PUBLIC EMPLOYMENT RELATIONS COMMISSION

BEFORE ARBITRATOR AUDREY B. EIDE, ESQUIRE

TEAMSTERS LOCAL UNION NO. 117, Union, and PORT OF SEATTLE, Employer.	ARBITRATOR'S DISCUSSION AND AWARD PERC # 136169-R-23 Grievance of Sergeant [REDACTED]

Sergeant [REDACTED] is a law enforcement employee of the Port of Seattle (Port). On January 15, 2021, Sergeant [REDACTED] received notice that he was a potential subject of a workplace investigation because of alleged staff misconduct. Sergeant [REDACTED] continued to work his regular schedule. While the investigation was still pending, the Teamsters Union Local No. 117 (Union) filed a Grievance on November 1, 2022, claiming that two years is not a reasonable timeline for an investigation. The Grievance requested a make-whole remedy including removal of documentation of the investigations from Sergeant [REDACTED]'s personnel file and that no punishment should result from the investigations. When the Grievance was not resolved through the grievance process, the Union unilaterally submitted a request to the Public Employment Relations Commission (PERC) for an assignment of an arbitrator from the Law Enforcement Discipline Roster. The Port objected and argued that this was not a discipline grievance.

The Port submitted a Motion to Dismiss the Grievance, the Union submitted a Brief on Arbitrability of the Grievance, and the parties submitted stipulated facts and exhibits on the issue of arbitrability to the Arbitrator and simultaneously exchanged them on March 22, 2024. The Port was represented by Sofia D. Mabee, Attorney at Law of Summit Law of Group, PLLC. The Union was represented by Eamon McCleery, Senior Staff Attorney of Teamsters Local Union No. 117. The stipulated facts and exhibits presented to the Arbitrator and the arguments filed in the Port's Motion and the Union's Brief have been carefully considered.

ISSUE

The parties did not agree upon a statement of the issue. The Union frames the issue as "May this grievance be decided by Arbitrator Eide pursuant to the parties' CBA and RCW 41.58.070?" (Union's Brief, page 2) The Port requested relief "that the grievance of Teamsters Local Union No. 117 on behalf of Sergeant [REDACTED] be dismissed as not arbitrable." (Port's Motion, page 1) The Arbitrator frames the issue as: Is the "Improper Investigation Grievance" of Sergeant [REDACTED] a disciplinary grievance and arbitrable under RCW 41.58.070?

The alleged improper investigation of Sergeant [REDACTED] also investigated workplace misconduct of other bargaining unit members. The Grievance on behalf of Sergeant [REDACTED] states it is a class grievance and requests a remedy for all similarly situated bargaining unit members. The parties have stipulated that the Grievance at hand only pertains to Sergeant [REDACTED] and no other individuals in the bargaining unit. The Union also filed Grievances because of the alleged improper investigation for two additional bargaining unit members. These additional Grievances by stipulation of the parties are not before the Arbitrator. Further, on September 7, 2023, Sergeant [REDACTED] received a Letter of Reprimand as the outcome of the investigation initiated in 2021. The Union filed a new Grievance September 15, 2023, on behalf of Sergeant [REDACTED] alleging the Letter of Reprimand was not supported by just cause. The parties also stipulated that the new Grievance is not before the Arbitrator.

SUMMARY OF STIPULATED FACTS

Sergeant [REDACTED] (Grievant) is employed by the Port and is a "law enforcement personnel" as defined in RCW 41.58.070(1)(b)(i)(A). He is a member of the Union. On January 15, 2021, the Grievant received notice that a workplace investigation was taking place by an outside investigator and that the Grievant was a potential subject of the investigation. He was to be interviewed with his Union Representative present on January 25, 2021, or another mutually agreeable date. The Grievant continued working his regular schedule.

Almost two years later the investigation was still ongoing and had not resulted in any findings against the Grievant. The Grievant had not received a verbal or written warning or reprimand, suspension, demotion, discharge, or termination because of the investigation and no one from the

Port or on behalf of the Port had indicated to the Grievant he was being disciplined or invited to a pre-disciplinary meeting. Even so, the Union filed a Grievance on behalf of the Grievant on November 1, 2022:

> In January 2021, Sgt. [REDACTED] was alerted that he was the subject of an investigation alleging staff misconduct at work. Nearly two (2) years have passed, and Sgt [REDACTED] remains under investigation. The Union asserts that two (2) years is not a reasonable timeline for this investigation. . . .

The Grievance requested a make-whole remedy including but not limited to:

> . . . the Department either fully and completely follow the CBA and Bill of Rights for investigations or end Sgt. [REDACTED]'s investigation, remove all documentation pertaining to this investigation from their file, no punishment from this investigation, and any other relief that is just and equitable. . ."

The Grievance was not resolved in the grievance process. The Union unilaterally submitted the Grievance to the PERC and requested assignment of an arbitrator from the Law Enforcement Discipline Roster. The Union described "Arbitration Details" on the Grievance submission form to PERC as: "Re: [REDACTED]-Improper Investigation."

The Port and the Union have had a collective bargaining relationship since 2019. They have negotiated two CBAs for the terms of 2019-2021 and 2022-2024. Article 10-Discipline has stated the following during the term of both CBAs:

> 10.01 Grievance Procedure – Applicability. The parties agree that discipline is a command function. Decisions on disciplinary matters where discipline imposed involves discharge, suspension, demotion or written reprimands shall be subject to the grievance procedure, however, written reprimands may not be pursued to arbitration.
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> 10.02 Grievance Procedure – Timing. If an employee claims to have been unjustly discharged, suspended, demoted, or reprimanded, to be timely the case may, within twenty (20) calendar days after the date of such discharge, suspension, demotion or reprimand be referred in writing to Step 2 of the grievance procedure, as outlined in Article 29.05.

Article 29.05 of the 2019-2021 CBA required at Step 4 of the grievance procedure that an arbitrator be selected for all grievances from a panel of arbitrators obtained from the Federal Mediation and Conciliation Service (FMCS). The parties changed this language in the 2022-2024 CBA to comply with new legislation in RCW 41.58.070(2)(a) that applies the arbitration selection procedure provided in the statute to "all grievance arbitrations for disciplinary actions, discharges, or terminations of law

enforcement personnel which are heard on or after January 1, 2022". The new Article 29.05 Step 4 of the CBA provides:

> Selecting an Arbitrator. For all arbitrations involving disciplinary actions, discharges, or terminations, the arbitration selection procedure shall be as established in RCW 41.58.070. For all other arbitrations, the Port and the Union mutually agree that either Party to this Agreement may apply to the Federal Mediation and Conciliation Service (FMCS) for a list of seven (7) persons who are qualified and available to serve as arbitrators for the dispute involved. . . .

On February 1, 2023, pursuant to RCW 41.58.070 the PERC assigned Arbitrator Audrey B. Eide, Esquire to hear the Grievance at arbitration. The Port objected and requested the PERC reconsider the assignment. The Port claimed this was not a discipline grievance as it was not a dispute or disagreement regarding any disciplinary action, demotion, discharge or termination decision, and the CBA required for non-discipline grievances that arbitrators be chosen by the parties from an FMCS List. The PERC responded that they did not have a mechanism for resolving a dispute between the parties about whether a grievance meets the definition of a "disciplinary grievance" and denied the Port's request.

During the process of scheduling for arbitration, the Port continued to raise substantive and procedural arbitrability issues. The Arbitrator advised the parties that they could decide the procedural arbitrability issues but that the substantive arbitrability issues could not be decided by the Arbitrator unless the parties agreed to submit them to the Arbitrator for a decision. The parties eventually scheduled the arbitration for January 16-18, 2024. The Arbitrator was informed by the parties in December 2023 that they had decided to bifurcate the hearing into the issues of arbitrability and the merits. The parties requested the hearing be cancelled and the issues be presented by briefs with stipulated facts. In a pre-hearing conference remote by Zoom on January 17, 2024, the parties agreed to a briefing schedule for the issue of arbitrability. If the Arbitrator decides that the Grievance is arbitrable then the parties will agree to a briefing schedule on the merits.

On March 22, 2024, the parties through their representatives submitted the issue of arbitrability to the Arbitrator under a signed statement that "The parties agree to submit these stipulated facts and briefing on the issue of arbitrability without waiving any of their rights as to this grievance or as to any other matter, proceeding, or grievance."

POSITION OF THE PARTIES

The Port argues that "The contents of the grievance itself as well as the requested remedy belie any argument that it is-or was intended to be-an appeal of disciplinary action". The Port points to Article 10.1 of the CBA which defines disciplinary grievances as decisions imposing discharge, suspension, demotion, or written reprimand and argue that "No such decision occurred at the time the grievance was filed." Further, they rely on a decision in *City of Snoqualmie*, PERC #134880-R-22 by Arbitrator Paul Gordon where he found an employer action was not discipline when a grievant did not receive formal or informal discipline in the form of a verbal or written warning, suspension, demotion, or dismissal. The Port claims the Grievance in the case at hand is not a disciplinary grievance and not arbitrable. (Port's Motion, page 7-8)

The Union concedes that the Port had not made a disciplinary decision when the Grievance was filed or when it was moved to arbitration, they argue that was the point of the Grievance. It was filed "on the basis that the Employer's investigation of the Grievant violated the parties' CBA, including by taking an unreasonably long amount of time to complete". The Union argues that the Port is interpreting Article 29.05 of the CBA too narrowly as "The plain text of that section does not require that a grievance be a direct challenge to a disciplinary decision for the arbitrator appointment procedures of RCW 41.58.070 to apply." The Union claims that the CBA 'merely' requires that a grievance involves disciplinary action, and that RCW 41.58.070 only requires that a grievance be 'regarding' a disciplinary action for a grievance to be disciplinary. Therefore, the Union argues because they are requesting that no punishment be issued to the Grievant resulting from the alleged improper investigation, the Grievance "clearly involves disciplinary action" and is 'regarding' a disciplinary decision. The Union claims this is a disciplinary grievance and it is properly before the Arbitrator. Union's Brief, page 9-11)

DISCUSSION

The parties disagree that the Grievance at hand is a disciplinary grievance. If this Grievance is a disciplinary grievance, then it was properly sent to the PERC for an appointment of an arbitrator under RCW 41.58.070. If it is not a disciplinary grievance then an arbitrator should have been chosen from an FMCS List under Article 29.05, Step 4 of the CBA. The parties stipulated that the Grievant had not been disciplined at the time the Grievance was filed. The issue here is does the fact that the Union requested a remedy in the Grievance that no punishment result from the alleged improper

investigation meet the definition of disciplinary grievance in Article 10 of the CBA or RCW 41.58.070(1)(c)?

Disciplinary grievance is defined in RCW 41.58.070. The statute was enacted by the Washington State Legislature in 2021 to address concerns about police accountability. The statute created a Law Enforcement Discipline Arbitrator Roster and put it under the administration of the PERC. Arbitrators could apply for appointment to the roster. The PERC would then appoint based on the qualifications required by the statute up to 18 arbitrators to the roster. The arbitrators appointed are required to complete specific training as developed and implemented by the PERC. PERC assigns arbitrators by rotation from the roster to "all grievance arbitrations for disciplinary actions, discharges, or terminations of law enforcement personnel which are heard on or after January 1, 2022". (RCW 41.58.070(2)(a)) The statute defines disciplinary grievance: "Disciplinary grievance means a dispute or disagreement regarding any disciplinary action, discharge, or termination decision arising under a collective bargaining agreement covering law enforcement personnel". (RCW 41.58.070(1)(c))

The Grievance at hand disputes an alleged improper investigation. The Grievance requests that the remedy for the alleged inappropriate investigation is that there will be no punishment (discipline) to the Grievant because of the investigation. Certainly, as the Union argues there is a reference to discipline in the Grievance request for remedy and to go one step further that reference to discipline also requests no disciplinary action. However, this is a request regarding a prospective and anticipated possible disciplinary action. The statute defines disciplinary grievance as a dispute or disagreement regarding any disciplinary action or decision. The Port had not taken any disciplinary action or made a disciplinary decision when the Grievance was filed. The Grievance did not dispute a disciplinary action or decision. It disputed an alleged improper investigation.

The goal of contract interpretation is to determine and carry out the mutual intent and agreement of the parties, if possible. The intent of the parties is determined from the language of the agreement as expressed in the CBA, the subject matter and objective of the agreement, bargaining history, past practice, and the reasonableness of the interpretations of the parties to the agreement. The Arbitrator in a contract dispute must determine and implement the probable mutual intent of the parties as expressed in the CBA. The parties negotiated Article 29.05 Step 4 (Selecting an Arbitrator) to comply with RCW 41.58.070. Article 29.05 states: "For all arbitrations involving disciplinary actions, discharges, or terminations, the arbitration selection procedure shall be as established by

RCW 41.58.070". The statute defines disciplinary grievances as a dispute or disagreement regarding any disciplinary action. The CBA defines disciplinary grievances as grievances disputing decisions on disciplinary matters where discipline is imposed in Article 10.01 of the CBA:

> Grievance Procedure – Applicability. The parties agree that discipline is a command function. Decisions on disciplinary matters where discipline imposed involves discharge, suspension, demotion or written reprimands shall be subject to the grievance procedure, however written reprimands may not be pursued to arbitration.

In the case at hand, no disciplinary action had been taken, no decision on disciplinary matters had been made and no discipline had been imposed when the Grievance was filed. The alleged "Improper Investigation" does not fall within the definition of disciplinary grievance under RCW 41.58.070 or Article 10.01 and 29.05 of the CBA.

It would be a stretch to find even in a broad interpretation of Article 29.05 Step 4 of the CBA the Grievance is a disciplinary grievance as it is "involving" disciplinary action because the requested remedy includes that no punishment results from the alleged improper investigation. It would similarly be a stretch to find that the Grievance is a disciplinary grievance in a broad interpretation of RCW 41.58.070(1)(c) because the requested remedy in the Grievance is "regarding disciplinary action". Article 29.05 Step 4 of the CBA defines the Arbitrator's authority:

> The arbitrator shall not have the power to add to, subtract from, or modify the provisions of this Agreement in arriving at a decision of the issue or issues presented; and shall confine their decision solely to the interpretation, application, or enforcement of this Agreement. The arbitrator shall confine themselves to the precise issue(s) submitted to them for arbitration and shall not have the authority to determine any other issues not so submitted to them.

For the Arbitrator to adopt the Union's broad interpretation of Article 29.05 of the CBA and RCW 41.58.070(1)(c) and find that the Grievance at hand is a disciplinary grievance, they would have to add to or modify the provisions of the CBA. The Arbitrator does not have that authority. Although the Union would like the Arbitrator to consider the Letter of Reprimand eventually issued to the Grievant to make that broad interpretation, the Reprimand is not before the Arbitrator. The Letter of Reprimand occurred after the Grievance in this case was filed. The parties stipulated that the new Grievance filed for the Grievant disputing just cause of the Letter of Reprimand is not before the Arbitrator. The CBA limits the Arbitrator's authority to the issues the parties have submitted to them.

Arbitrations decided under RCW 41.58.070 are required to be filed with the PERC and published on their web site. The Port submitted the entire list of cases decided under RCW 41.58.070 to this date. Nine cases are disciplinary grievances all of which dispute formal discipline. In addition is the case decided by Arbitrator Gordon in *City of Snoqualmie*, PERC #134880-R-22. This case is also persuasive in interpreting that the case at hand is not a disciplinary grievance and therefore not arbitrable. In that case the City of Snoqualmie had given a Law Enforcement Officer a directive not to work and was paid on administrative leave because he was not fully vaccinated. The Union grieved and alleged the Officer had been disciplined. The City disagreed and argued that their actions were administrative not disciplinary and the grievance was not arbitrable under RCW 41.58.070. Arbitrator Gordon found no disciplinary allegations or actions were taken against the Grievant in that case. He found that no one charged the Grievant with any disciplinary offense, there was no investigation into or disciplinary interest in the officer's conduct, there were no meetings or hearings for the Grievant to present his position on any disciplinary matter, no formal or informal discipline document was produced or issued to the Grievant. The Arbitrator awarded that the Grievant was not disciplined and the grievance was not arbitrable on the merits. The decision of Arbitrator Gordon defines disciplinary grievance as one where the grievant has been disciplined. The parties in the case at hand stipulated the Grievant had not been disciplined when the Grievance was filed.

CONCLUSION

At the time the Grievance was filed the Grievant had not been formally or informally disciplined, invited to a pre-disciplinary meeting or informed he would be disciplined. The Grievance does not dispute discipline. It disputes an alleged "Improper Investigation' which does not fall within the definition of discipline under RCW 41.58.070 or Article 10.01 of the CBA. The Grievance of the alleged "Improper Investigation" of Sergeant [REDACTED] is not a disciplinary grievance under RCW 41.58.070 or the CBA. The Grievance is not arbitrable under RCW 41.58.070 and must be dismissed.

AWARD

The "Improper Investigation Grievance" of Sergeant [REDACTED] is not a disciplinary grievance and is not arbitrable under RCW 41.58.070.

The Motion to Dismiss the Grievance is GRANTED.

The Grievance is hereby DISMISSED.

Respectfully Submitted, this 17th day of April 2024.

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Audrey B. Eide, Esquire

Arbitrator & Mediator