

IN THE MATTER OF THE ARBITRATION BETWEEN) AMERICAN ARBITRATION
) ASSOCIATION CASE NUMBER
) 75 390 00202 12
)
WASHINGTON FEDERATION OF)
STATE EMPLOYEES,)
Union) ARBITRATOR'S
) OPINION AND AWARD
and)
) GRIEVANT:
) STANISLAU KOSCIOW
)
STATE OF WASHINGTON)
DEPARTMENT OF HEALTH)
Employer)

ARBITRATOR: ANTHONY D. VIVENZIO

OPINION AND AWARD DATE: June 14, 2013

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PROCEDURAL HISTORY

The Washington State Department of Health is hereinafter referred to as “the Employer”. The Washington Federation of State Employees is hereinafter referred to as “the Union.” Stanislaw Kosciow is hereinafter referred to as “the Grievant.” Collectively, they are hereinafter referred to as “the Parties.”

The Employer and the Union are Parties to a Collective Bargaining Agreement effective July 1, 2011 to June 30, 2013, hereinafter referred to as the “Agreement.” The Union filed its grievance in this matter on January 9, 2012. Following unsuccessful attempts to resolve this matter through the grievance procedures set forth in Article 29 of the Agreement, the Union then invoked arbitration under Article 29.3B Step 5. Using the services of the American Arbitration Association (AAA), Anthony D. Vivenzio was appointed as Arbitrator. The arbitration hearing was held at 1800 Cooper Point Road SW, Olympia, WA, on March 5, 2013. The Parties stipulated that all prior steps in the grievance process had been completed or waived. During the course of the hearing, both Parties were afforded a full opportunity for the presentation of evidence, examination and cross-examination of witnesses, and oral argument. A transcript was taken of the proceedings. The evidentiary record was closed on March 5, 2013. Timely post-hearing briefs were received from both Parties on April 16, 2013. The full record was deemed closed and the matter deemed submitted on April 16, 2013.

BACKGROUND

The Department of Health was formed in 1989 to promote and protect public health, monitor health care costs, maintain standards for quality health care delivery and plan activities related to the health of Washington citizens. The Department of Health works with many health partners including hospitals and clinics, the University of Washington School of Public Health

and Community Medicine; and state and local community-based organizations, associations and coalitions. It also has close working relationships with federal agencies including the Centers for Disease Control and Prevention, the Department of Health and Human Services, the Department of Agriculture and the National Institutes of Health. The Washington Federation of State Employees is Council 28 of AFSCME, the American Federation of State, County and Municipal Employees. WFSE/AFSCME represents more than 37,000 state and public service employees in Washington. AFSCME is the largest public employees union in the United States with more than 1.6 million members.

The Grievant has been employed with the Department of Health for twenty-one years. For the last nineteen of those years, the Grievant has served as a Chemist 2, performing analytical analysis and troubleshooting, including the maintenance of instruments. In the latter part of 2010, the Employer presented the Grievant with a document entitled Performance and Development Planning, setting forth its expectations of the Grievant for the period ending October 31, 2011. In December of 2011, the Employer presented the Grievant with a document entitled Performance and Development Assessment, containing feedback of various aspects of the Grievant's performance, including areas such as Accountability, Judgment and Problem Solving, and Teamwork. The Assessment contained assessment language which the Grievant found objectionable and brought the grievance which has resulted in this arbitration.

ISSUE BEFORE THE ARBITRATOR

The Parties were unable to stipulate to statement of the issue or issues to be resolved in this matter. The Employer stated the issue as:

Did the Employer comply with the performance evaluation process set forth in Article 5 of the CBA in evaluating the Grievant's performance for the period November 1, 2010 to October 31, 2011? If not, what is the appropriate remedy?

The Union would state issues as follows:

Did the Employer violate Article 5 of the CBA by failing to provide Mr. Kosciow with proper notice regarding any performance issues he was having before documenting those issues in his performance evaluation dated November 30, 2011? If so, what is the remedy?

Did the Employer violate Article 27 of the CBA in the course of its performance evaluation process by essentially disciplining Mr. Kosciow without using one of the forms of discipline allowed for in Article 27 in the CBA or following due process in administering that discipline? If so, what is the remedy?

The Parties stipulated at the hearing that the Arbitrator should formulate the issue or issues before him, based upon his understanding of the presentations of the Parties derived from the record. Based upon his review of the record as a whole, the testimony, exhibits, arguments and briefs presented by counsel, the Arbitrator states the substantive issue to be resolved in the arbitration as follows:

Did the Employer violate Article 5 or Article 27 of the Collective Bargaining Agreement in the course of evaluating the Grievant's performance for the period November 1, 2010 to October 31, 2011? If so, what is the remedy?

PERTINENT COLLECTIVE BARGAINING AGREEMENT PROVISIONS:

Collective Bargaining Agreement effective July 1, 2011 through June 30, 2013:

ARTICLE 5 PERFORMANCE EVALUATION

5.1 Objective

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

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

5.2 Evaluation Process

- D. The evaluation process is subject to the grievance procedure. The specific content of performance evaluations are not subject to the grievance procedure.

ARTICLE 27 DISCIPLINE

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

ARTICLE 29 GRIEVANCE PROCEDURE

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

POSITIONS OF THE PARTIES AND DISCUSSION

Position of the Union

The position of the Union is stated in summary as follows:

The Union's position is that the evaluation contains objectionable language, and requests that that language be removed. The contract does not allow the grieving of content, however, the process is grievable. Here, the process resulted in an evaluation that contained language and references that surprised the Grievant as there was no notice provided to him that these issues

were going to be included in his evaluation. Article 5 provides that an employee needs to be given notice that they are having performance issues during the evaluation so that they will have an opportunity to correct those issues so that they will not be included in their evaluation. That process was not followed here. The language is so harsh and negative, it can only be seen as disciplinary, so the employer has essentially subverted the just cause requirement for discipline.

Position of the Employer

The position of the Employer is stated in summary as follows:

This case is about an employee who wants to change his supervisor's evaluation of his negative performance into his own evaluation of himself. What can be examined is whether the employer complied with the performance evaluation process outlined in the contract. The burden is on the Union to prove it did not. Article 5 requires that the employer evaluate employee work performance. It states that performance problems will be brought to the attention of the employee to give them an opportunity to receive training and/or to correct the problem before it is mentioned in an evaluation. The employer did comply with this article. Ms. Shaunak met with the Grievant and reviewed his performance expectations in light of instances of inappropriate behavior she had observed before mentioning them in her evaluation. Supervisor John Thompson was present in that meeting and will confirm the specific incidents and performance expectations that were addressed. The Grievant also takes issue with the characterization of his transfer "due to conflict." This is indeed what occurred, and Ms. Shaunak explained her concerns and determined he would be transferred to another project. This matter is a nondisciplinary performance evaluation. Though the Grievant views the evaluation as harsh, it contains some positive and some negative aspects about his performance, as performance

evaluations do. We respectfully request that you find that the Agency did not violate Article 5 or Article 27 of the Agreement, and that you dismiss the grievance.

DISCUSSION

At the outset, the Arbitrator would like to express his appreciation for the professional manner in which the Parties conducted themselves in the course of the proceedings, rendering vigorous, but courteous, advocacy. The Arbitrator has studied the entire record in this matter carefully and has considered the Parties' arguments and any authorities cited in their briefs. That a matter has not been discussed in this Award does not indicate that it has not been considered by the Arbitrator. Only those matters that were found to be essential to the resolution of this matter have been addressed.

The Arbitrator is called upon to determine whether language contained in a "Performance and Development Assessment" presented to the Grievant in December 2011, *Jt. Ex. 3*, should be, as the Union seeks, removed of record, as constituting a violation of the Agreement, specifically Articles 5 and 27. In matters involving claims of violation of contract, the burden of proof is upon the grieving party, in this case, the Union, which has the burden of proving the violation by a preponderance of the evidence, or "more probably than not." This means that there must be more than equally weighted competent evidence on the side of the Union in order for it to prevail.

Employer's Performance and Development Planning (PDP) Expectations for the Period 11/1/2010-10/31/2011

The Employer's Performance and Development Assessment to which the Union objects is based upon its Performance and Development Planning document which charted performance expectations of the Grievant for the period 11/1/2010 to 10/31/2001. *Jt. Ex. 4*. This document

sets forth a number of expectations that are related to the Grievant's professional/mechanical tasks and his interactions with coworkers and supervisors. At issue in this case are expectations relating to the latter. In pertinent part, the Grievant was expected to fulfill the following expectations:

Key Competencies:

Accountability- ... Follow rules and procedures.

Teamwork-... promote a friendly environment, good morale, and cooperation among other team members.... Treat others with respect and dignity.

In addition- Follow directions from lead workers and supervisors at all times... Listen to and respect each individual in the office. Speak with each other courteously.

Part 2: Training and Development Needs/Opportunity

Stan should follow lead worker and supervisor's directions at all times.

Stan will demonstrate professional and respectful communication with stakeholders.

... Stan is expected to be open and collaborative when receiving input and directions from lead workers and management; any clarifications, questions, or concerns will be conveyed professionally.

The document containing these expectations was presented to the Grievant, who signed for its receipt on December 10, 2010.

Employer's Performance and Development Assessment for the Period 11/1/2010-10/31/2011

On or about December 14, 2011, the Grievant was presented with the assessment which is the source of his grievance in this matter. *Jt. Ex. 3*. A fair reading of the assessment reveals a number of strengths of performance in addition to comments to which the Grievant objects:

Key Results Assessment:

Processing and testing high volume of newborn specimens-... Stan tested large number of specimens; he met most of the expectations of performing the variety of chemical, biochemical and analytical tests. However, in the midst of his assignment on the lysosomal storage disease (LSD), he was re-assigned to MS/MS due to conflict that

developed between him and LSD project lead worker... in the MS/MS area he performed well and was helpful when equipment problems delayed the process and caused backlog.

Use of computer software-Stan continued to maintain the ability to use the Neometrics, laboratory information system.

Troubleshooting and Maintenance-Stan performed maintenance on MS/MS. He was able to fix problems. He kept his supervisors informed and aware of the situation.

Record Keeping-Stan maintains records of QC/QA, analysis sheets, work lists, equipment maintenance logs, and other.

Key Competencies Assessment:

Accountability- Stan is punctual; he arrived to work on time. He was careful with the protocols and paid attention to details, however during his assignment on the LSD project, he deviated for the protocol thus affecting the LSD data. He was conscientious about his work and desired to complete his tasks with accuracy.

Judgment and Problem Solving-Stan demonstrated good mechanical ability to troubleshoot instruments used by his position. His understanding and maintaining instruments was good. He was able to fix problems with MS/MS and kept his supervisor aware of any work issues and unusual findings.

Development- Stan has accepted the new assignment in MS/MS. Stan showed good chemist skills.

Teamwork- Stan is a member of newborn screening team. During this evaluation period, Stan had difficulty maintaining professional behavior i.e. making indirect comments, raising voice, disrespectful and unkind, this inappropriate behavior was exhibited on 4/6/2011 and 4/13/2011 incidents.

Communication- Stan understood written and verbal instructions related to his laboratory assignments. He responded to e-mails and attended NBS staff meetings.

The Grievant refused to sign this document.

The Performance Assessment as a Disciplinary Device

A principal argument presented by the Union is that the language the Employer used in the Teamwork section of the Grievant's performance evaluation was so harsh as to constitute a written reprimand for misconduct or insubordination, disciplinary in nature, contrary to the

purpose of performance evaluations recognized in the Agreement. That purpose, set forth in the Article 5, included above, cites, in sum, an opportunity to discuss goals and expectations, review performance in their light, and support of an employee's professional development to achieve alignment with Agency requirements. That the Employer alleged specific dates the Grievant exhibited inappropriate behavior, the Union argues, raises the evaluation to a level appropriate for consideration through the disciplinary process, provided in Article 27 of the Agreement, with its protective just cause requirement. The Union cites the potential impacts of the evaluation's inclusion in the Grievant's personnel file, e.g., review by others who will assume its accuracy, negatively impacting the Grievant's future employment options. That the employer has done this without establishing just cause for the allegations, the Union argues, warrants the removal of the objectionable language.

First, it is noted that the Parties, in bargaining Articles 5 and 27, agreed that:

Article 5 (D): The evaluation process is subject to the grievance procedure. The specific content of performance evaluations are not subject to the grievance procedure.

and

Article 27 (2): ...Discipline includes oral and written reprimands, reductions in pay, suspensions, demotions, and discharges.

The clear language of these articles, taken together, is that matters subject to treatment as discipline, and grievable as such, include only those Employer actions set forth in the Article. Further, employees are not to have the grievance procedure available for contesting specific language contained in performance evaluations. Their only recourse is a challenge of the evaluation process, which will be considered later in this Award. This contractual language is consistent with prevailing arbitral principles: A challenge to an employer's procedures for evaluations... is a matter of contract interpretation rather than discipline. *Discipline and*

Discharge in Arbitration, Brand, p. 136 (1998). A corollary is that performance evaluations are not considered to be disciplinary in nature even if such evaluations may later be used as a basis for disciplinary action. Only in cases where a management official has made little or no use of the evaluation process, that is, has acted in an arbitrary and capricious manner and has abused their discretion, has an arbitrator found the resulting action to be a disciplinary device substituting for appropriate action. See, for example, *State of Wisconsin*, 64 LA 663, 667-668 (Marshall, 1975), cited in *Elkouri and Elkouri*, Sixth Edition, p. 902. Here, the evaluation contains a number of positive assessments indicating the author, the Grievant's supervisor, Santosh Shaunak, gave consideration to a number of standards of evaluation, not suggestive of a process such as would cast the evaluation as a substitute for discipline. *Jt. Ex. 3*. The procedural sufficiency of the Employer's evaluation process will be further discussed later in this Award. The Arbitrator finds that the performance evaluation is not grievable as discipline, based upon the clear language of Article 27 of the Agreement and the supervisor's consideration of an array of performance aspects consistent with substantial utilization of the evaluation process.

The Analytical Framework for Assessing the Evaluation Process

As has been noted previously, a challenge to an employer's procedure for performance evaluation is a matter to be analyzed under principles of contract interpretation rather than discipline. The clear language of the Agreement restricts the scope of the review which the Arbitrator may undertake. Specific content is not subject to the grievance procedure, but the evaluation process is. Various concepts underlie contract interpretation in this matter. While it may be said that content is not subject to the grievance procedure, it must be acknowledged that if the procedure that was undertaken was fundamentally flawed, conducted in an arbitrary and

capricious manner, constituting an abuse of discretion , then, in that extreme case, the fruit of that poisonous tree, the content, would need to be stricken. The content, in that instance, would constitute a result not contemplated by the Agreement, an absurd, unjust result. It is axiomatic that an employee must receive a “fair” as opposed to a “perfect,” performance evaluation. See, for example, *San Antonio Air Traffic Logistics Center*, 74 LA 486, 488-489 (1979). This means that the evaluation must have factual support, knowledge, information, a basis in observed job performance related to factors set forth in the Agreement, or in recognized workplace references, such as a job description or written performance expectations like those present in this case. *Jt. Ex. 4*. Given the presence in evidence of information before the Employer concerning its projected expectations of the Grievant and the Grievant’s later performance, the Arbitrator’s inquiry must be, given the denial of the grievance procedure to evaluation content, and prevailing arbitral principles, whether the Employer’s findings upon the facts before it were clearly erroneous, or so lacking in rationality as to have been made in a manner that was only a matter of the author’s will, i.e., arbitrary and capricious, constituting an abuse of discretion. To impose a stricter standard on the Employer in light of the language of the Agreement, allowing the Arbitrator to remove the objected-to language upon a lesser standard, would place him in the position of re-writing the evaluation and otherwise exceeding the scope of his authority.

Given this analytical framework, the Arbitrator next considers the evaluation process undertaken by the Employer.

The Collective Bargaining Agreement

The first reference for assessing the evaluation process is the Agreement between the Parties. Article 5.1 speaks in terms of “objectives,” noting that the Employer will evaluate work

performance, the evaluation to include performance goals and expectations. The Article speaks of providing an "opportunity" to discuss expectations and review performance; give support to employees in professional development; recognize accomplishments and address performance issues in a timely manner, and bring problems to the attention of an employee to give the employee an opportunity to receive training or correct a problem before it is mentioned in an evaluation. Next, the Arbitrator considers the evaluation process undertaken by the Employer, and the Grievant's participation in it, considering the information before the Employer basing the Grievant's performance.

Events of January 13, 2011

The Grievant objects to this language in his evaluation:

In the midst of his assignment on the lysosomal storage disease (LSD), he was re-assigned to MS/MS due to conflict that developed between him and LSD project lead worker...*Jt. Ex. 3*

The events of January 13, 2011, which are the source of the language contained in the evaluation, are summarized in a January 14 e-mail from the Grievant's lead, Susan Elliott, to the Grievant's supervisor. *Jt. Ex. 5*. Ms. Elliott had started a new assay of specimens on the night of January 12 which needed to be quenched in the morning immediately after 16 hours of incubation. The Grievant quenched the assay on time but let the quench buffer come to room temperature before quenching the assay. He had been directed on January 10 to cease his practice of letting the quench buffer come to room temperature before quenching the reaction as his method was contrary to the protocol for the procedure. The Grievant argued that his approach was more scientifically correct and denied there was an applicable protocol. Ms. Elliott located the protocol, signed by the Grievant, and showed it to the Grievant, who replied

that the protocol was illegal and that he was being illegally exposed to chemicals. Ms. Elliott explained that the deviations affected the data and that the Grievant needed to follow protocol or he could not remain on the study. The Grievant later stated that it was only in regard to the one assay that he waited to quench the reaction and then denied that he had said earlier that he was waiting to quench the assay to allow the buffer to come to room temperature. The argument "went around for a couple of minutes." *Jt. Ex. 5*. Other staff confirmed with Ms. Shaunak that the Grievant deviated from protocol and that there was discord in the lab. *Tr. p. 78. Testimony, Shaunak*. Ms. Elliott went to Ms. Shaunak to discuss her problems with the Grievant, his failure to follow protocol and his arguing. His method resulted in the testing being inaccurate, and Ms. Elliott showed her that data had to be dumped because the Grievant deviated from the protocol. *Tr. pp. 76, 77, Testimony, Shaunak*. On January 14, the Grievant's supervisor notified him that he was no longer assigned to the LSD project "due to conflict between you and the University of Washington lead on the LSD project... if you have any questions, please see me." *Jt. Ex. 6*. The Grievant's supervisor spoke to him in the presence of Ms. Elliott and discussed the event with him before sending the e-mail. *Tr. p. 41, Testimony Kosciow*. The Grievant testified that he would call the event a "disagreement," not a "conflict." He had performed the assay in accordance with his ethics, and it was the quality of Ms. Elliott's work that he questioned. He testified that Ms. Elliott has raised her voice to him, and when he confronted her, she apologized. The Grievant did not disagree with Ms. Shaunak's action, or respond to it, because he had previously asked Ms. Elliott, not Ms. Shaunak, for reassignment. Finally, he stated that no notice was given to him that the language regarding the reassignment, and the comments regarding teamwork, would appear in his evaluation, and so he did not have a chance to improve. *Tr. pp. 18, 22-25, 39, Testimony, Kosciow*.

Events of April 6, 2011

Ms. Shaunak's notes of the events of this day, *Jt. Ex. 9*, reflect that she and a coworker were standing at the entrance to the workplace when the Grievant entered the building. Then, while walking to the locker room, he turned to a coworker and repeated several times, loudly, "Did you 'punch' (transferring the dots from dry blood samples into special plastic trays used for analysis) today, Crisanta, you need to punch today," mocking Ms. Shaunak's earlier request of Crisanta that she punch specimens. With regard to this event, the Grievant testified that he had no recollection of it, it had never been addressed to him, and that he never saw a record of it before being shown the supervisory file as part of the grievance procedure. *Tr. pp. 18, 27-29, Testimony, Kosciow*. Ms. Shaunak testified that she discussed this event with the Grievant nine days later at a meeting with the Grievant and his Union representative on April 15, which she characterized as a retraining of the Grievant of some of the expectations relating to his inappropriate behavior on April 6 and on April 13. *Tr. p. 71, Testimony, Shaunak*.

Events of April 13, 2001

Ms. Shaunak's notes of the events of this day, *Jt. Ex. 9*, reflect that the lab was short of staff, and she was recruiting people to fill in punching specimens. As she was doing this, the Grievant was involved in another procedure. As she was going back and forth to the lab, she noticed on at least three occasions that the Grievant was still holding the pipette and talking to a coworker, Abbey, who was working in the next bay. During these rounds, she asked Ms. Elliott if another employee could help with punching. That employee volunteered to perform punching in addition to his regular duties. She next saw the Grievant leave his work area with his pipette in his hand, approaching Abbey. When she asked, "Stan, can you help punch?," he became very

angry and yelled at her saying, "Who are you to tell me what to do?" criticized her for "micromanaging," and criticized her conversation with Ms. Elliott. The Grievant started arguing and creating a hostile environment. His behavior was very disruptive. He refused to listen, went back to pipetting, and Ms. Shaunak left the lab.

With regard to this event, the Grievant initially testified that he did not remember the incident and first saw the exhibit in the course of the grievance procedure. During this period he lodged a harassment complaint against Ms. Shaunak. He recalls her not asking where he was in the procedure he was performing. She asked if he could cancel or pause his job, pointed her finger at him, and asked him to punch. The Grievant communicated that he could not do it because he was working on a process of extraction which is time sensitive and he would destroy his whole day's work. Another lead recognized the procedural problem, and the Grievant then completed his extraction process and did what Ms. Shaunak had asked. The Grievant attributed what appeared to be yelling to Ms. Shaunak to his impaired hearing and the ambient noise of the environment. *Tr. pp. 29-33, Testimony, Kosciow.*

Meeting of April 15, 2011

Union and Employer witness testimony concerning the content and nature of this meeting differed widely. The Grievant testified that Ms. Shaunak simply read from the Employer's Performance and Development Planning document, including the expectation to follow the directions of the lead worker. Ms. Shaunak gave him no directions to do anything differently with regard to his performance in this meeting, which he estimated to have lasted no more than two to four minutes. The Grievant testified that he did not know what the meeting was about, or why it was called, as he is capable of reading the document on his own. Finally, he testified that

no other performance issues were made known to him until December's evaluation. The Grievant did not consider that he had issues because they should have been brought to his attention, saying he can improve if they are addressed. He believed he has been respectful and has acted appropriately. *Tr. pp. 34-38, Testimony, Kosciow.* The Grievant's shop steward, Called Vandergrift, attended this meeting with the Grievant along with Employer representatives Ms. Shaunak and John Thompson. She characterized the meeting as "very short:" Ms. Shaunak read through the expectations, standard expectations, and then the meeting ended. The witness testified that the events of the meeting were accurately represented in notes she typed a year after the event, April 30, 2012. *Tr. pp.46-50, Testimony, Vandergrift.*

Ms. Shaunak testified that she did talk to the Grievant about the events of April 6 and April 13. Her notes reflect that the meeting was called regarding his behavior on those days. After giving him a short description of his behavior on April 6, she told the Grievant that his behavior was unprofessional and inappropriate, and gave him the expectation that he behave professionally and appropriately at all times in the workplace. She then gave him a copy of the PDP which spelled out the Employer's expectation. She reminded him again of the expectations regarding his behavior, stating, "I expect you to behave professionally and appropriately at all times," pointing out the specific expectations listed in the PDP. Ms. Shaunak advised the Grievant that he should come to her if there were any issues. When the shop steward asked if this meeting was a reprimand, Ms. Shaunak said, "No, I'm reminding him of his expectations." The steward wanted to know staff names, had Ms. Shaunak repeat the behavior of April 13, and said she wanted to talk to her later if needed for investigation. *Jt. Ex. 9.* In testimony, Ms. Shaunak stated that she had personally observed much of the Grievant's behavior, during the evaluation period to the preparation of the performance evaluation as much of it had been

directed at her. In sum, she considered the meeting of April 15 to be a retraining and reminder of expectations with reference to the events of April 6 and April 13. *Tr. pp.67- 71, 73-75, Testimony, Shaunak.* Ms. Shaunak's testimony was supported by John Thompson, a Health Services Consultant 4, a supervisory position. He testified that Ms. Shaunak explained two separate incidents where she had observed the Grievant's inappropriate behavior. She gave the dates, explained what happened and why it was inappropriate, and gave the Grievant a copy of his PDP expectations. When Ms. Shaunak mentioned his unwillingness to help punch specimens, the Grievant replied that he had already spent time punching and sorting. Ms. Shaunak replied that the discussion wasn't about what he had done but how he had responded to her when she asked him for additional help. Mr. Thompson confirmed the accuracy of *Jt. Ex. 9.*

The Period between the April 15 meeting and the Employer's Performance Evaluation

Ms. Shaunak testified that the Grievant's behavior did not improve during this period.

Q: What did you base your opinion on that he had not improved?

A: ... I had several, several, complaints from staff and verbally, in e-mails, about Stan's ongoing indirect comments, harassment, hostile environment, and inappropriate and unprofessional behavior, disturbing staff from their concentration, focusing on work. It was impacting the work... but then, every time staff complained to me, they were afraid. And when I asked them, do you want me to talk to him, they were afraid that he will retaliate and he will do more, and they were not willing to suffer. And they said, "We've been suffering from his indirect comments ever since he joined newborn screening. And by talking to him, he will do more."

Because those specific instances were not documented at the request of the complainants, they were not mentioned in her evaluation. Ms. Shaunak experienced some of these behaviors directed at her, personally:

If I am in the lab for some other purpose, maybe taking some documents, picking up some records, or seeing some other employees and talking to them-because I have 11 employees that I have to supervise and... if I'm there for laboratory operations he will

make some sort of indirect comments, take somebody's-coworker's name: "Better go to work. Somebody's watching. Doesn't have anything else to do." Always.

Ms. Shaunak further testified concerning the Grievant's resistance to her instructions or directions "even to this day," where he "makes a big scene in the lab," so she tries to avoid asking him things. She testified about a conflict with the Grievant over scheduling vacation, and the Grievant's threatening her with complaints to the Union and legal action, which she has experienced since he has worked in newborn screening. *Tr. pp.74-79, Testimony, Shaunak.*

The Evaluation

The Union's principal arguments for finding a violation of Article 5 are summarized as follows:

- Because performance matters mentioned in the evaluation were never addressed with him, the Grievant did not have an opportunity to improve his performance before the evaluation;
- Ms. Shaunak failed to perform an investigation adequate to support her findings;
- The Grievant received no counseling or training to support his improvement;
- The April 15 meeting did not adequately inform the Grievant of performance problems that needed to be improved lest they appear on his evaluation, thus giving him no opportunity for improvement;
- Even if the April 15 meeting was sufficient, there was no proof of a failure to improve after that meeting.

With regard to the Grievant's January 13, 2011 reassignment, the Arbitrator finds upon the preponderance of credible evidence that Ms. Shaunak was not abusing her discretion in her description of this event as a conflict between the Grievant and his lead person over work methods, and a failure to follow her directions. She had adequate information reported to her by Ms. Elliott and other staff, and personally confirmed the facts. It should be noted that rather than take the course he did, the Grievant had other avenues available to him for addressing his concerns about the protocol for the procedure. For example, he could have taken the matter to his

Union, or further up the line of authority, or made contact with another partner/regulatory agency.

The Union stated that the language contained in the evaluation's section on "Teamwork" was of concern:

difficulty maintaining professional behavior i.e. making indirect comments, raising voice, disrespectful and unkind, this inappropriate behavior was exhibited on 4/6/2011 and 4/13/2011 incidents.

Much of the Grievant's behavior was directed to Ms. Shaunak herself, direct confrontation, mocking behaviors, indirect comments and the like, throughout the evaluation period.

Upon a review of the record as a whole, the Arbitrator finds that a preponderance of the credible evidence supports a finding that Ms. Shaunak did not abuse her discretion in her description of the Grievant's performance during the subject period, such as would support a removal of the subject language or other alteration of the Grievant's performance evaluation.

As to the level of investigation performed by Ms. Shaunak, it must be acknowledged that personnel matters such as this, that, while they must be fair, they need not, and should not be held to the same standards as a scientific study or criminal prosecution. The standard to be applied in considering this case, within the context of the Collective Bargaining Agreement and arbitral practice, is whether the evaluator has made findings so removed from fact and logic that they are arbitrary and capricious, essentially a product of the will of the evaluator, clearly erroneous, and represent an abuse of discretion. The Arbitrator does not find that to be the case in this matter. Credible evidence supports a finding that the Grievant's performance was not unfairly characterized, and that the purposes of Article 5 were fairly served.

Upon a review of the record as a whole, the Arbitrator finds that the April 15 meeting was adequate to provide the Grievant with notice of the behaviors that prompted the meeting,

and the nature of those behaviors that would need to be corrected. It is ingenuous for a person of the Grievant's intelligence and sophistication to allege that he did not know why he was being called to a meeting with his supervisor just a few days after the subject events, or that, if he did not improve his performance in the specific areas, that performance could be reflected in his evaluation. Likewise, alleging, in effect, that if a matter was not specifically mentioned to him that, in this total context, he would not be aware of it, and so be deprived of an opportunity for improvement, must be seen as facetious. Last, the Arbitrator is unsure how one "counsels" a mature, sophisticated scientist, like the Grievant, to become "respectful, kind, and courteous" except through the discomfiting candor of a performance evaluation.

With regard to the period between the April 15 meeting and the presentation of the Grievant's evaluation, the Arbitrator finds that there is adequate credible evidence of record tending to prove that the Grievant did not improve his performance during that period, much of that evidence consisting of Ms. Shaunak's personal experiences.

A supervisor has a personal vested interest in her success in that role, and that success is tied to the success of the employees under her supervision. No evidence of record supports bias or other motive on the part of Ms. Shaunak that would work to motivate her to act contrary to that principle in the case of the Grievant.

Upon the record as a whole, the Arbitrator cannot say that the process proceeded against logic and evidence or was a product of the evaluator's will as opposed to having a basis in fact and logic, or that the Employer's actions were so far out of bounds that the Grievant did not have an opportunity to understand the nature of his performance issues or an opportunity to correct them, or, that had a "perfect" evaluation been performed, its outcome would have been different.

The Arbitrator finds that the Union has failed to prove by a preponderance of the evidence that the Employer violated the Agreement in the course of assessing the Grievant's performance.

CONCLUSION

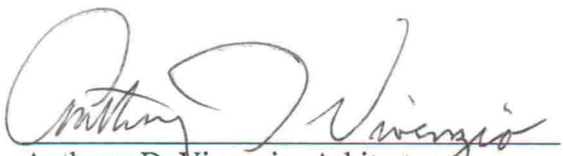
The Union has not carried its burden to prove that the Employer was in violation of the Collective Bargaining Agreement between the Parties when it issued its Performance and Development Assessment of the Grievant on December 14th, 2011, for the period November 1, 2010 to October 31, 2011. The Arbitrator will enter an award consistent with this conclusion.

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| <p>IN THE MATTER OF THE ARBITRATION BETWEEN</p> <p>WASHINGTON FEDERATION OF STATE EMPLOYEES, Union</p> <p>and</p> <p>STATE OF WASHINGTON DEPARTMENT OF HEALTH Employer</p> | <p>) AMERICAN ARBITRATION</p> <p>) ASSOCIATION CASE NUMBER</p> <p>) 75 390 00202 12</p> <p>)</p> <p>) ARBITRATOR'S</p> <p>) OPINION AND AWARD</p> <p>)</p> <p>) GRIEVANT:</p> <p>) STANISLAU KOSCIOW</p> <p>)</p> <p>)</p> <p>)</p> |
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Having heard or read and carefully reviewed the evidence and arguments in this case, and in light of the above discussions, American Arbitration Association Grievance No. 75 390 00202 12 is denied.

The Employer was not in violation of the Collective Bargaining Agreement between the Parties when it issued its Performance and Development Assessment of the Grievant on December 14th, 2011, for the period November 1, 2010 to October 31, 2011.

RESPECTFULLY SUBMITTED this 14th day of June, 2013.


 Anthony D. Vivenzio, Arbitrator