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Susan Grody Ruben, Esq.
Labor Arbitrator
30799 Pinetree Road, #226
Cleveland, OH 44124

ARBITRATION PROCEEDING PURSUANT TO COLLECTIVE BARGAINING AGREEMENT BETWEEN THE PARTIES

In the Matter of

OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION, AFSCME, Local 11

and

STATE OF OHIO, ENVIRONMENTAL PROTECTION AGENCY

Grievant: Richard Kroeger
Case No. 12-00-16-05-03-01771-01-13

ARBITRATOR'S OPINION and AWARD

This Arbitration arises pursuant to the collective bargaining agreement ("the Agreement") between the Parties, the OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION ("the Union") and the STATE OF OHIO ("the State") under which SUSAN GRODY RUBEN was appointed to serve as sole, impartial Arbitrator. Her decision shall be final and binding

pursuant to the Agreement. The Parties stipulated there are no procedural impediments to a final and binding Award.

Hearing was held October 24, 2016. Both Parties were represented by advocates who had full opportunity to examine and cross-examine witnesses and introduce documentary evidence. Both Parties made oral closing arguments.

APPEARANCES:

On behalf of the Union:

James Hauenstein, Staff Representative, OCSEA, Columbus, Ohio.

On behalf of the State:

Megan Schenk, Esq., Office of Legal Services, Ohio EPA, Columbus, Ohio.

ISSUE

Was the Grievant removed for just cause?
If not, what shall the remedy be?

RELEVANT PORTIONS OF THE AGREEMENT
July 1, 2015 – February 28, 2018

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ARTICLE 5 – MANAGEMENT RIGHTS

The Union agrees that all of the functions, rights, powers, responsibilities and authority of the Employer, in regard to the operation of its work and business and the direction of its workforce which the Employer has not specifically abridged, deleted, granted or modified by the express and specific written provision of the Agreement are, and shall remain, exclusively those of the Employer.

Additionally, the Employer retains the rights to: 1) hire and transfer employees, suspend, discharge and discipline employees....

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ARTICLE 24 – DISCIPLINE

24.01 – 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....

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. One (1) or more written reprimand(s);

b. One (1) or more working suspension(s). A minor working suspension is a one (1) day suspension, a medium working suspension is a two (2) to four (4) day suspension, and a major

working suspension is a five (5) day suspension. No working suspension greater than five (5) days shall be issued by the Employer.

...

c. One (1) or more day(s) suspension(s). A minor suspension is a one (1) day suspension, a medium suspension is a two (2) to four (4) day suspension, and a major suspension is a five (5) day suspension. No suspension greater than five (5) days shall be issued by the Employer;

d. Termination.

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24.06 – Imposition of Discipline

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

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24.07 – Prior Disciplinary Actions

...All records relating to written reprimands issued on or after July 1, 2015 will cease to have any force and effect and will be removed from an employee's personnel file twenty-four (24) months after the date of the written reprimand if there has been no other discipline imposed during the past twenty-four (24) months.

...Records of other disciplinary action issued on or after July 1, 2015 will be removed from an employee's file under the same conditions

as written reprimands after thirty-six (36) months if there has been no other discipline imposed during the past thirty-six (36) months.

The retention period may be extended by a period equal to employee leaves of fourteen (14) consecutive days or longer, except for approved periods of vacation leave. Employees who are terminated and subsequently returned to work without any discipline through arbitration, shall have the termination entry on their Employee History on Computer (EHOC) stricken.

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FACTS

The Grievant was employed by the State since July 16, 2001 as an Environmental Specialist 2. He was removed on May 3, 2016 from his employment for violation of work rules, specifically Insubordination and Motor Vehicle Use.

The Grievant had received a 5-day working suspension on January 25, 2016 for violating the same work rules, specifically, Insubordination and Motor Vehicle Use. That suspension was not grieved.

On February 19, 2016, the Grievant received a traffic citation for making an improper right turn in violation of Columbus Municipal Code Section 2131.10. The Grievant had turned right on a green light at the intersection of Broad Street and High Street in downtown Columbus,

where all turns are prohibited during certain hours. The Grievant was driving a State vehicle at the time.

The Grievant timely reported the citation to management. The Grievant also timely paid the citation.

An administrative investigation found the Grievant had received a traffic citation while operating a State vehicle. A pre-disciplinary meeting was held. The State found there was just cause for termination.

POSITIONS OF THE PARTIES

State Position

The State had just cause to remove the Grievant. The Motor Vehicle Use Policy requires employees to comply with all traffic laws while driving a State vehicle. The Grievant's failure to do so was a violation of the Conduct and Discipline Policy, specifically, Insubordination – failure to follow written policies.

This was the Grievant's third violation of this work rule. Less than one month before the traffic violation that led to the Grievant's removal, he had received a 5-day suspension for two violations of this work rule. After a 5-day suspension, the only penalty left to progress to was

removal. Other employees who have violated this work rule, but have not been removed, did not have active discipline on their record.

The Grievant's removal comports with progressive discipline and was commensurate with the offense. The State requests the Arbitrator to uphold the removal and deny the grievance.

Union Position

The State failed to meet its burden of proving the removal was for just cause. The Grievant received a traffic citation for turning red on a green light. In compliance with the Motor Vehicle Use Policy, he reported the citation to his supervisors and paid the citation. He was not insubordinate. An element of insubordination is intent to violate a policy. The Grievant did not intend to violate the Motor Vehicle Use Policy.

Historically, the State has not disciplined employees for receiving minor traffic citations. The Grievant has been treated disparately.

We all are familiar with Arbitrator Daugherty's Seven Tests of Just Cause. There is also the "smell test." Should the Grievant be subject to any discipline, let alone removal?

The Union requests the Arbitrator to uphold the grievance, return the Grievant to his position, and grant him a make-whole remedy, including back pay, benefits, leave accruals, retirement payments, and seniority. The Union also requests the Arbitrator to retain jurisdiction to oversee the remedy.

OPINION

The State has the burden of proving it had just cause to terminate the Grievant's employment. Just cause consists of proving: 1) the Grievant did what he is accused of doing; and 2) termination is appropriate under the circumstances. [1]

1. The Charges Against the Grievant

The May 3, 2016 termination letter states the Grievant violated two policies: a) Conduct and Discipline (Insubordination); and b) Motor Vehicle Use.

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[1] *See* Board of Trustees of Miami Twp. v. FOP, Ohio Labor Council, Inc., 81 Ohio St.3d 269 (1998); *see also* City of Piqua v. FOP, Ohio Labor Council, 183 Ohio App. 3d 495 (2009); and Summit County Children Services Board v. CWA Local 4546, 113 Ohio St.3d 291 (2007). This two-part test essentially is a summary of Arbitrator Daugherty's seven tests of just cause from Enterprise Wire Co., 46 LA 359, 363-64 (1966).

a. Conduct and Discipline (Insubordination)

The March 15, 2016 pre-disciplinary letter states that the basis for the charge of insubordination is, "you received a traffic citation in the City of Columbus while operating a state vehicle." It is undisputed that the Grievant received a traffic citation in the City of Columbus while operating a State vehicle. The question for the Arbitrator is whether that traffic citation forms the basis for a charge of insubordination.

The Arbitrator finds the Grievant's traffic citation does not form the basis for a charge or insubordination. The Grievant credibly testified that en route to a work meeting in downtown Columbus, an area he was not very familiar with, his GPS instructed him to turn right onto Broad Street from High Street. He did not notice the traffic sign stating this turn was prohibited during certain hours. For making an improper right turn, he received a traffic citation, which he reported promptly to his supervisor. He also promptly paid the citation. This is hardly insubordination as that term is understood by arbitrators.[2]

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[2] *See, e.g.,* Brand and Biren, Editors, DISCIPLINE AND DISCHARGE IN ARBITRATION, Third Edition, (BBNA, 2015) at p. 5-4:

> ...Being insubordinate...involves a failure or refusal to recognize or submit to the authority of a supervisor....

b. Motor Vehicle Use

The Motor Vehicle Use policy states in pertinent part:

> **All drivers...of a State vehicle must comply with all applicable State and local motor vehicle laws....**

It is undisputed the Grievant violated a City of Columbus motor vehicle law when he turned right onto Broad Street from High Street.

2. Whether Termination is Appropriate under the Circumstances

Given as set out above that the Grievant was not insubordinate, the question for the Arbitrator is whether termination is appropriate for the Grievant's violation of the Motor Vehicle Use Policy. The Arbitrator finds it is not.

The Arbitrator understands the State was concerned about the Grievant's February 2016 incident being so close in time to the Grievant's January 2016 suspension. But making a prohibited right turn onto Broad Street just cannot be the basis for a 16-year State employee losing his job. The record shows other employees have not been disciplined for traffic

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In order to find an employee insubordinate, he or she must have acted in willful disregard of an order....

Most arbitrators have found that mere negligence in performing one's duties is not insubordination....

citations; they have received corrective counselings, which are not considered discipline under the Agreement.

The State contends it had "no choice" but to terminate the Grievant, given his recent 5-day working suspension. Consistent with the principles of progressive discipline and Article 24.02(b) and (c), however, the State had the option of issuing the Grievant a 5-day unpaid suspension. Given that the Grievant's misconduct was mere negligence, and nothing more, the Arbitrator finds a 5-day unpaid suspension would have been the appropriate penalty, not termination. The Arbitrator finds termination was not "reasonable and commensurate with the [Grievant's] offense" pursuant to Article 24.06.[3]

[3] If the Grievant had been under a last chance agreement, his negligence could have caused his termination. The Grievant, however, was not under a last chance agreement.

AWARD

For the reasons stated above, the State did not have just cause to terminate the Grievant's employment.

The Grievant is to be reinstated to his former position and made whole with full back pay, benefits, leave accruals, retirement contributions, and seniority. The back pay, benefits, leave accruals, retirement contributions, and seniority shall be calculated minus a 5-day unpaid suspension.

The 5-day unpaid suspension will be deemed to have been issued on May 3, 2016 (the date of the Grievant's termination), and served on May 3, 4, 5, 6, and 9, 2016.

Pursuant to Article 24.07, this 5-day unpaid suspension shall be removed from the Grievant's personnel records on May 2, 2019.[4]

The termination is to be reduced to a 5-day unpaid suspension in the Grievant's personnel records.

The Arbitrator retains jurisdiction over remedy only.

November 17, 2016 *Susan Grody Ruben*
Arbitrator

[4] The Arbitrator holds that the Grievant's time off since his May 3, 2016 termination is not an "employee leave" as that term is used in Article 24.07, and therefore that time off does not extend the Article 24.07 "retention period" for disciplinary actions.