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OPINION AND AWARD
IN ARBITRATION PROCEEDINGS
PURSUANT TO A
COLLECTIVE BARGAINING AGREEMENT

In the Matter of a Dispute Between)

County of Sacramento)

Employer)

and) Grievance of [Grievant] – Desk Files

United Public Employees Local One)

Union)

APPEARANCES:

For the Employer: Timothy D. Weinland
Deputy County Counsel
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For the Union: Mechele Dews, Sr. Business Agent
United Public Employees, Local One
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PROCEDURAL BACKGROUND

The above-referenced matter was processed through the grievance procedure contained in the collective bargaining agreement (CBA) between the parties. Remaining unresolved, it was submitted to final and binding arbitration. The undersigned was selected as the arbitrator by mutual agreement of the parties. The matter was heard on September 5, 2013 in Sacramento, California. The parties stipulated that the matter was properly before the arbitrator and that all steps of the grievance procedure had been met or waived. The parties also stipulated that the arbitrator retains jurisdiction for the purpose of the implementation of the remedy in the event that the arbitrator grants in whole or in part the remedy sought by the union.

Both parties were afforded full opportunity to present documentary evidence and to examine and cross-examine witnesses. At the conclusion of the hearing, the parties chose to conclude their presentations by making oral argument and the matter was submitted for decision.

ISSUE

The parties stipulated to the following issue:

Did the County violate Section 16.4(b) of the labor agreement by declining to remove eight items from [Grievant's] desk file? If so, what is the proper remedy?

RELEVANT CONTRACT PROVISIONS

AGREEMENT BETWEEN COUNTY OF SACRAMENTO AND UNITED PUBLIC EMPLOYEES, LOCAL #1 COVERING ALL EMPLOYEES IN THE WELFARE NON-SUPERVISORY UNIT 2006-11 (EXTENDED TO JUNE 30, 2013)

ARTICLE V Grievance and Arbitration Procedure

5.15 Decision

b: The arbitrator shall have no authority to add to, delete or alter any provisions of this Agreement nor shall the arbitrator substitute his/her discretion in any case where the County is given or retains such discretion. The arbitrator shall limit his/her decision to the application and interpretation of the provisions of this Agreement. This subsection does not authorize the County to exercise its discretion in an arbitrary or capricious manner.

ARTICLE XVI Miscellaneous

16.2 Performance Evaluations

a. Employees shall be given performance evaluations on an annual basis. The purpose of performance evaluations is employee development. Performance evaluations are not to be used for disciplinary action.

16.4 Desk Files

a. Employees will have access to their desk files and receive copies upon request at a time that is mutually convenient.

b. Supervisors will review the contents of the supervisor's desk file annually (generally at the time of the annual performance evaluation) and remove any materials that are not of current relevance.

c. The supervisor's desk file will be transferred between supervisors when an employee transfers to a different position in the department or when there is a change in the employee's supervisor. The prior supervisor's comments should be included in the performance evaluation for the period they supervised the employee.

d. Material removed from the supervisor's desk file will be destroyed or given to the employee.

FACTS

The Grievant is an eligibility specialist in the County's Department of Human Services at the Employer's 1725 28th St. location. She has been in that position since 2002, and has worked at various locations. She had not received any disciplinary actions to the date of the instant grievance.

In May of 2012, [Employee A] was promoted to eligibility supervisor and was assigned to supervise the Grievant. Shortly after he became supervisor, [Employee A] was asked by his supervisor, [Employee B], to complete all overdue employee performance evaluations. [Employee B] testified as follows:

Because there was a big movement of supervisors and a lot of overdue PEP's [performance evaluations] that were like two, three, four years overdue, not just [Grievant]'s, but others, so the supervisors were told "Anything that's overdue, if you were not the supervisor, just put 'Overdue PEP' and just do standard."

[Employee B] testified that this initiative came from above.

It wasn't really being enforced by upper management that evaluations be done, and then all of a sudden a hammer came down and said, "Get them all done. In the performance tool, get those evaluations current." So it was pretty much department-wide. We were all given spreadsheets showing where all the supervisors had...overdue evaluations due within their bureau, and it was like numerous. There was like probably close to a hundred easily in my bureau.

After [Employee A] was given the instruction to complete overdue evaluations, he reviewed the file on the Grievant that had been passed along to him from the Grievant's prior supervisor. In that file, called a desk file, [Employee A] found a number of items placed there by the prior supervisor. The items were dated as early as September 2009, and as recently June 2011. The oldest item was a hand-written note from the supervisor, about a phone call from another supervisor with a concern about the grievant's behavior. Several other documents in the desk file were copies of emails received from other supervisors about incidents involving the Grievant. The desk file also contained one email response from the Grievant.

[Employee A] testified that he consulted with [Employee B] about how to do a performance evaluation for a period of time during which he was not the employee's supervisor. "I was advised to put standard at that time," he stated.

[Employee A] then completed a performance evaluation for the Grievant. The review covered the period November 27, 2010 through November 27, 2011. The evaluation gave the Grievant an overall rating of "Meets Standards," as well as "Meets Standards" for each individual category. Those categories included "Communication." The evaluation was signed by [Employee A] and the Grievant on June 28, 2012.

When [Employee A] was asked on cross-examination why he did not comment in his performance evaluation on the items placed in the desk file by the prior supervisor, he responded as follows:

I wasn't aware how to prepare the documents or the records, how to reflect them in the annual evaluation, and – as I was a new supervisor at that time, and as I consulted with program manager, and I did not include this information at that time, but I did not think it was irrelevant...I did not include as I did not have enough experience as a supervisor and I was going through certain trainings how to do that.

The Grievant testified that she first looked at the contents of her desk file in June 2012. At that time, she testified, the items that later became the subject of this grievance were not in her file. On July 31, 2012, she and shop steward [Employee C] met with [Employee A] to review the contents of her file. It was on that date that she discovered that the items dated from 2009 to 2011 were in her file¹. On September 5, 2012, [Employee C] sent an email to [Employee A], requesting a meeting with him and the Grievant to discuss materials in the Grievant's file. The three of them met on September 17, and

¹ No explanation of the apparent reappearance of the documents was offered by any witness at the hearing.

[Employee C] and the Grievant requested the removal of certain items that she considered out of date. [Employee A] responded on September 28 by stating that he had pulled some of the documents but was leaving others in the file.

[Employee A] testified to the reason that he declined to remove some of the documents that were dated from prior to his becoming the Grievant's supervisor:

Based on the previous behavior and the current one...I discovered that she continues exhibiting the same behavior and these documents are relevant and that they should stay in her desk file until the behavior corrects.

Once [Employee C] verified that the items remaining were from prior to June 2012, he notified [Employee A] that this was not acceptable, stating that the items were not "of current relevance" and stating that he would be filing a grievance. The grievance was filed, worked its way through the various steps of the grievance procedure, and is now the matter before the undersigned.²

[Employee C] testified at the hearing about the events described above and also on the topic of bargaining and grievance history on the issue of desk files. No employer witness testified on the issue of bargaining and grievance history.

[Employee C] testified that a grievance was filed in 2004 on this subject. At that time, the contract was silent on when or whether materials would be removed from supervisors' desk files. The grievance settlement, in December 2005, introduced the phrase "remove any materials that are not of current relevance." The entire sentence read:

Supervisors will review the contents of the supervisor's desk file annually (generally at the time of the annual performance evaluation) and remove any materials that are not of current relevance.

By its language, the settlement appeared to set practice for all future such situations.

[Employee C] was a member of the Union's bargaining team for contract negotiations in 2006. At the bargaining table in April 2006, the Union proposed language to be included in the CBA that derived (in part) from the above-referenced grievance settlement. The proposal, 64b, included the following as a proposed 16.2 g:

Supervisors will review the contents of the supervisor's desk file annually and remove all materials that are not of current relevance.

² A subsequent performance evaluation of the Grievant dated March 2013 was introduced into evidence, and there was testimony about it at the hearing. However, given that this subsequent evaluation was issued after the filing of the instant grievance, it will not be considered in this decision.

Bargaining notes introduced by the Union and the hearing, and verified by [Employee C], included the following exchange:³

[Union negotiator 1]: Next, our #64b on Personnel files. Language comes from a grievance settlement in DHA/DHHS.

[Management negotiator]: What do you mean by “not of current relevance”?

[Union negotiator 2]: Not related to an ongoing discipline or investigation.

The language in the final agreement in 2006, that has been carried over unchanged to the present, was identical to the original language in the 2005 grievance settlement but varied somewhat from the Union’s 2006 proposal. The primary difference was that, in the Union’s original proposal in 2006, the phrase “generally at the time of the annual performance evaluation” was deleted. In the final contract language that parenthetical phrase was re-inserted. The other change that the Union proposed from the grievance settlement was to substitute the word “all” for “any.” In the final agreed-to version, the word “any” was used.

UNION’S POSITION

The Union contends that the Employer has been arbitrary and capricious in keeping the disputed materials in the Grievant’s desk file. The Grievant has not even been counseled in regard to the documents that the Employer claims are relevant.

The supervisor testified that he reviewed the disputed documents prior to the June 2012 evaluation, the union asserts. Yet he did not mention them or the incidents behind them in that evaluation.

The Union requests that the grievance be sustained and the materials be removed from the Grievant’s desk file.

EMPLOYER’S POSITION

The Employer argues that the contract gives the supervisor the discretion to determine what items are retained in or removed from the desk file. Only if the supervisor is being arbitrary and capricious in

³ “[Union negotiator 1]” and “[Union negotiator 2]” were Union spokespersons [Union negotiator 1] and [Union negotiator 2]. “[Management negotiator],” responding for the Employer, was [Management negotiator].

that determination is there a violation. The issue is not whether or not the underlying facts in those documents are true, since no disciplinary action was taken.

Testimony shows that the Grievant's attitude remains a matter of concern to the supervisor, the Employer asserts. Therefore, it is reasonable for the supervisor to retain these supporting documents.

Since there has been no arbitrary or capricious conduct on the part of the supervisor, the Employer asks that the grievance be denied.

DISCUSSION

This grievance was filed on October 4, 2012. As noted in a footnote above, only the events leading up to that date will be considered in this analysis.

The contract language that governs this dispute is relatively clear and unambiguous. Supervisors "will" review the contents of desk files once a year and "remove any materials that are not of current relevance." Parenthetically, the contract notes that this review will "generally" occur at the time of the annual performance review. The question to be decided here is exactly what is meant by "of current relevance" and how it applies to the facts of this case.

The location of the "Desk Files" section of the agreement is notable. It is not a subsection of "Performance Evaluations," but stands as a separate section of the "Miscellaneous" article. This leads the contract reader to surmise that desk files might exist for more than just the purpose of preparing employee evaluations. However, within the "Desk Files" subsection, there are two separate references to performance evaluations that link desk files to performance evaluations: (1) – the above referenced parenthetical reference to the timing of desk file review, and (2) – a requirement that a prior supervisor's desk file comments on an employee should be included in a performance evaluation for the time he or she supervised the employee. There is, then, a strong inference that a desk file document's "current relevance" should be measured by whether or not it is relied upon in the current evaluation.

The contract section 16.4, considered as a whole, provides a solid framework for analyzing this grievance. In the instant case, a new supervisor inherited desk files from a prior supervisor. The part of the agreement that requires desk files to be transferred from one supervisor to another when there is a change in an employee's supervisor was apparently honored. The next part of the agreement, that requires a prior supervisor's comments to be included in the appropriate performance evaluation, then came into play.

The Employer argues that the supervisor has the discretion to remove material or not. This contention will be addressed later. In any case, the Employer would certainly be correct were it to argue that the supervisor had the discretion to include or not to include negative references from a prior supervisor's materials in the Grievant's performance evaluation. In the case of [Employee A] and the Grievant, he chose not to include any reference to the earlier documentation of communication or behavior problems on the part of the Grievant. His stated reason for not including reference to them is that he was a new supervisor on a deadline, that he had not completed his training, and that he was told he could just mark "standard" in all categories. That in fact is what he did in the June 2012 evaluation of the Grievant.

Up to this point, there was arguably no contract violation.

What followed next is problematic for the Employer. Having decided not to include references to the prior supervisor's materials in the performance evaluation, the supervisor then decided to nonetheless retain those materials in the desk file. The key question in this grievance is whether that decision violated the CBA.

The Employer argues, in essence, that the supervisor retains the discretion to determine what materials are "of current relevance," subject only to an "arbitrary and capricious" standard. However, the agreement in Section 16.4 does not explicitly give the supervisor that discretion. Given the grievance and bargaining history, and a reading of the section in its entirety, it is clear that "of current relevance" takes on a specific negotiated meaning. It is not a phrase that each supervisor can freely interpret. The specific language in 16.4b must be given more weight than the general language from the CBA in Article 5 cited by the Employer.

The contractual context is that this removal of materials takes place annually and "generally" at the time of the performance review. The Union's original proposal in 2006 had deleted the phrase "generally at the time of the annual performance evaluation". It is notable that it was, apparently, the Employer at the bargaining table that insisted that the parenthetical clause from the original grievance settlement linking desk file review to the annual evaluation be added back in to the language.

The CBA specifies an annual interval for employee performance evaluations. Evaluations are to be done annually and review of desk files are to be done annually in conjunction with that. When the files are reviewed, materials that are not "of current relevance" are to be removed. There is a strong inference that materials in desk files apply only to the next upcoming evaluation. Those documents are presumably there to help the supervisor recall both positive and negative items from the prior year for the purpose of

writing a fair and helpful evaluation. Once the evaluation has been issued, the contract requires that materials that are no longer relevant be removed and destroyed.

In the instant grievance, the Union contends that the supervisor's failure to include references to prior materials in the Grievant's evaluation rendered those prior materials no longer "of current relevance." Due to the foregoing analysis, the undersigned reads the CBA the same way and concurs with the Union's contention. Once the supervisor decided, for whatever reason, that the prior materials would not be referenced in the June 2012 evaluation and that the Grievant would be given all "meets standards" in the relevant categories, then those materials should have been removed. Whether or not the Grievant continued prior behaviors, as alleged by [Employee A], is not germane. The items in question were stale by definition, and should not have been considered for any subsequent evaluations.

Even after a formal request from the Grievant and her shop steward, the items were not removed. The preponderance of the evidence is that the contract was violated. Therefore, the grievance is sustained and the Employer is ordered to remove the items in question from the supervisor's desk file on the Grievant.

AWARD

- 1) The Employer violated Section 16.4(b) of the labor agreement by declining to remove eight items from [Grievant]'s desk file.
- 2) The Employer shall remove the eight items from the supervisor's desk file on the Grievant, [Grievant].
- 3) The arbitrator retains jurisdiction for the purpose of the implementation of the remedy.



Paul D. Roose, Arbitrator

Date: September 30, 2013