

**ARBITRATION DECISION NO.:**

O78

**UNION:**

OCSEA, Local 11, AFSCME, AFL-CIO

**EMPLOYER:**

Ohio Department of Taxation

**DATE OF ARBITRATION:**

November 9, 1987

**DATE OF DECISION:**

December 23, 1987

**GRIEVANT:**

G. Harris

**OCB GRIEVANCE NO**

G87-0239 and

G-87-1253

**ARBITRATOR:**

Rhonda R. Rivera

**FOR THE UNION:**

Dan Smith, Esq.

**FOR THE EMPLOYER:**

Timothy Stauffer, Esq.

**KEY WORDS:**

Suspension

Termination

Just Cause

Progressive Discipline

Inefficiency

**ARTICLES:**

Article 24 – Discipline

§24.01 – Standard

§24.02 – Progressive Discipline

**FACTS:**

Grievant was a Tax Commissioner Agent 2 employed at the Ohio Department of Taxation. Grievant received an oral reprimand, a written reprimand, a three-day suspension, and a five-day suspension prior to discharge for unacceptable quality of work performed and unacceptable production level.

The arbitrator held that management retained the right to set standards of work quality and quantity of production. No evidence was introduced that the Agency's standards were unreasonable or unevenly applied; however, ample evidence was introduced that the Grievant did not perform adequately under reasonable management standards.

The Grievant's discipline was for just cause and was clearly progressive under Section 24.02. Give the time period involved (over 2-1/2 years) and the quantity and nature of the error, Employer had "cause" to discipline the Grievant. Under the Agreement, any discipline imposed must be progressive in nature. In this case, the Grievant was systematically taken through each disciplinary step, each discipline was documented, and notice was clear. Grievant produced no evidence of disparate treatment. The overall evidence showed a long-term effort at progressive discipline and correction without concomitant action on the part of the Grievant. Within the protective boundaries of: the contract, for just cause, an employer has the right to terminate non-productive workers. As such, the grievance was denied and the discharge was upheld.

**TEXT OF THE OPINION:**                   \* \* \*

IN THE MATTER OF THE  
ARBITRATION BETWEEN

Ohio Department of Taxation,

Grievance No. G87-0239  
(5 day Suspension)

Employer

Grievance No. G87-1253  
(Termination)

and

Ohio Civil Service Employees  
Association, Local 11, AFSCME,  
AFL-CIO

Grievant G. Harris

Hearing Date:  
November 9, 1987

Union

For Ohio Department of Taxation: Timothy D. Stauffer, Esq.

For OCSEA: Dan Smith, Esq.

Present at the Hearing: Stauffer, Smith, Grievant Harris,  
Wyndolyn Shell (Union Steward), Lois Haynes (Staff, OCSEA),  
Christine E. Brockway (ODT - union witness), Arthur M. Suchta  
(Administrative Counsel ODT), Joseph Bettinger (Supervisor ODT,  
Toledo), Michele Delaney (Administrator ODT, Toledo)

Preliminary Matters

-  
The hearing covered two (2) grievances brought by the same employee regarding serial discipline. The parties agreed to present the evidence chronologically. Presumptively after the last

information with regard to the suspension, the parties rested and then reopened evidence on the matter of termination. The Arbitrator is to resolve the two grievances with separate

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statements as to the awards. The parties left to the Arbitrator the task of reconciling the results of the two grievances, if necessary.

The parties agreed that the Arbitrator might record the proceedings solely to use such recording to refresh her memory. The parties understand that the tapes shall be destroyed on the day the decision is rendered.

The parties agreed that the Arbitrator might publish the opinion after the decision is rendered.

The parties agreed that the grievances were properly before the Arbitrator.

### Relevant Contract Provisions

#### § 2.02 - Agreement Rights

No employee shall be discriminated against, intimidated, restrained, harassed or coerced in the exercise of rights granted by this Agreement.

#### § 2.03 - Affirmative Action (in part)

The Employer and the Union agree to work jointly to implement positive and aggressive affirmative action programs in order to redress the effects of past discrimination, whether intentional or not, to eliminate current discrimination, if any, to prevent further discrimination, and to ensure equal opportunity in the application of this Agreement. Within ninety (90) days

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of the effective date of this Agreement, the parties will form a statewide Affirmative Action Committee composed of an equal number of Union and Employer representatives and co-chaired by a Union representative and an Employer representative.

#### § 24.01 – Discipline Standard

Disciplinary action shall not be imposed upon an employee except for just cause. The Employer has the burden of proof to establish just cause for any disciplinary action. In cases involving termination, if the arbitrator finds that there has been an abuse of a patient or another in the care or custody of the State of Ohio, the arbitrator does not have authority to modify the termination of an employee committing such abuse.

#### 24.02 - Progressive Discipline

The Employer will follow the principles of progressive discipline. Disciplinary action shall be

commensurate with the offense. Disciplinary action shall include:

- A. Verbal reprimand (with appropriate notation in employee's file);
- B. Written reprimand;
- C. Suspension;
- D. Termination.

Disciplinary action taken may not be referred to in

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an employee's performance evaluation report. The event or action giving rise to the disciplinary action may be referred to in an employee's performance evaluation report without indicating the fact that disciplinary action was taken.

Disciplinary action shall be initiated as soon as reasonably possible consistent with the requirements of the other provisions of this Article. An arbitrator deciding a discipline grievance must consider the timeliness of the Employer's decision to begin the disciplinary process.

#### 24.03 - Supervisory Intimidation

An Employer representative shall not use the knowledge of an event giving rise to the imposition of discipline to intimidate, harass or coerce an employee.

In those instances where an employee believes this section has been violated, he/she may file a grievance, including an anonymous grievance filed by and processed by the Union in which the employee's name shall not be disclosed to the Employer representative allegedly violating this section, unless the Employer determines that the Employer representative is to be disciplined.

The Employer reserves the right to reassign or discipline employer representatives who violate this section.

Knowingly making a false statement alleging patient

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abuse when the statement is made with the purpose of incriminating another will subject the person making such an allegation to possible disciplinary action.

#### 24.05 - Imposition of Discipline (in part)

Disciplinary measures imposed shall be reasonable and commensurate with the offense and shall not be used solely for punishment.

Issue(s)

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- (1) Was the Grievant's suspension for five (5) days for just cause pursuant to § 24.01?
- (2) Was the Grievant's termination for just cause pursuant to § 24.01?

Facts

- Grievant at the time of the grievances was a Tax Commissioner Agent #2. She was originally employed by the Ohio Department of Taxation on November 21, 1977 in the Toledo office, Income and Franchise Section. on September 06, 1982, Grievant took a Leave of Absence without Pay (LOA) "in order to further her education." (Exhibit #22) Grievant stated that the educational leave would give her a "chance to deepen my accounting knowledge and skills, which would make me a better auditor for the State." The leave was approved. During her first period of employment, the Grievant had received no discipline.

On September 5, 1984, the Grievant returned to work. Because no positions were available in Income/Franchise, Grievant was assigned to Personal Property Tax Section. The minimum class requirements for that position include: "Ability to calculate fractions, decimals, and percentages; and to complete forms and prepare routine correspondence plus: 6 courses in accounting (or 6 months experience); 3 courses in general business (or 3 months experience); or equivalent" (Exhibit #5).

The job duties included "conducts in-office audits or reaudits . . . and/or field investigations. . ." (emphasis added) (Exhibit #5).

From September 5, 1984 through November 23, 1984, the time sheets record the Grievant's time as "training." Supervisor Bettinger testified that the Grievant was given the manuals of the section, the forms of the section, and a book designed to instruct lay persons on preparing property tax returns. After two weeks for review of these materials, Grievant was assigned unincorporated returns to screen as on-the-job training. The supervisor testified that he was available to answer questions and review materials with the Grievant and that he did so on a regular basis. The supervisor testified that this method -- two weeks review plus 40 days on-the-job training -- was the same method used for all new persons in the Section. The supervisor testified that new persons learned at different speeds but that within one (1) year a person was usually on their own and competent.

On November 16, 1984, Grievant received an evaluation

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(exhibit #10). This evaluation was poor. However, the supervisor testified that he specifically noted on the form that the Grievant had just returned to work after a two year LOA and that she was still in

her training period.

Supervisor Bettinger testified that during the first year of her work in his Section Grievant's work never improved and that she made the same type of errors repetitively. These errors were of various types:

1. mathematical,
2. grammatical,
3. errors reflecting lack of comprehension of the fiscal year concept,
4. carelessness (asking for items already provided by the taxpayer),
5. failure to recognize taxpayer errors, and
6. incomprehensible letters to taxpayers.

The supervisor testified that no matter how often he corrected these areas, the Grievant continually repeated the same mistakes.

Administrator Michele Delaney came to the Toledo office in October 1984, shortly after the Grievant. Administrator Delaney's previous work was as an Affirmative Action Officer. Within a few short months after Delaney's coming to ODT, Delaney interviewed all employees. At that interview, the Grievant told Delaney that she had been unfairly treated in her prior work at Ohio Department of Taxation. Delaney testified that after this conversation she contacted the Grievant's supervisor and advised him that fair

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treatment and proper training were expected.

Subsequently, the Administrator recommended to the supervisor that he prepare a written guide for filling out Form 920, ostensibly for all agents, but really to aid the Grievant. He did so. (Exhibit #23)

On October 29, 1985, Administrator Delaney met with Grievant to review production goals. For fiscal year 1986, the Grievant's second year on the job, the Grievant's production goal was set at \$100,000 (1/3 of the other agents). The Administrator reviewed the Grievant's method of screening with the Grievant. Grievant asked when could she do field audits? She was told that she could do field audits when she had mastered in-office audits. This interview was reduced to writing and sent to the Grievant. (Exhibit #23).

On November 26, 1985, Supervisor Bettinger did the annual evaluation of the Grievant. The evaluation was poor. He said she had shown unsatisfactory progress in fourteen months. He said "she need(s) to improve her knowledge of accounting theory and practice . . ." He detailed errors and omissions and her need for constant supervision. This evaluation was accompanied by a 3 page memo detailing errors, problems, and where the work needed to be improved. The basic

thrust of the problem included lack of comprehension and understanding of basic accounting principles.

On December 6, 1985, the Grievant wrote an IOC to Supervisor Bettinger with regard to her evaluation. The Grievant attributed her errors to nervousness about being corrected and claimed that

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the errors were used "against her." She specifically requested "formal training for this job." She said "Yes you have gone over my mistakes with me and answered my questions but formal training you have not given me." She asked to be taught to prepare a personal property return and to do field audits. (Exhibit #12) on January 3, 1986, Grievant again discussed her situation with Administrator Delaney. She blamed her mistakes on "atmosphere" and "lack of training." Delaney told Grievant that she (Delaney) had asked all Supervisors (including Bettinger) to send correction memos attached to all errors to every agent. This system she reminded the Grievant had been going on for months. The purpose of corrections, Delaney said, is "training". When Delaney asked the Grievant if she was using the written guideline for Form 920, the Grievant said she "didn't remember having one." (Exhibit #24) At that time, the Grievant said she was using the form letter provided. (Exhibit #8)

On January 10, 1986, Supervisor Bettinger gave Grievant an oral warning for poor quality of work and low production. The warning was 4 typed pages which detailed the errors. Attached were twelve (12) specific examples of errors. These problems included 1) failure to follow instructions, 2) mathematic errors, 3) inaccurate forms, and 4) inadequate letters. Of 24 correction notices done by the Grievant in December 1985, 14 had to be returned, and 20% of these were returned a second time. (Exhibit #13)

On February 12, 1986, Supervisor Bettinger gave the Grievant

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a written reprimand for unacceptable quality of work performed and unacceptable production level. In this review period, 79% of Grievant's correction notices were returned and 33% were returned a second time. Forty-four percent (44%) of her letters had to be re-written. Attached to the reprimand were 10 samples of representative errors.

On March 19, 1986, Supervisor Bettinger recommended that the Grievant be given a three (3) day suspension. In this review period, 75% of her correction notices were in error and 40% had to be returned a second time. Sixty-three percent (63%) of the letters were found to be inaccurate. Attached to this reprimand were 25 samples of errors. At the arbitration hearing, the employer also provided all the error notices of the other three (3) agents for the same period, 6 errors in total.

On April 17, 1986, Grievant wrote to the Tax Commissioner. In that letter, she said the supervisor was not telling the truth. She claimed he was not training her because by training "he is talking about reading books and going through returns on my own." (Exhibit #26)

On June 9, 1986, Grievant was suspended for three (3) days from June 17, 1986 through June

19, 1986. (Exhibit #16)

On June 12, 1986, Supervisor Bettinger wrote all agents asking for specific questions which he could ask at a Supervisor's Workshop to clear up any problems any agent might have. (Exhibit #5) Before June 17, 1986, the Grievant submitted no questions. Only July 1, 1986, the Grievant again wrote to the Tax

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Commissioner. In this letter, the Grievant accused Administrator Delaney and Supervisor Bettinger of unfairness to her. She again asked "to be trained." She indicated (p. 2, line 6) however, that her training was the same as other agents. She stated that 1) she had been "harassed" for 8-1/2 years."

On August 5, 1986, Supervisor Bettinger wrote a memo to the file. (Exhibit #4) In this memo, he indicated that Grievant was on disability leave from June 23rd to July 28th. On August 5th, Supervisor Bettinger met with Grievant from 10:00 a.m.-12 noon and 2:00-3:45 p.m. and reviewed the material brought up at the Supervisor's workshop on June 23rd. At this meeting, Grievant asked one question: when could she do field audits? She said she still did not know how to prepare a personal property tax return. The supervisor asked her if she understood a True Value Schedule and a gross profits computation. She said yes. He explained that these two forms comprised the gist of the personal property return. He asked her to take a day, prepare a list of questions, and meet again on August 7, 1986. (Exhibit #4) On August 6, 1986, Grievant submitted a list of questions. #1 asked how to prepare a personal property tax return. #2 asked about Form 19-26. #3 asked what kind of return a business which began business in Mid-December should file. #4 asked how the department determined when to do a field audit. #5 asked when the Grievant could do field audits. #6 asked what would happen to a person who failed to meet their production goal.

On August 8, 1986, Supervisor Bettinger replied by IOC. In

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his IOC, he noted that 4 of the 6 questions covered areas already discussed at length on August 5, 1986. (Exhibit #6) He replied at length, in detail, and in writing to each question.

#### Summary:

1. The job of Agent #2 is not to prepare tax returns. However, the method is outlined in the Booklet designed for lay persons given to her during her training period. Then he explained the basic two computations (True Value and Gross Profits) and how these computations formed the basis of the return.
2. He agreed that 19-26 was a problem. He stated that he had asked Central office for clarification for all the agents.
3. He explained how to determine tax year proration.



4. He said it was a complex decision made by agents. He gave examples.
5. Grievant could do field audits when she could do routine office audits acceptably.
6. Supervisor detailed process of production review.

On August 7, 1986, Supervisor Bettinger wrote Grievant a 3 page memo detailing inadequate and improper letters. (Exhibit #7)

On September 12, 1986, Supervisor Bettinger recommended a five (5) day suspension for Grievant. (Exhibit #20)

In the 30 day review period ending September 11, 1986, Grievant's correction notices were 82% in error, 25% needed to be \*\*12\*\*

submitted a second time, and 45% of her letters were inadequate. Attached to the recommendation were 32 examples of errors. At the Arbitration, employer submitted the errors of the other 3 agents during that period, 8 in number.

On November 20, 1986, Supervisor Bettinger again evaluated the Grievant. The evaluation was poor. On December 4, 1986, Grievant was suspended from December 10 through December 16, 1986. (Exhibit #19)

On February 27, 1987, Supervisor Bettinger recommended that Grievant be terminated. During the thirty day review period, Grievant's correction notices showed a 73% error rate, 50% were submitted twice, 25% three times, and 44% of the letters were inadequate. Attached were 32 error examples. At the Arbitration, employer submitted all errors of all other 3 agents for period, 7 in number.

On April 21, 1987, Grievant was terminated. (Exhibit #2)

The Grievant testified in her own behalf. She stated that on her 2 year leave of absence she did not study any accounting. She also said that Supervisor Bettinger found screened returns shortly before her termination which she should have written up as correction notices but had not done so. She said the papers had gotten mixed up with others by mistake.

Her explanation for her errors was as follows: 1) inadequate training, 2) pressure which caused headaches which caused more errors and 3) harassment. Grievant defined harassment as the Supervisor constantly correcting her mistakes. She said that the

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supervisor favored a handicapped employee in the office, answering his questions more often,

doing him favors, and giving him personal gifts. She said Bettinger was "reasonably available," "encouraged questions," but used them (the questions) as discipline against her. Grievant stated that she had been harassed in her previous position and that she took the two year LOA because of that prior harassment. Another Agent #2, Christine Brockway testified that the Grievant was not wanted in Personal Property when she returned from her LOA and that Grievant was not treated sympathetically. Brockway refused to characterize the quality of Grievant's work. On redirect, Grievant said she remembered that her lawyer at the three day suspension hearing suggested that she take courses in accounting or read texts to refresh her skills.

## Discussion

The Arbitrator has reviewed every document with an alleged error provided by employer, both of the Grievant and those of other agents. The Arbitrator characterizes many of the errors as careless, repetitive, and easily corrected. Many of these errors would not have been repeated if preparer had paid attention to the first correction and merely followed previous directions. The mathematical errors could have been caught if the figures were re-checked before submission. The Arbitrator concludes that these errors are unrelated to "training issues."

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Approximately 25% of the errors appear to have been based on inadequate comprehension of accounting principles.

Almost one year after beginning her tenure, Grievant was committing numerous errors. The employer, through the person of Administrator Delaney, provided Grievant with a written guideline for Form 920 and a review of her screening process. Both of these actions, preceded the careful documentation of her work product.

The documentation of Grievant's poor work is thorough and convincing. The question becomes whether management can be at fault for these errors through harassment or are Grievant's errors to be discounted because management is unfairly disciplining her and not disciplining others.

The Grievant repeatedly asked for training. Whatever one may think of the training provided, the testimony is convincing that Grievant's training was exactly the same as that of her colleagues.

The Grievant was also treated similarly to all other agents in that all received error memos.

The Grievant presented no evidence of race or gender harassment. Her concept of harassment by Supervisor Bettinger was that he corrected her repeatedly and was impatient with her. This lack of sympathy was noted by Agent Brockway. Bettinger admitted his frustration..

Grievant's discipline was clearly progressive under § 24.02. Grievant was clearly on notice of her problems for over 1-1/2

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years.

Management retains the right to set standards of work quality and quantity of production. In Grievant's case, no evidence was adduced that these standards were unreasonable or unevenly applied.

Evidence from the Grievant's testimony and own writings indicates that she perceived herself as harassed long before she entered the Property Tax Section. Moreover, her leave of absence taken according to her own justification to increase her accounting skills, did not do so. In fact, at her own choice, Grievant spent two years away from accounting. Upon her return, after being told repeatedly in writing and orally that her skills were deficient, Grievant took no action on her own to remedy the problem. In fact, Grievant's testimony and letters indicate a refusal to acknowledge the issues. Even if Grievant were unable to find a method of skill improvement, the materials indicate that she did not (or could not) take special efforts to lower other kinds of errors by attention to detail and rechecking grammar and math. Grievant's failure to utilize the Guideline provided is incomprehensible.

The evidence is overwhelming that Grievant did not perform adequately under reasonable management standards.

The contract requires that discipline be for just cause. The Grievant presented no evidence to dispute the alleged errors. Certainly given the time period involved (over 2-1/2 years) and the quantity and nature of the errors, the employer had "cause."

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The cause must also be "just." Under this contract, discipline is to be progressive. The Grievant was systematically taken through each disciplinary step, the discipline was documented, and notice was clear. Grievant produced no evidence of disparate treatment. Management has a right and an obligation to set work standards and monitor them. The employee might prefer that correction be sympathetic and pleasant. However, guarantees of attitudes are not in the contract. The Arbitrator is aware that termination is characterized as the labor equivalent of the death sentence. The evidence in this case shows a long term effort at progressive discipline and correction without concomitant action on the part of the Grievant. Within the protective boundaries of the contract, for just cause, management has the right to terminate non-productive workers. Without this management ability, the jobs of all workers are ultimately at risk.

Award (1)

The suspension is sustained.

Grievance is denied

Rhonda R. Rivera

Arbitrator

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Date: December 23, 1987

Award (2)

The termination is sustained. Grievance is denied.

Rhonda R. Rivera

Arbitrator

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Date: December 23, 1987