arbitrary they seem in their application, must be followed during the processing of a grievance. A central principle of labor-management relations is to "obey now and grieve later". Arbitrators generally take the position that employees must follow Employer policies, even when they believe that those policies violate their contractual rights. See Elkouri and Elkouri, *How Arbitration Works* (8th ed. 2016), p. 5-84-A.

Based on the evidence presented at the arbitration hearing, the Arbitrator concludes that the Employer conducted a fair and thorough investigation and was able to document and verify the Employer's concerns outlined in the written reprimand. The Grievant was provided ample opportunity to respond to the Employer's concerns, and he was provided with competent Union representation throughout the investigatory process. The June 10, 2021 meeting between the Grievant, his supervisors, and his Union representative provided clear notice to the Grievant about the Employer's expectations of him as an employee of ESD and the Employer's concerns regarding the accuracy of his reporting. The Employer is entitled to expect honest and accurate records from the Grievant.

The Union has argued that the specific timesheet discrepancies were minor and could be corrected by the supervisor. The Union's argument assumes that the supervisor would catch every discrepancy in every pay period. The Union's argument places an unreasonable burden on the supervisor. The responsibility for accurate time records rests with the Grievant, not his supervisor. The discrepancies in the Grievant's time records have called into question the Grievant's trustworthiness and reliability, regardless of the specific amounts in question. See *Cadillac Products*, 76-2 ARB §8541 (Forsythe, 1976).

In 2019, the Employer had raised previous concerns about the accuracy of the Grievant's time records and the Grievant's violations of Department policies on access to Department resources for personal business (Joint Exhibit 2). The parties' Expectations Agreement served as a second chance for the Grievant to regain trust and salvage his career with ESD. No amount of vigorous representation by the Union can replace the Grievant's personal responsibility to adhere to the commitments that he agreed to on March 10, 2021 (Joint Exhibit 3). The Grievant's prior service and disciplinary history support a written reprimand for the Employer's continuing concerns.

Based on the documentation, testimony, policies, and evidence provided by the Employer, the Arbitrator concludes that the Employer had just cause to issue a written reprimand to the Grievant for the misconduct cited in Joint Exhibit 5. The grievance challenging the written reprimand is dismissed.

II. DID THE EMPLOYER VIOLATE ARTICLES 7, 7.2, 7.4, AND/OR ARTICLE 8 OF THE CONTRACT IN ITS TREATMENT OF THE GRIEVANT UPON HIS REINSTATEMENT TO UIS ADJUDICATOR-4?

Department Policy 3010 provides that employees are responsible for confirming pre-approval for overtime in order to work overtime hours (Employer Exhibit 2, p. 3). No mention is made in the Contract regarding the impact of Total Quality Review (TQR) on an employee's eligibility for overtime. No mention was made regarding TQR status in an all-department alert for overtime work (Employer Exhibit 15). Policy 3010 also provides that the Collective Bargaining Agreement supersedes the policy where there is a conflict between the two (Employer Exhibit 2, p. 1).

Article 7.2- A. of the Contract provides: "Full-time overtime-eligible employees who have *prior approval* and work more than forty (40) hours in a workweek will be compensated at the overtime rate…." (Joint Exhibit 1). Article 7.4 of the Contract provides "If an employee was not offered overtime for which they were qualified, *the employee will be offered the next available overtime opportunity for which they are qualified*…" (Joint Exhibit 1). No mention is made of Total Quality Review (TQR) in the Contract and whether that status disqualifies someone for overtime work. Article 6.1-C of the Contract defines an "overtime eligible" position as one that is "assigned duties and responsibilities that meet the criteria for overtime coverage under federal and state law" (Joint Exhibit 1, p. 18). The parties' focus on eligibility, as defined in Article 6.1-C of the Contract, is whether the position is covered or exempt under the Fair Labor Standards Act (Joint Exhibit 1, p. 18).

The Employer has argued that it exercised its management rights in determining that the Grievant did not participate in sufficient training and had not shown sufficient mastery of the adjudication work to qualify him for overtime assignments (Employer post-hearing brief). Lead workers or supervisors are expected to review the work of employees in TQR status, and the necessity for additional review would create more work and worsen the backlog of claims (Employer post-hearing brief). In contrast, the Union argues that keeping an employee in TQR status for the most minute details and requiring repetitive rework of claim adjudications, as well as denying the opportunity to earn overtime pay, constituted disparate treatment and retaliation for the Grievant's reinstatement (Union post-hearing brief).

The Arbitrator views the instant case as a stalemate between the parties. The Grievant's ongoing TQR status, along with his ineligibility for overtime, continued to create conflict and frustration for both the Employer and the Grievant. At the time that post-hearing briefs were filed on September 1, 2023, the Grievant had been relegated to TQR status for perpetuity and denied overtime opportunities for the foreseeable future. The Employer argues that it has the management right to determine "the skills and abilities of the employees required to perform the work… and whether employees interested in working overtime are "qualified" for the work (Sections 7.4 of Joint Exhibit 1, p. 29). The Arbitrator respects the Employer's management rights to "establish work performance standards" and "determine the need for and method of scheduling, assigning, authorizing, and approving overtime" (Joint Exhibit 1 – Article 35).

Arbitrators generally recognize that management rights are not unfettered. Workplace rules and policies must be reasonable, supported by a legitimate business objective, and applied in a reasonable manner. See *Discipline and Discharge*, 3rd ed. 2015, p. 2-63, citing *Nuplex Resins, LLC*, 133 LA 996 (Wilson, 2014) and Hill & Sinicropi, *Management Rights – A Legal and Arbitral Analysis*, 71 (BNA Books 1986). The Contract's requirement for an employee to be "offered the next available overtime opportunity for which they are qualified" envisions an equitable distribution of overtime work and overtime pay (Joint Exhibit 1). Deeming an employee to be unqualified in perpetuity undermines the parties' contractual language. Ms. Williams, the Grievant's co-worker, testified that she observed ESD management using TQR and overtime eligibility as tools to exact punishment rather than serve legitimate business needs (Day 2: Tr. 217-218). The Grievant has exacerbated this stalemate by resisting training and insisting that he knows all he needs to know about adjudication policies and procedures.

Communications about management expectations for overtime work were unclear at times in 2021. For example, Supervisor Livie-Brown sent this email message to the Grievant on May 10, 2021:

> "I know that I approved your OT for the weekend & for this morning. The approval was for working in the Timely Claiming Work Queue. In the future, if there was not any production available then you would log off. This happens to everyone sometimes when UTAB is not working or a project runs out of items to work. The OT during this time is no different than OT was when you were working it previously & I apologize if I did not make that clear to you."
>
> (Employer Exhibit 11 - email from Livie-Bown, dated May 10, 2021)

The Arbitrator notes that no evaluative documents or statements were offered by the Employer to demonstrate job performance concerns over the adjudication recommendations or findings made by the Grievant. No mention was made of manager disagreements with the Grievant's adjudication

findings. Employer Exhibit 16 and Union Exhibit 2 demonstrate that the vast majority of employees moved through TQR in much less time than the Grievant. The comparison employees were brand new to the ESD department; whereas, the Grievant was a returning employee with three years of experience.

Based on the evidence and arguments provided by the parties, the Arbitrator concludes that the Employer violated Article 7 of the Contract in keeping the Grievant on TQR status for 2+ years and denying him any opportunities to earn overtime pay while on indefinite TQR status . The grievance challenging the ongoing TQR status and denial of overtime work is upheld in part (Joint Exhibit 4).

The grievance filed on September 7, 2021 also alleges "redundant training" (Joint Exhibit 4). The remedy sought by the Union is to limit the Grievant's training to "that appropriate for his experience as an Adjudicator-4" (Union's post hearing brief). The Arbitrator respects management's right to determine the training and employment development opportunities that will be provided to employees in accordance with agency policies and available resources (Joint Exhibit 1, Article 8, p. 49). The Grievant does not have the authority to declare that a required training is redundant or unnecessary. The parties clearly stated that training decisions are to be made by the Employer (see Article 35-N in Joint Exhibit 1). The Employer had legitimate, non-retaliatory reasons to require the Grievant to undergo refresher training – two years had passed and there were multiple changes in law, policy, and procedures for unemployment claims (Day 1: Tr. 36-38; Day 2: 239-240).

Based on the evidence and arguments provided by the parties, the Arbitrator concludes that the Employer did not violate Article 8 on Training and Employee Development. This portion of the grievance that challenges training requirements is hereby dismissed (Joint Exhibit 4).

AWARD

Based on the evidence and arguments presented by the parties, the Arbitrator concludes that the Employer substantiated violations of the Expectations Agreement, Policy 3010 on timekeeping records, and Policy 1016 on Conflict-of-interest. The written reprimand did not violate Article 27 of the parties' Contract, nor did the reprimand constitute retaliation for the Grievant's earlier reinstatement. The Grievance in Joint Exhibit 6 is dismissed.

Based on the evidence and arguments presented by the parties, the Arbitrator concludes that the Employment Security Department violated Article 7 of the Collective Bargaining Agreement in determining that Jacob Rainey had to remain in Total Quality Review (TQR) for an indefinite period and that he was ineligible for overtime opportunities while on perpetual TQR status. The evidence supports the allegation that Mr. Rainey was treated differently with regard to TQR scrutiny and duration. He has been denied reasonable overtime opportunities that were available to other employees.

The grievance in Joint Exhibit 4 is partially upheld on the issues of being kept in TQR status for perpetuity and being denied overtime. The Employer is directed to remove the Grievant from TQR status within four (4) calendar weeks of receiving this arbitration Decision and Award. No backpay is awarded since any retroactive overtime pay would violate Article 7.4 of the Contract and be speculative in nature.

Based on the evidence and arguments presented by the parties, the Arbitrator concludes that the Employer complied with Article 8 of the Collective Bargaining Agreement and that no contract violation was shown. The portion of Joint Exhibit 4 pertaining to training is hereby dismissed. Furthermore, the Grievant is directed to comply with Employer training requirements.

In accordance with Section 29.3-E-4 of the parties' Collective Bargaining Agreement, costs for the services of the Arbitrator shall be shared equally by the State of Washington Employment Security Department (Employer) and WFSE (Union).

Respectfully submitted on November 28, 2023.

Arbitrator Donna E. Lurie /s/

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