

IN THE MATTER OF THE ARBITRATION BETWEEN

WASHINGTON FEDERATION OF	)	
STATE EMPLOYEES, AFSCME	)	
COUNCIL 28, AFL-CIO,	)	ARBITRATOR'S OPINION
	)	AND AWARD
	)	
UNION,	)	
	)	MARK FEY
and	)	UNFAIR EVALUATION
	)	GRIEVANCE
STATE OF WASHINGTON,	)	
COMMUNITY COLLEGES	)	
OF SPOKANE,	)	AAA NO. 01-15-0005-9409
	)	
EMPLOYER.	)	
	)	

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BEFORE: JOSEPH W. DUFFY  
ARBITRATOR  
PO BOX 12217  
SEATTLE, WA 98102-0217

REPRESENTING  
THE UNION: CHRISTOPHER J. COKER  
YOUNGLOVE & COKER, PLLC  
1800 COOPER POINT ROAD SW, BLDG. 16  
OLYMPIA, WA 98502-7846

REPRESENTING  
THE EMPLOYER: DONNA J. STAMBAUGH  
SENIOR COUNSEL  
ASSISTANT ATTORNEY GENERAL  
1116 W. RIVERSIDE AVENUE  
SPOKANE, WA 99201-1194

HEARING HELD: MARCH 30, 2015  
SPOKANE, WA

## OPINION

### Introduction

Washington Federation of State Employees (“Union”), serves as exclusive bargaining representative for a bargaining unit of workers employed by Community Colleges of Spokane (“Employer”). The Union and the Employer (“Parties”) submitted this dispute to arbitration under the terms of their July 1, 2013 – June 30, 2015 collective bargaining agreement (“Agreement”), excerpts from which they introduced at the hearing as an exhibit. (U1)

This arbitration arose from a grievance filed by the Union on behalf of the Grievant, Mark Fey. The grievance alleges certain violations of the Agreement related to the Performance Development Plan (“PDP”, also referred to as the evaluation) issued to the Grievant for the 2/1/2014 to 1/31/2015 Performance Period. (U2, U6)

The hearing took place on March 30, 2016 at the Offices of the Attorney General in Spokane, WA.

At the start of the hearing, the Parties agreed that the grievance is properly before me for a final and binding decision on the merits, with the exception that the Employer contends that certain matters related to an evaluation are not grievable. (TR5:9-TR6:13) The Parties agreed to proceed with the hearing on the merits with the understanding that I will address the Employer’s arbitrability concerns in this decision.<sup>1</sup> The Parties also agreed that I should retain jurisdiction for a period of sixty (60) days after issuance of the award to aid in the implementation of the remedy, if a remedy is awarded. (TR8:18-TR9:3)

The hearing proceeded in an orderly manner. The attorneys did an excellent job of presenting the respective cases. Both Parties had a full opportunity to call witnesses, to make arguments and to introduce documents into the record. Witnesses were sworn under oath and subject to cross-examination by the opposing Party. A court reporter transcribed the hearing and made a copy of the transcript available to the Parties and to me.

The Union submitted thirteen exhibits (U1-U13) that were received into the record without objection. (TR9:4-8) A total of six witnesses testified at the hearing (Mr. Fey, HR Consultant Reginald Eans, Nursey and Grounds Lead Charles Howland, Director of Facilities

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<sup>1</sup> The attorney for the Union noted on the record that the Union did not intend to argue that the content of the particular Performance Development Plan is grievable. The Union contends, however, that a process issue is present and a remedy for a process error or violation of the Agreement may include removal of certain content or the Performance Development Plan as a whole. (TR6:1-13)

Operations Jeff Teal, former Director of Human Resources Gary Nilsson (by phone) and Chief Administrative Officer Greg Stevens). By agreement of the Parties, one witness testified by telephone. At the close of the testimony, the Parties agreed to submit post-hearing briefs simultaneously to me and to each other on May 13, 2016. I received the briefs on May 13, 2016 and then closed the record.

#### Issue for Decision

The Parties did not agree on a statement of the issue and they left it to me to frame the issue based on their proposals. (TR8:13-17)

The Employer proposed the following issue statement:

Did the Employer violate Articles 6.1, 6.2, 6.3, 3.3 or 40.1 of the Agreement in relation to the Grievant's 2015 performance evaluation? If so, what is the appropriate remedy? (TR8:5-8)

The Union proposed the following issue statement:

Issue One: Did the Community Colleges of Spokane violate CBA Article 6.1, 6.2 and/or 6.3 when Grievant's supervisor, during an applicable evaluation period: 1.) Failed to discuss any alleged performance deficiencies and/or performance goals; 2.) Failed to support Grievant in his professional development, and; 3.) Failed to bring to Grievant's attention alleged performance problems at the time of occurrence prior to raising concerns in a formal Performance and Development Plan (PDP)? If so, what is the appropriate remedy?

Issue Two: Did the Community Colleges of Spokane violate CBA Article 40.1 when, on May 6, 2015, Grievant's supervisor refused the Grievant's request for Union representation to assist him with review and response to content and process used in his PDP for the period of 2/1/14 to 1/31/15? If so, what is the appropriate remedy?

Issue Three: Did the Community Colleges of Spokane violate CBA Article 3.3, which is an anti-retaliation article, when Grievant's supervisor issued the PDP for the period 2/1/14 through 1/31/15 in violation of multiple CBA articles and in retaliation for Grievant's complaints about the reviewing supervisor to human resources for Community Colleges of Spokane? If so, what is the appropriate remedy? (TR7:2-TR8:2)

When framing the issue, I prefer to adopt an issue statement in the form of a question that does not include the details of the specific arguments or factual conclusions of the parties. The purpose of this approach is to pose a question that is broad enough to cover the positions taken

by the parties without introducing any suggestion of prejudgment of facts or contentions. Therefore, I have adopted the Employer's proposed issue statement.

### Background

The Grievant went to work for the Employer in September 2000 as a sprinkler maintenance worker. Since then, his job title has changed to Grounds and Nursery Specialist 3, but his duties have remained essentially the same. His duties include grounds work that involves caring for the irrigation system, pruning trees, removing debris, cultivating plants and lawns and other similar duties. (TR15-TR16)

When the Grievant first came to work, his supervisor was Arden Crawford, who has since retired. The Grievant had Mr. Crawford as his supervisor until about July 2012 when Jeff Teal became the Grievant's supervisor. (TR16; TR90:16-19) Mr. Teal serves as the Director of Facilities Operations and reports to Dennis Dunham, who is the Director of Facilities. (TR87:15-TR88:2)

Mr. Teal conducted performance evaluations of the Grievant for the periods February 1, 2011 through January 31, 2012 and February 1, 2012 through January 31, 2013 and February 1, 2013 through January 31, 2014. (U7, U8, U9)

This dispute involves the Grievant's performance evaluation for the period February 1, 2014 through January 31, 2015. (U6) In that evaluation, Mr. Teal rated the Grievant a "2" in eleven rating categories and rated him "1" in one. Previously, the Grievant had never received a rating below "3".

The Grievant filed a grievance alleging violations of a number of provisions of the Agreement. (U2) When the Parties could not resolve the dispute in the grievance procedure, this arbitration followed. (U4, U5, U6)

### The Agreement

The Agreement contains the following provisions:

#### **ARTICLE 3**

#### **WORKPLACE BEHAVIOR**

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**3.3 Retaliation against employees who make a workplace behavior complaint will not be tolerated. (U1, p. 2)**

## **ARTICLE 6**

### **PERFORMANCE EVALUATION**

#### **6.1 Objective**

The performance evaluation process gives a supervisor an opportunity to discuss performance goals with their employee and assess and review his or her performance with regard to those goals. Supervisors can then provide support to the employee in his or her professional development, so that skills and abilities can be aligned with the college/district mission and goals. Performance problems should be brought to the attention of the employee at the time of the occurrence to give him or her an opportunity to address the issue.

#### **6.2 Evaluation Process**

A. The immediate supervisor will meet with an employee at the start of his or her review period to discuss performance expectations. The employee will receive copies of his or her performance expectations as well as notification of any modifications made during the review period. Employee work performance will be evaluated during probationary, trial service and transition review periods and at least annually thereafter. Notification will be given to a probationary or trial service employee whose work performance is determined to be unsatisfactory.

B. The supervisor will discuss the evaluation with the employee. The employee will have the opportunity to provide feedback on the evaluation. The discussion may include such topics as:

1. Reviewing the employee's performance;
2. Identifying ways the employee may improve his or her performance;
3. Updating the employee's position description, if necessary;
4. Identifying performance goals and expectations for the next appraisal period; and
5. Identifying employee training and development needs.

C. The performance evaluation process will include, but not be limited to, a written performance evaluation on forms used by the Employer, the employee's signature acknowledging receipt of the forms, and any comments by the employee. A copy of the performance evaluation will be provided to the employee at the time of the review. A copy of the final performance evaluation, including any employee or reviewer comments, will be provided to the employee. The original performance evaluation forms, including the employee's comments, will be maintained in the employee's personnel file.

D. If an employee disagrees with his or her performance evaluation, the employee has the right to attach a rebuttal.

E. The performance evaluation process is subject to the grievance procedure in Article 30. The specific content of a performance evaluation is not subject to the grievance procedure.

F. Performance evaluations will not be used to initiate personnel actions such as transfer, promotion or discipline.

**6.3** Training on performance evaluations will be offered to all bargaining unit employees. (U1, p. 14-15)

## **ARTICLE 30**

### **GRIEVANCE PROCEDURE**

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#### **30.3 Filing and Processing**

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##### **C. Processing**

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#### **Step 5: Arbitration**

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##### **E. 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 staffing levels or to direct staff to work overtime. (Agreement, p. 65)

**ARTICLE 40**  
**UNION RIGHTS AND ACTIVITIES**

**40.1 Representation**

Upon request, an employee will have the right to representation at all levels on any matter adversely affecting his or her conditions of employment. The exercise of this right will not unreasonably delay or postpone a meeting. Except as otherwise specified in this Agreement, representation will not apply to discussions with an employee in the normal course of duty, such as giving instructions, assigning work, informal discussions, delivery of paperwork, staff or work unit meetings or other routine communications with an employee. (U1, p. 82)

Discussion

The Grievance

The grievance filed in this case describe the dispute in the following terms. The individual items have been broken out and identified by letter for ease of reference:

- a. On 5/1/15 at approximately 2:15 PM nearing the end of Mark's shift Mr. Jeff Teal conducted Mr. Mark Fey's performance evaluation for the evaluation period 2/1/14-1/31/15 therefore it was not timely.
- b. Mr. Teal did not address Mr. Fey's alleged short comings during the evaluation period failing to bring these matters to the attention of Mr. Fey at the time of the occurrence.
- c. During the evaluation discussion Mr. Teal brought in events that, if happened, were outside the evaluation period and/or the PDP.
- d. On 5/6/15 Mr. Teal refused Mark's request for additional time to contact union representation before responding to content and process used in this evaluation.
- e. Mr. Teal used second hand information that was not fairly investigated.
- f. Information and comments taken out of context from co-workers, co-workers that may have been coached and subpoenaed to testify against Mr. Fey's law suit against the college.
- g. Mr. Fey's PDP has not been updated over several evaluations periods his expectations have remained the same.
- h. His work practice, attitude, ethics are unchanged as well as his interactions with coworkers, however, his performance evaluation has been degraded by Mr. Teal after Mr. Fey reported Mr. Teal's perceive unprofessional behavior to HR.

As a remedy, the Union requested the following:

That the evaluation for the period 2/1/14-1/31/15 be immediately removed from Mark's personal file. That all information be removed from his supervisors file dated before 2/1/15, that all removed files be given to Mr. Fey or destroyed in his presents. That all future evaluations be done in a timely and fair manner. Any other remedies that would make grievant whole. (U2)

### The Union's Position

The Union contends that under the system for conducting performance evaluations an employee should never be surprised by the ratings and comments made by the supervisor in the evaluation. Article 6.1 of the Agreement states: " Performance problems should be brought to the attention of the employee at the time of the occurrence to give him or her an opportunity to address the issue." The Union argues that in past evaluations the Grievant had never received less than a three rating in any rating category.<sup>2</sup> In the 2/1/14-1/31/15 evaluation<sup>3</sup>, however, the Grievant received eleven ratings of two and one rating of one. The Union contends that at no time during the rating period did the Grievant's supervisor bring to the Grievant's attention any of the issues that resulted in the lower ratings on the evaluation. The Union contends that the discussion during the performance evaluation meeting was one-sided and belligerent on the part of the supervisor. The Union contends that consequently the Grievant reasonably concluded that the interaction was in fact disciplinary and would have an adverse impact on his employment. Therefore, he believed that he was entitled to Union representation. The Union also argues that in response to an email from his supervisor dated October 22, 2014, the Grievant attempted to discuss the issues raised in the email but the supervisor refused. As a result, the Grievant contacted Human Resources and the Grievant believes that someone in Human Resources then notified the Grievant's supervisor. The Union contends that the performance evaluation that came after these events and the lower ratings are retaliation for contacting Human Resources about his concerns with the October 2014 email. (U13)

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<sup>2</sup> The rating scale is 1 to 5 with 5 as the highest rating and 1 the lowest. A rating of 3 is generally considered satisfactory and a rating of 2 or less indicates unsatisfactory work performance. (U6)

<sup>3</sup> Sometimes in this Opinion the evaluation at issue is referred to as the evaluation, the 2014-2015 evaluation , or the 2015 evaluation, all of which mean the evaluation for 2/1/14 to 1/31/15.



### The Employer's Position

The Employer contends that some of the issues raised in the grievance relate to the content of the performance evaluation and are not arbitrable as provided in Article 6.2.E ("The specific content of a performance evaluation is not subject to the grievance procedure.") The Employer contends that the Agreement does not contain a specific time line for completion of evaluations, and the Union's timeliness allegation is therefore without merit. The Employer argues that the concerns about the Grievant's work performance that are covered in the evaluation were discussed with him during the course of the review period. The Employer contends that the supervisor gave the Grievant five days to submit his response to the evaluation, and no time limit exists for submitting a rebuttal, so the Grievant continues to have that option of submitting a rebuttal open to him. The Employer argues that it has evidence to counter the assertion that events outside the evaluation period were relied on in preparing the evaluation and to counter the assertion that second-hand information from employees was used. The Employer asserts that nothing in the Agreement prescribes when a Performance Development Plan ("PDP") has to be updated. The Employer contends that the Union cannot now add allegations that were not included in the original grievance that the Union filed. The Employer contends that the assertion that the Grievant's behavior has not changed but the rating have changed is an issue of the content of the evaluation and content is not grievable. The Employer asserts that the performance evaluation at issue was conducted fairly, openly and accurately and in compliance with the Agreement.

### Analysis

Although the original grievance and the Parties' opening statements discussed a number of issues, the essential questions in this case are whether the Employer violated Articles 3.3, 6 and 40.1.<sup>4</sup> The following addresses the alleged violations in each of those areas.

#### 1. Alleged Violations of Article 6

The Grievant stated in his testimony that his biggest complaint is that the negative material that turned up in his evaluation had not previously been brought to his attention.

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<sup>4</sup> Based on the record, I find that the Employer's arbitrability concerns do not need to be addressed. The Union's focus in this proceeding is on the process used to conduct the evaluation, not the content of the evaluation. Although the retaliation argument relates to the content, the reliance on content is limited to the fact that the Grievant received overall lower ratings in the 2014-2015 evaluation than the ratings he received in any prior evaluation. The Union's contentions do not focus on the specific ratings other than to note that they are much lower, which could be evidence of retaliation.

(TR58:22-TR60:10) As noted earlier in this Opinion, Article 6.1 provides, in part, as follows: “Performance problems should be brought to the attention of the employee at the time of the occurrence to give him or her an opportunity to address the issue.” The Union contends that, in the February 1, 2014 to January 31, 2015 evaluation, the Employer completely failed to comply with this provision prior to substantially reducing the ratings for the Grievant below the level of past rating periods. (U6) The Grievant testified that the change in the ratings from previous evaluations astonished him.

Q. And why? Why were you astonished?

A. Because they were unfounded and something that wasn’t—wasn’t familiar to me. I felt—I was amazed.

Q. Okay. And prior to this meeting of May—that occurred in May of 2015, had Mr. Teal brought certain concerns he had regarding your leadership or any other issues to your attention?

A. No.

Q. Okay.

A. Absolutely not.

....

Q. Prior to May of 2015, had Mr. Teal come to you in any form, fashion or otherwise to discuss with you concerns he had relating to—related to this particular area of the evaluation?

A. Absolutely not.

Q. Had he come to you and asked you if any other coworkers—any of your coworkers—or informed you that your coworkers had an issue with you?

A. Absolutely not. (TR32:12-TR34:4; see also TR53:18-TR54:8)

The Grievant testified that during the May meeting to discuss the evaluation Mr. Teal “chewed him out” about “comments that I had made to other people and things that I was unaware of.” (TR36:1-11) Similarly, on rebuttal the Grievant testified that he did not recall the discussion Mr. Teal described about sitting in the van and not working. He also had a different recollection of the discussion concerning driving the van on the athletic fields. (TR155:7-

TR156:15) The Grievant also did not recall conversations with Mr. Teal about maintaining the athletic fields. (TR157:1-12)

Mr. Teal testified that he discussed performance issues with the Grievant during the 2014-2015 evaluation period. He testified:

Q. And I'm going to specifically talk about January of 2014 through January of 2015, end of January. That time period, do you discuss issues with Mr. Fey about his performance?

A. I have.

Q. And when did you do that?

A. Multiple times. I can't tell you exactly when.

Q. Was it toward the end of the period? Was it the middle? What's your—

A. I don't recall.

Q. What's your practice.

A. It's as it comes up. It could be weekly. It could be monthly. It could be every two months. I don't know. (TR99:8-21)

Mr. Howland, who serves as the Grievant's lead, testified:

Q. So if Mr. Fey indicates that no one has ever talked to him about any kind of—giving him any feedback about his performance, from your perspective is that accurate?

A. I don't think so. I don't believe—I think his performance is—how do I want to say? Let me put it this way: Mark has—has excellent knowledge of what we do, all phases. He has good skill sets, but at times I believe his attitude kind of hinders his performance.

There seems to be an ongoing—I don't know what you want to call it—battle or struggle he seems to be going through each and every day. I enjoy working with Mark. At times it's good, but getting past his struggles is at times a chore in itself. (TR82:11-24)

Mr. Teal testified that he sent the October 22, 2014 email to the Grievant about performance issues because he did not think Mr. Fey was taking his conversations seriously.

Q. What's the purpose of the e-mail?

A. The e-mail is because I want to make sure I had something in writing so it wasn't a "I never was told this," so I wanted to start an electronic file.

Q. So is this the first thing you put in writing?

A. It was.

Q. And, again, why did you decide you needed to put this in writing?

A. Because it didn't seem like our conversations were getting taken seriously.

Q. Okay. And I think you said Mr. Fey said "I never heard this."

A. Correct.

Q. What does that—

A. In lots of different conversations. Well, I can give you an example. I mentioned to him that I don't want him driving in his irrigation van on the athletic fields because it leaves, during the fall, imprints and burns the grass, and I told him to use the golf cart.

Mr. Fey, when we had another discussion about it, said, "I was never told that or I would have followed that process." So he seems to forget our conversations. That's why I put it—

Q. Okay.

A. —into an electronic file.

Q. All right. And this is your routine now?

A. It is now. (TR101:8-TR102:9; U13)

Later, on cross-examination Mr. Teal testified:

Q. So are there any other e-mails that were created during the applicable time that you sent to Mr. Fey documenting performance issues you had with him?

A. No.

Q. Okay. Why not?

A. Because I was—at that time just had an open dialogue, and I don't have the time to sit down and document every single thing, but I have learned from this and now I do. (TR109:7-15)

Mr. Teal also testified on cross-examination that he cannot recall if other issues came up with the Grievant between the October 22 email and the evaluation. (TR123-TR124)

Mr. Teal testified that he asked the Grievant to leave his office when the Grievant came to discuss the October 22, 2014 email. He testified that he wrote in the email that no response from the Grievant was needed:

Because when every time we—I bring something up to Mark, it’s an argument that wants to keep going and going and going and going, and I don’t have the time for it to go. I gave him a directive and that was then the directive. (TR109:20-24)

Article 6.1 establishes a standard that performance issues “should be brought to the attention of the employee at the time of the occurrence.” The purpose of this approach is to give the employee notice near the time of the event so that the employee can work on correcting the problem. If such on-going communication occurs, then the employee will not be surprised by the ratings and comments that the supervisor makes in the annual performance evaluation. Mr. Teal agreed during his testimony that failing to discuss issues with employees during the course of the review year would not be okay because the employee needs to know about the issues so that the employee can change the behavior. (TR112:11-22) Similarly, the Chief Administrative Officer, Mr. Stevens, testified that the Employer has a general expectation that performance issues should be dealt with when they arise and not held until the annual evaluation. (TR144:19-TR145:6; TR149:25-TR:150:4)

From the testimony provided by the witnesses, the Grievant and Mr. Teal clearly had communication problems. The Grievant contends that the issues on which he received unsatisfactory ratings on the evaluation had never been brought to his attention prior to receiving the evaluation. Mr. Teal says otherwise and Mr. Howland provided some support for the fact that Mr. Teal communicated with the Grievant about performance issues. I find it significant that the Grievant complained about being harassed or over-supervised by Mr. Teal, but at the same time the Grievant asserts that Mr. Teal never talked to him about concerns about his performance during the evaluation year.<sup>5</sup> These two conflicting assertions raise questions about the credibility of the Grievant’s contention that prior to May 1, 2015, Mr. Teal never “brought

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<sup>5</sup> Mr. Eans also testified that the Grievant reported to him that the Grievant and Mr. Teal had run ins prior to the October 2014 email. Mr. Eans testified the Grievant explained that he felt Mr. Teal was harassing him by “By following him, spying on him, let’s put it that way, coming to him in his vehicle when he wasn’t expecting him, no prior call, those kinds of things.” (TR74-TR75)

certain concerns he had regarding your leadership or any other issues to your attention.” (TR32:21-25) Without question, Mr. Teal could have documented his discussions more carefully either by taking notes that would indicate what was discussed when or by using written communication to the Grievant, such as the October 22 email, to make clear that the discussions took place. Had Mr. Teal done so, this arbitration might not have occurred. Based on the record, however, I am not convinced that Mr. Teal failed to discuss issues with the Grievant during the course of the evaluation year. Therefore, I find that no violation of Article 6.1 occurred.

The Grievant had significant concerns about the fact that Mr. Teal gave him five days to sign the evaluation because the Grievant wanted more time to prepare a rebuttal. The record includes testimony about the process for signing off on evaluations and when the sign off is to occur. From the record, it appears that the Employer previously used a system in which the supervisor signed the evaluation electronically and then the system sent the document to the employee for electronic signature. For example, Mr. Teal signed the 2/1/2013 to 1/31/2014 evaluation electronically on February 19, 2014, but the Grievant did not sign off on it until August 19, 2014. Mr. Teal testified that once he signed the document and the system sent it to the Grievant for signature, he assumed the system would follow up to see that the Grievant signed. In 2015, the former system for processing evaluations apparently no longer was in place, and so Mr. Teal had the responsibility to see that the Grievant signed off. The sign off did not mean agreement with the contents of the evaluation but only that the evaluation had been received. (TR114:19-TR119:20)

Therefore, the evidence in the record does not establish a violation of Article 6.2 or 6.3. Under Article 6.2.D, the option for the Grievant to write a rebuttal to the 2014-2015 evaluation remains open. (TR146:19-TR147:16; TR148:17-TR149:10)

#### The Alleged Violation of Article 40.1

Article 40.1 provides, in part, as follows: “Upon request, an employee will have the right to representation at all levels on any matter adversely affecting his or her conditions of employment.”

Article 40.1 also includes the following exception:

Except as otherwise specified in this Agreement, representation will not apply to discussions with an employee in the normal course of duty, such as giving instructions, assigning work, informal discussions, delivery of paperwork, staff or

work unit meetings or other routine communications with an employee. (U1, p. 82)

The Grievant testified that he felt threatened by the 2014-2015 evaluation because the evaluation stays in his permanent record with Human Resources. (TR34:13-TR35:2)

The Grievant testified that he wanted to submit a rebuttal to the 2014-2015 evaluation and Mr. Teal told him he had five days to do so. The Grievant testified he found writing the rebuttal difficult and felt he needed help. He testified he never previously had to write such an extensive rebuttal and he was unfamiliar with the process. The Grievant testified that on the fifth day he asked Mr. Teal for more time in order to consult with the Union steward, but Mr. Teal told the Grievant he wanted the response that day. (TR36:21-TR39:22)

The Grievant testified he felt he could be accused of insubordination if he did not comply, and so he signed and wrote the following comment on the evaluation:

I have been instructed to finish this block today by Mr. Teal. I do not feel I was given ample time to contact my union representative. I find this evaluation wholly mistaken. It is unacceptable to me. It is slanderous to me and shows prejudice against me for making complaints about Mr. Teal's professional behavior. It shows retaliation for having had a lawsuit against the college. It bears false witness and is full of assumptions. It is untimely and I'm only acknowledging it under duress. (U6, TR40:4-14)

The Agreement provides that: "Performance evaluations will not be used to initiate personnel actions such as transfer, promotion or discipline." (Article 6.2.F, U1, p. 15) Mr. Stevens agreed during his testimony, however, that an evaluation might be collateral evidence of an employee's performance, but he testified that the document itself could not be introduced in, for example, a disciplinary case. (TR152:11-TR153:4)

The box for the employee's signature on the performance evaluation form has the notation: "This report has been discussed with me." (U6) Mr. Teal testified that the purpose of the employee's signature is to provide acknowledgement that the employee has received the review and a discussion about it has occurred. The employee's signature does not indicate agreement with the contents of the review and the employee has the opportunity to submit a rebuttal. Mr. Teal testified he told the Grievant that the signature did not imply agreement with the review and the Grievant had the right to submit a rebuttal. (TR105:25-TR106:22; TR55)

Mr. Teal and the Grievant both agreed that the May 1 meeting about the evaluation was tense. The Grievant testified that Mr. Teal yelled at him and chewed him out, but Mr. Teal denies yelling. Nevertheless, an employee could reasonably feel threatened in a tense meeting in which the employee received negative feedback about his work.

The Grievant, however, did not request Union representation in the meeting on May 1. On May 6, the Grievant asked Mr. Teal to extend the time for signing the evaluation and submitting comments until the Grievant had the opportunity to talk with a Union representative. (TR38:4-20) Mr. Teal told the Grievant that he wanted the signed evaluation that day.

Although the Grievant testified he did not fully understand the process for rebutting a negative evaluation, the fact remains that his signature on the form served only as an acknowledgement that he received the evaluation and it had been discussed with him.

The Grievant testified that he feared he could be charged with insubordination if he did not sign the document and provide his comments on May 6. (TR39) Under the circumstances, his concern that failing to sign might lead to discipline could potentially fall within the language of 40.1 that permits Union representation for a “matter adversely affecting his or her conditions of employment.” Although the Agreement provides in Article 6.2.F that performance evaluations will not be used to initiate discipline, the Grievant might have believed that he would be violating a direct order and therefore engaging in insubordination if he refused to sign. The Grievant did, however, have five days to obtain representation. Had Mr. Teal insisted that the Grievant sign off on May 1, the result might be different. In my judgment, however, the May 6 deadline falls under the “delivery of paperwork” exception found in Article 40.1 and the Employer did not violate the Grievant’s right to Union representation by requiring him to sign the acknowledgement by May 6. The option to write a rebuttal remained open indefinitely, had the Grievant chosen to submit one, which he has not, other than the comments he wrote on the form. Since the option to submit a rebuttal remains open, the Grievant has a full opportunity to seek assistance from the Union in preparing a rebuttal.

Alternatively, assuming for the sake of argument that Mr. Teal’s refusal to grant more time violated Article 40.1 by depriving the Grievant of Union representation, I cannot see what remedy would be appropriate under the circumstances of this case to address the issue.



### The Article 3.3 Retaliation Allegation

The Grievant testified that when he received the email critical of his work from Mr. Teal in October 2014 he wanted to discuss the email with Mr. Teal and work out the problems. (U13) The Grievant wrote an email response and attempted three times to discuss the email with Mr. Teal. The Grievant testified that Mr. Teal first said he was too busy and then the third time told the Grievant to get out of his office. The Grievant testified that he told Mr. Teal if Mr. Teal would not discuss the email then the Grievant would have to “take it over his head”, meaning go to higher level management. He testified that Mr. Teal said “go ahead.” The Grievant testified he talked to Gary Nilsson, who suggested that the Grievant call Dennis Dunham, Mr. Teal’s supervisor. The Grievant testified Mr. Dunham said he would talk with Mr. Teal. (TR42:16-46:17)

The Grievant testified that in the May 1, 2015 meeting to discuss the 2014-2015 evaluation, the subject of the Grievant’s call to HR came up.

Q. And what did Mr. Teal say?

A. He just said, “Yeah, what happened with that?”...Like “Yeah, did you get anywhere?” is what he meant. (TR46:18-TR47:17)

Mr. Teal denied saying to the Grievant “How did that go for you, going to HR.” (TR119:21-25)

Mr. Teal testified that the Grievant told Mr. Teal that the Grievant planned to go over his head to HR and Mr. Teal responded that the Grievant had that right. (TR110:12-16) Mr. Teal testified that his boss, Mr. Dunham, and he subsequently discussed the call from HR concerning the Grievant.

Mr. Nilsson testified that he received a call from the Grievant. In that call, the Grievant complained about certain conduct by his supervisor, which Mr. Nilsson summarized as being “over-supervised” by his supervisor. Mr. Nilsson testified he talked with Mr. Teal:

I called Jeff and I spoke to Jeff about it. Jeff gave his version of what was going on. He—he pretty much agreed with Mr. Fey that, yeah, he was observing him on the job. He wasn’t happy with his performance on the job. And after talking to Mr. Teal, I concluded that it was an employee/supervisor issue and that’s where I left it. (TR131:15-20)

On cross-examination, Mr. Nilsson testified that when he talked with Mr. Teal, they had a normal business conversation and Mr. Teal wasn't angry or upset. He testified that after talking with Mr. Teal, Mr. Nilsson had "no concerns whatever." (TR132:7-16)

Retaliation can be difficult to prove for the reason that correlation does not mean causation. In other words, the fact that events occur close in time does not mean that one event caused the other. More evidence of a retaliatory motive is needed. The fact that the Grievant and Mr. Teal had a strained relationship also is not, on its own, evidence of retaliation. The email shows that Mr. Teal had concerns about the Grievant's work performance prior to the Grievant's complaint to HR. Although Mr. Teal refused to discuss the email with the Grievant, which seems unusual, Mr. Teal explained that his discussions with the Grievant often involved prolonged, circular arguments that did not produce a resolution. Mr. Howland's testimony reinforced this assertion to some extent when he described the Grievant as a capable worker who seemed to be engaged in a "battle or struggle he seems to be going through each and every day." The Union points to the fact that Mr. Teal demanded that the Grievant sign the evaluation on May 6 as evidence of a change in the treatment of the Grievant by Mr. Teal, but in my judgment Mr. Teal's reasons for wanting the signature and the effect of providing the signature have been adequately explained in innocent terms in the record in that the circumstances changed for the process of signing evaluations. (TR114:19-TR119:20 and specifically TR119:10-20)

Based on the evidence in the record, I find that no violation of Article 3.3 occurred.

#### Conclusion

After full consideration of the evidence and the arguments submitted by the Parties, I find that the Employer did not violate Articles 6.1, 6.2, 6.3, 3.3 or 40.1 of the Agreement in relation to the Grievant's 2015 performance evaluation. Consequently, no remedy is appropriate.

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IN THE MATTER OF THE ARBITRATION BETWEEN

WASHINGTON FEDERATION OF )  
STATE EMPLOYEES, AFSCME )  
COUNCIL 28, AFL-CIO, )

UNION, )

and )

STATE OF WASHINGTON, )  
COMMUNITY COLLEGES )  
OF SPOKANE, )

EMPLOYER. )  
\_\_\_\_\_ )

ARBITRATOR'S OPINION  
AND AWARD

MARK FEY  
UNFAIR EVALUATION  
GRIEVANCE

AAA NO. 01-15-0005-9409

For the reasons set forth in the Opinion that accompanies this Award, the grievance must be and it is denied.

Dated this 13<sup>th</sup> Day of June 2016

  
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Joseph W. Duffy  
Arbitrator