

In the Matter of Arbitration Between the	:	Grievance Number: TAX-2019-03212-14
	:	
<b>STATE OF OHIO, DEPARTMENT OF</b>	:	
<b>TAXATION,</b>	:	
Employer	:	Grievant: Janet Mandel
and the	:	
	:	Hearing date: March 31, 2021
<b>OHIO CIVIL SERVICE EMPLOYEES</b>	:	
<b>ASSOCIATION, AMERICAN FEDERATION</b>	:	
<b>OF STATE, COUNTY AND MUNICIPAL</b>	:	Howard D. Silver, Esquire
<b>EMPLOYEES, LOCAL 11, AFL-CIO,</b>	:	Arbitrator
Union	:	

DECISION AND AWARD OF THE ARBITRATOR

APPEARANCES

For: State of Ohio, Department of Taxation, Employer

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## TABLE OF CONTENTS

	Page
Case Caption .....	1
Appearances .....	1
Procedural Background .....	3
Joint Stipulated Issue Statement .....	3
Joint Stipulations .....	3
Joint Stipulated Exhibits .....	4
Statement of the Case .....	5
Summary of Testimony .....	7
Dara Greene .....	7
Jillian Hall .....	10
Positions of the Parties .....	15
Position of the Ohio Department of Taxation, Employer .....	15
Position of the Ohio Civil Service Employees Association, AFSCME, Local 11, AFL, CIO .....	18
Discussion .....	22
Award .....	28
Certificate of Service .....	29

## PROCEDURAL BACKGROUND

This matter came on for a remote arbitration hearing at 9:00 a. m. on March 31, 2021 through the teleconferencing platform Zoom. During the arbitration hearing both parties were afforded a full and fair opportunity to present evidence and arguments in support of their positions. The hearing concluded at 11:15 a. m. on March 31, 2021 and the evidentiary portion of the arbitration hearing was closed at that time.

The parties filed post-hearing briefs with the arbitrator by April 30, 2021 and the arbitrator exchanged the post-hearing briefs between the parties on April 30, 2021.

This matter proceeds under a collective bargaining agreement in effect between the parties from May 12, 2018 through February 28, 2021, Joint Exhibit 1.

No challenge to the arbitrability of the grievance has been raised. Under the language of the parties' collective bargaining agreement, the arbitrator finds the grievance underlying this proceeding to be arbitrable.

## JOINT STIPULATED ISSUE STATEMENT

Was the grievant, Janet Mandel, removed for just cause? If not, what shall the remedy be?

## JOINT STIPULATIONS

1. The grievance is properly before the Arbitrator
2. The Grievant was hired by the State of Ohio, Department of Taxation May 9, 1988.
3. The grievant's position at time of hiring was Attorney 2.
4. The grievant was promoted to Attorney 3 on March 26, 1989.

5. The grievant was removed from employment on August 30, 2019.
6. The Grievant's prior discipline consists of:
  - May 31, 2017 – Written Reprimand – Violation of Department Work Rule #3h-Neglect of Duty – Unsatisfactory work performance
  - March 19, 2019 -One (1) day suspension – Violation of Departmental Work Rule-#2j- Being absent from work without prior authorization or approved leave for less than eight (8) work hours in a pay period and violation of Departmental Work Rule #2b – Failure to timely notify a supervisor of an absence.
  - August 14, 2019 – Three (3) day suspension – Violation of Departmental Work Rule #31-Failure to meet work standards for quality or quantity of work to be performed.
7. The Grievant was removed for violation of the following work rule:
  - Departmental Work Rule #31 – Failure to meet work standards for quality or quantity of work to be performed.

#### JOINT STIPULATED EXHIBITS

1. Contract between the State of Ohio and OCSEA/AFSCME Local 11, 2018-2021
2. Grievance Trail
  - a. Arbitration Request – OH Grievance
3. Removal Order
  - a. Correction notice
4. Pre-Disciplinary Packet
  - a. Meeting notice
  - b. Administrative Investigation
  - c. Tax Appeals Division Production Report – July 2019
  - d. Employee policy acknowledgement (sic) Standards of conduct policy
  - e. Discipline grid
  - f. Employee's active disciplinary record
5. Transcript of the Pre-Disciplinary Meeting
  - a. Sign in sheet
  - b. Hearing officer notes

## STATEMENT OF THE CASE

The parties to this arbitration proceeding, the State of Ohio, Department of Taxation, hereinafter referred to as the Employer, and the Ohio Civil Service Employees Association, American Federation of State, County and Municipal Employees, Local 11, AFL-CIO, hereinafter referred to as the Union, are parties to a collective bargaining agreement in effect from May 12, 2018 through February 28, 2021, Joint Exhibit 1.

Within the parties' collective bargaining agreement, Joint Exhibit 1, is Article 24, Discipline. Article 24, section 24.01, Standard, includes the following language: "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." See Joint Exhibit 1, page 93.

The grievant in this case, Janet Mandel, was hired by the Employer effective May 9, 1988 to fill an Attorney 2 position in the Sales and Use Tax unit in the Division of Tax Appeals, a position to operate from the Office of the Chief Counsel at the Ohio Department of Taxation. Ms. Mandel was promoted to an Attorney 3 position effective March 26, 1989. See Stipulations 2, 3, and 4.

The grievant was removed from her employment by the Employer effective August 30, 2019. See Stipulation 5.

As stipulated by the parties, the grievant's disciplinary history while employed by the Employer from May 9, 1988 through August 30, 2019 included a May 31, 2017 written reprimand for a violation of Departmental Work Rule #3h, neglect of duty, unsatisfactory work performance; a March 19, 2019 one day suspension for violation of Departmental Work Rule #2j, absent from work without prior authorization or approved leave for less than eight (8) hours in a pay period and violation of Departmental Work Rule #2b, failure to timely notify a supervisor of an absence; and an August 14,

2019 three-day suspension for violation of Departmental Work Rule #31, failure to meet work standards for quality or quantity of work to be performed. See Stipulation 6.

The order of removal, Joint Exhibit 3, is dated August 30, 2019 and addressed to Ms. Mandel. The August 30, 2019 order of removal notified Ms. Mandel that her employment by the Employer was being terminated at the close of business on August 30, 2019. The reason expressed in the order of removal was:

... violation of Departmental Work Rule #2b – violation of Departmental Work Rule #31 – Failure to meet work standards for quality or quantity of work to be performed. Specifically, for July 2019 you disposed of one final determination (FD). The goal for you is to dispose of 8 - 10 each month.

The August 30, 2019 order of removal referenced prior discipline issued to Ms. Mandel, mentioning the May 31, 2017 written reprimand for violation of Departmental Work Rule #3h-Neglect of Duty-Unsatisfactory Work Performance; a January 15, 2019 one day working suspension for violation of Work Rule #2j-Being absent from work without prior authorization or approved leave for less than 8 work hours in a pay period; a March 19, 2019 one day working suspension for violation of Departmental Work Rule #2j-Being absent from work without prior authorization or approved leave for less than 8 work hours in a pay period and Departmental Work Rule #2b- Failure to timely notify a supervisor of an absence; and an August 14, 2019 three-day suspension for violation of Departmental Work Rule #31-Failure to meet work standards for quality of work to be performed.

On November 22, 2019 a “Corrected Notice” was directed to Ms. Mandel, Joint Exhibit 3a. This notice reiterated the removal of Ms. Mandel effective the close of business on August 30, 2019; reiterated the reasons for Ms. Mandel's removal; reiterated the prior discipline presented in the August 30, 2019 removal order, and shows an amendment only to the signature of the Tax Commissioner who

signed the August 30, 2019 order of removal at page two of the order.

On September 3, 2019 a formal grievance was filed with the Employer on behalf of Ms. Mandel, charging that the discipline imposed upon the grievant on August 30, 2019, termination of employment, was imposed without just cause.

The grievance concerning the August 30, 2019 removal of the grievant was discussed by the parties at grievance steps described in Article 25, Grievance Procedure, in the parties' collective bargaining agreement. These grievance steps occurred on October 9, 2019 and December 19, 2019. The grievance remained unresolved between the parties and the grievance was directed on to final and binding arbitration under the authority of Article 25, section 25.02.

#### SUMMARY OF TESTIMONY

##### Dara Greene

Dara Greene works with the Ohio Department of Taxation's Division of Tax Appeals. Ms. Greene has sixteen years of experience working in the Division of Tax Appeals and has been the Administrator of the Division for two years. From her present position Ms. Greene supervises twenty-seven (27) employees.

Ms. Greene explained that the Division of Tax Appeals reviews and determines petitioners' requests for a tax reassessment, as well as petitioners' requests to reverse a denial of a tax refund. Ms. Greene explained that in each case a final, written decision is to be issued by the Tax Commissioner, with the final written determination to be prepared by an attorney in the division working from the Office of the Chief Counsel, including the position filled by the grievant, Ms. Mandel.

Ms. Greene explained that there are timelines associated with preparing the written final decisions to be issued in response to petitioners' requests for tax reassessments and petitioners' requests

for the reversal of tax refund denials. Ms. Greene explained that when these timelines are exceeded, interest accumulates, with either the non-prevailing petitioner having to provide the extra interest due to the delay, or if the petitioner prevails, the State of Ohio becomes responsible for the interest that accrued due to a delay in meeting the timelines associated with such a determination.

Ms. Greene had worked with Ms. Mandel at the Department of Taxation in the Division of Tax Appeals for fourteen (14) years. When Ms. Greene became Administrator of the Division she examined the monthly reports provided by Ms. Mandel reflecting her work quantity. Ms. Greene recalled that there were a number of months wherein no final determinations had been completed by Ms. Mandel. Ms. Greene noted that as Administrator of the Division it became her responsibility to discuss with Ms. Mandel the quantity and quality of the final determinations expected to be prepared by Ms. Mandel.

When Ms. Greene talked to Ms. Mandel about Ms. Mandel's work, Ms. Greene had been specific about what was lacking in Ms. Mandel's work product, including a lack of clear language describing the issues raised by the petition and an absence of citations to statutes and other legal authority. Ms. Greene testified that Ms. Mandel's work product did not improve during the two years Ms. Greene has served as Administrator of the Division, and Ms. Greene found Ms. Mandel's work product to be below the level of others performing the same work. Ms. Greene found that the volume of work completed by the grievant was well below similarly situated co-workers.

Ms. Greene identified Joint Exhibit 4(c), paginated 13, as the Tax Appeals Division Production Report - July 2019. This listing presents the attorneys employed in the Division's Sales and Use Tax unit and the number of final decisions issued by each. Attorney 3 Mandel is reported as having completed one final decision in July 2019. Five Attorneys 2 are listed in the Sales and Use Tax unit in the Tax Appeals Division on the July 2019 report, with three of the Attorneys 2 issuing two final decisions in July 2019 and two of the Attorneys 2 issuing one final decision in July 2019. Four of the



five Attorneys 2 listed had been newly hired within the Tax Appeals Division, having one month of experience by July 2019.

Ms. Greene pointed out that the final decisions to be completed by Ms. Mandel required solid factual and legal bases and therefore research was a critical component of the work assigned to the grievant. Ms. Greene noted that an internal departmental database was available for this research, including applicable precedents. Ms. Greene came to discover that Ms. Mandel was not accessing the research tools available to her from within the Department, explaining to Ms. Greene that Ms. Mandel had not known how to make use of these research tools.

Ms. Greene testified that she attempted to help Ms. Mandel become more productive by answering questions raised by Ms. Mandel, and recalled that others in the Office of the Chief Counsel, including Ms. Mandel's immediate manager, Jillian Hall, had also tried to assist Ms. Mandel in improving her work performance.

Under questioning by the Union's representative, Ms. Greene confirmed that she has been the Administrator of the Tax Appeals Division for two years and for one and one-half years prior to that had served as a supervisor in the Division, although not as the direct supervisor of Ms. Mandel. Ms. Greene recalled that for ten years Ms. Mandel's direct supervisor had been Carolyn Fox. Ms. Fox retired in January 2019. From January 2019 through April 2019 Ms. Greene served as Ms. Mandel's direct supervisor. During those four months Ms. Greene made no recommendation that Ms. Mandel be disciplined.

Ms. Greene confirmed that in April 2019, Jillian Hall became the direct manager of Ms. Mandel's position.

Ms. Greene recalled that on August 13, 2019 a three-day suspension was issued to Ms. Greene for failure to meet production goals, an action that Ms. Greene described as an effort to get Ms. Mandel

to improve her work performance. Ms. Greene stated that Ms. Mandel was given to the end of August 2019 to improve her work performance, and when it did not improve Ms. Mandel was discharged effective August 30, 2019. The three-day suspension was served August 14-16, 2019. The reason for the three-day suspension was Ms. Mandel's failure to meet May 2019 and June 2019 production goals.

Ms. Greene testified that Ms. Mandel had had two weeks to show improvement in her work performance and failed to do so. Ms. Greene testified that the removal of the grievant from her employment by the Employer was based on Ms. Mandel's overall work performance.

Ms. Greene was referred to Joint Exhibit 4, page 1, an August 26, 2019 notice directed to Ms. Mandel about a pre-disciplinary meeting to occur on August 28, 2019 for the purpose of affording Ms. Mandel and her representative an opportunity to comment, refute, or rebut the circumstances supporting a request for discipline that may include removal. The third paragraph of this notice reads:

You are charged with violation of Departmental Work Rule #31-Failure to meet work standards for quality or quantity of work to be performed. Specifically, for July 2019 you disposed of one final determination (FD). The goal for you is to dispose of 8-10 each month.

Ms. Greene was referred to Article 24, section 24.06 which provides: "Disciplinary measures imposed shall be reasonable and commensurate with the offense and shall not be used solely for punishment."

Under re-direct questioning by the Employer's representative, Ms. Greene stated that the grievant was removed because she cannot do the job assigned to her position.

#### Jillian Hall

Jillian Hall has served in the Office of the Chief Counsel, Ohio Department of Taxation for the past ten years. Ms. Hall serves in an Attorney 5 position and is the Manager of all Sales and Use Tax

unit attorneys. At the time of the grievant's discharge, Ms. Mandel reported directly to Ms. Hall. Ms. Hall assumed her current position in April 2019. Ms. Hall noted that Ms. Mandel had been swerving in an Attorney 3 position in the Division of Tax Appeals in the Sales and Use Tax unit for twenty-nine (29) years.

Ms. Hall explained that Attorneys 3 within the Sales and Use Tax unit are assigned cases to review, hold a hearing if necessary, collect additional information, perform legal research, and in each case prepare a written final determination. Ms. Hall explained that these had been the duties assigned to the grievant during her entire tenure of over thirty years with the Employer, with twenty-nine years experience performing these duties from an Attorney 3 position. Ms. Hall noted that although Ms. Mandel's job duties had remained unchanged for three decades, and although Ms. Mandel had spent thirty years performing the same duties, Ms. Mandel's quantity and quality of work remained unsatisfactory. Ms. Hall pointed out that although Ms. Mandel had the longest tenure with the Department among all the attorneys in the Tax Appeals Division, her work in her official capacity as an Attorney 3 remained unacceptable in its quantity and its quality.

Ms. Hall was referred to Employer's Exhibit 1, an exhibit that includes the performance evaluations of Ms. Mandel for the years June 1, 2017 through May 31, 2018 and from June 1, 2018 through May 31, 2019. The Manager associated with both evaluations is identified as Jillian Hall. The supervisor rating Ms. Mandel in these evaluations is identified as Carolyn Fox.

Ms. Hall was referred to page 6 of Employer's Exhibit 1, the June 1, 2018 to May 31, 2019 performance evaluation of Ms. Mandel, in particular Section 8 – Overall Performance Ratings Summary in which the Manager rated Ms. Mandel as “Meets Expectations.” Under Manager Comments there appears the following:

Janet has completed the tasks asked of her. Her current supervisor believes she has the ability to do more in the coming year. She has met the minimum goals set for her but has to (sic) potential to write a greater quantity of cases and more difficult cases.

At page 14 of Employer's Exhibit 1, in Section 8 - Overall Performance Ratings Summary within the performance evaluation for the period June 1, 2017 through May 31, 2018, the following appears:

**Manager Rating:** 2. Needs Improvement

**Manager Comments:**

While Janet met minimum goals, she did so while having excessive absenteeism and tardiness. She is disruptive to others' work habits, and does not create a positive image for other employees. To turn this around, she needs to arrive at work on time, visibly work more efficiently, actively work her case files in an expeditious manner, and generally appear interested in her work.<sup>1</sup>

Ms. Hall was asked why she had evaluated Ms. Mandel as meeting expectations. Ms. Hall explained that she had only been supervising Ms. Mandel and others in the Sales and Use Tax unit for one month and had been new to the manager position. Ms. Hall recalled that she had wanted Ms. Mandel to succeed in her position in the division and had thought that by beginning with a clean slate Ms. Mandel could be prompted to improve her work performance so as to meet the duties of her position.

Ms. Hall recalled weekly meetings with Sales and Use Tax unit attorneys and meeting with Ms. Mandell one-on-one as needed. Ms. Hall edited Ms. Mandel's written final determinations and Ms.

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<sup>1</sup> The annual performance evaluation of Ms. Mandel from June 1, 2018 through May 31, 2019 that begins at page 1 of Employer's Exhibit 1 is titled: "Manager Evaluation – Completed"; the annual performance evaluation of Ms. Mandell from June 1, 2017 through May 31, 2018 that begins at page 9 of Employer's Exhibit 1 is titled: "Manager Evaluation – Canceled."

Mandel was advised that Manager Hall's office door was always open to Ms. Mandel if assistance were needed. Ms. Hall recalled that Ms. Mandel never asked for assistance, showed no improvement in her work product, and had been aware of the Employer's demand that her work improve in its quality and its quantity. Ms. Hall stated that Ms. Mandel had been aware of the number of written final determinations expected from her each month.

Ms. Hall stated that for the month of May 2019 Ms. Mandel completed one written final determination. Ms. Hall stated that for the month of June 2019 Ms. Mandel completed one written final determination. This unsatisfactory pace of work was reported to the Human Resources Department. Ms. Hall recalled that when she had asked Ms. Mandel why she had not met the amount of work expected of her, Ms. Mandel had explained to Ms. Hall that she, Ms. Mandel, didn't work the way Ms. Hall did. Ms. Mandel nonetheless insisted that her work was under control; it was just how Ms. Mandel worked.

Ms. Hall recalled weekly meetings with Ms. Mandel wherein Ms. Mandel's final determinations were edited. Ms. Hall testified that it was understood by all that eight to ten written final determinations were to be completed in a month. Ms. Hall noted that for May, June, and July 2019 Ms. Mandel completed one final determination each month. Ms. Hall recalled that there had been no improvement in the quality of Ms. Mandel's work product or work performance. Ms. Hall testified that by the end of August 2019 Ms. Hall harbored no expectation that Ms. Mandel's work would improve. For the four and one-half months Ms. Hall served as Ms. Mandel's supervisor, Ms. Mandel completed one final determination per month.

Under questioning by the Union's representative, Ms. Hall said that she had supervised Ms. Mandel from April 2019 to Ms. Mandel's removal effective August 30, 2019. Ms. Hall said that prior to April 2019 she had served as a hearing officer in the Sales and Use Tax unit with Ms. Mandel.

Ms. Hall confirmed that a three-day suspension had been issued to Ms. Mandel on August 13, 2019 that was served on August 14, 15, and 16, 2019, for not meeting work performance standards. See Joint Exhibit 4, page 37. Ms. Hall confirmed that the Employer had known by August 13, 2019 that the grievant had not met work standards for July 2019.

Ms. Hall was referred to Joint Exhibit 4, page 1, the August 26, 2019 pre-disciplinary notice directed to Ms. Mandel, setting a pre-disciplinary meeting for August 28, 2019. This pre-disciplinary notice included the following:

You are charged with violation of Department Work Rule #31 – Failure to meet work standards or quantity of work to be performed. Specifically, for July 2019 you disposed of one final determination (FD). The goal for you is to dispose of 8 – 10 each month.

Ms. Hall was referred to Article 24 of the parties' collective bargaining agreement, specifically Article 24, section 24.06. The fourth paragraph of this provision reads: “Disciplinary measures imposed shall be reasonable and commensurate with the offense and shall not be used solely for punishment.”

Ms. Hall testified that from August 17, 2019 through August 26, 2019 Ms. Hall had still been attempting to help Ms. Mandel.

Ms. Hall testified that she understands Ms. Mandel was removed for a lack of work production in July 2019.

Ms. Hall testified that when Ms. Mandel showed no sign of improving in her work, the Human Resources Department was notified. Coaching of Ms. Mandel continued but Ms. Hall testified that Ms. Mandel did not respond to the coaching. Ms. Hall gave up any expectation that Ms. Mandel's work performance would improve.

Ms. Hall confirmed that no performance improvement plan was created for Ms. Mandel.

## POSITIONS OF THE PARTIES

### Position of the Ohio Department of Taxation, Employer

The Employer notes that the grievant was removed from her Attorney 3 position in the Sales and Use Tax unit within the Division of Tax Appeals in the Office of the Chief Counsel effective August 30, 2019 for violation of Work Rule #31 – Failure to meet work standards for quality or quantity of work to be performed, as set forth in the Department's Standards of Conduct Policy ODT-002, presented at Joint Exhibit 4, pages 16-29. Referring to Joint Exhibit 4, page 23, section 6, the section of the policy on discipline, and Joint Exhibit 4, page 26, the disciplinary grid to be applied under this policy, the Employer points out that the grievant was charged in the order of removal with having failed to complete the number of final determinations expected for the month of July 2019. In this regard the Employer refers to the annual performance review of Ms. Mandel for the year June 1, 2019 through May 30, 2020, in particular page 7 of Joint Exhibit 4 which presents, under Section 6, Goals and Performance Expectations, the following from Jillian Hall dated June 27, 2019:

Must prepare and submit Final Determinations disposing of an average of 10 to 12 cases per month. Must make the best recommendation for each case. Preside over requested administrative hearings in a courteous, accurate, equitable, and professional manner. FDs submitted must be accurate, with minimal to no numerical, grammatical and formatting errors. Prior to submission for case review, prepare the casefile (sic) as required by Divisional guidelines.

The Employer points out that the grievant completed one final determination in the month of July 2019 thereby failing to complete the number of final determinations expected from her position. The Employer contends that the failure of the grievant to meet reasonable expectations about the productivity of her position, coupled with the grievant's chronic poor work performance, along with the

prior violations of work rules as shown by the grievant's disciplinary record, combine to provide the just cause needed for the discharge of the grievant. The Employer argues that the grievant had been fully aware that her continued unsatisfactory work performance could be a basis for removal.

The Employer points out that the grievant worked her entire career with the Employer in the same Sales and Use Tax unit, in the same Tax Appeals Division, performing the same work – reviewing contested tax assessments and denials of tax refunds. The Employer points out that any delay in the processes implemented by Ms. Mandel from her position as an Attorney 3 results in higher costs, either to the petitioner who is unsuccessful in his claim or the State of Ohio when the appeal is upheld.

As to the grievant's disciplinary history, the Employer points to a May 31, 2017 written reprimand for failing to produce the required amount of work. The Employer notes that the grievant had been tasked with completing fifty-two final determinations in a year but only completed twenty-seven.

The Employer refers to a one day suspension issued March 12, 2019 for attendance-related issues, and refers to a three-day suspension issued August 13, 2019 for failing to produce the required number of final determinations for the months of May 2019 and June 2019. See Joint Exhibit 4, page 37.

The Employer points out that in the annual performance evaluation that concluded on May 31, 2018, Employer's Exhibit 1, page 14, in Section 8, Manager Hall referred to Ms. Mandel's excessive absenteeism and tardiness, her disruption of others' work habits, her failure to create a positive image for other employees, and the need for Ms. Mandel to arrive for work on time, work more efficiently, actively work her assigned cases in an expeditious manner, and generally appear more interested in the



work.<sup>2</sup>

In January 2019 Ms. Mandel's long-time supervisor retired and Dara Greene assumed the role of supervisor of Ms. Mandel for a brief period of time, until April 2019. Ms. Greene had previously worked with Ms. Mandel, and was aware from her supervision of Ms. Mandel and from prior productivity reports that Ms. Mandel's production numbers were well below other employees doing comparable work, and the quality of Ms. Mandel's work product had been poor. Ms. Greene testified of her authorized access to production reports within the Tax Appeals Division, reports showing the production of each of the attorneys in the division, Ms. Greene noted that Ms. Mandel issued one final determination in the month of July 2019, the same number, one, as had been issued by Ms. Mandel in May 2019 and in June 2019. See Joint Exhibit 7, pages 11 through 14.

The Employer concedes that other attorneys in the Tax Appeals Division's Sales and Use Tax unit produced only one final determination in a month, but points out that these were attorneys who were new to the Tax Appeals Division, some having been so employed for one month. The Employer notes that even some of the new hires issued more final determinations than Ms. Mandel although Ms. Mandel had been assigned the same work for thirty-one years and assigned only the simplest sales tax cases requiring a final determination.

Jillian Hall, the Manager of the Tax Appeals Division who assumed that position in April 2019, testified that by May 2019 she had too little time to assess the work of Ms. Mandel and so found on May 31, 2019 that Ms. Mandel had met minimum goals and objectives but still asserted in her comments that Ms. Mandel had the potential to write more final determinations and had been capable of handling more difficult cases.

Ms. Hall in her testimony described Ms. Mandel's work product as poor in quality, with the

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<sup>2</sup> A verbatim presentation of these Manager Comments are found at page 12 of this decision.

amount of work produced by Ms. Mandel well below the amount of work provided by other attorneys doing comparable work. Ms. Hall made herself available to Ms. Mandel to assist her in improving her work productivity and quality of work, and emphasized to Ms. Mandel the need to improve her work performance. Ms. Hall testified that she had desired that Ms. Mandel succeed in her position by improving her work performance.

The Employer rejects the claim that the Employer acted too swiftly in removing the grievant, or failed to provide the notice necessary for such a job action. The Employer urges the arbitrator, at page 6 of its closing argument, not to pay an undue amount of attention “... to the paper administrative steps, dates and actions going on in the background of the Grievant's ongoing daily failure to perform, and ignores the very real efforts by Ms. Hall on almost a daily basis to improve her performance.” The Employer notes that from April 2019 through August 2019 Ms. Mandel had been advised repeatedly by her manager, Ms. Hall, that Ms. Mandel was not meeting minimum productivity standards. The Employer declares it impossible to accept that the grievant had been confused about what was expected from her in terms of the quality and quantity of her work.

The Employer argues that over the final four months of the grievant's employment by the Employer, when a total of thirty-six (36) to forty-five (45) completed cases had been expected to be completed, the grievant completed four. The Employer claims that despite the best efforts of the Department, the Employer was unable to move the grievant to perform her job and the Employer was left with the need to address an employee who had no interest in the work assigned to her position, an employee who refused to perform the duties reasonably expected of her position. The Employer claims that the grievant had had every opportunity to improve her work performance with the assistance of her manager, Ms. Hall, but failed to avail herself of that opportunity.

The Employer contends that the removal of the grievant was for just cause and therefore urges

the arbitrator to deny the grievance in its entirety.

Position of the Ohio Civil Service Employees Association, American Federation of State,  
County and Municipal Employees, Local 11, AFL-CIO, Union

The Union frames the issue in this case as: “Was Janet Mandel removed from her position without just cause? If so, what shall the remedy be?”

The Union argues that it has demonstrated that the Employer did not have just cause to remove the grievant from her Attorney 3 position. The Union reminds the arbitrator that the discharge of the grievant occurred on August 30, 2019, a mere fourteen days from the end of a three-day suspension served by the grievant for what the Union believes to be the same violation. The Union contends that such a circumstance violated the express provisions of Article 24, in particular Article 24, section 24.06 – Imposition of Discipline.

The Union points to the thirty-one (31) years of service provided by the grievant to the Ohio Department of Taxation by the time of the grievant's removal. The Union acknowledges the grievant's disciplinary history that includes a written reprimand on May 31, 2017; a one day working suspension on March 19, 2019; and a three-day working suspension served on August 14, 15, and 16, 2019. The Union notes that Ms. Hall became the Manager over the grievant's position in the Spring of 2019.

The Union points out that on July 22, 2019, the Employer conducted an administrative interview of Ms. Mandel concerning Ms. Mandel's work performance in May 2019 and June 2019.

On August 2, 2019, the Employer issued a pre-disciplinary packet about the Ms. Mandel's work performance for May 2019 and June 2019.

On August 13, 2019, the Employer issued a three-day working suspension to Mr. Mandel for

failure to meet Work Rule #31 – Failure to meet work standards for quality or quantity of work to be performed, due to Ms. Mandel's work performance during the months of May 2019 and June 2019.

On August 23, 2019, the Employer conducted an administrative interview of Ms. Mandel concerning Ms. Mandel's work performance in July 2019.

On August 26, 2019, the Employer issued a pre-disciplinary packet about Ms. Mandel's work performance for July 2019.

On August 30, 2019, the Employer issued an order of removal, directing that Ms. Mandel's employment terminate on August 30, 2019.

The Union notes that within the grievant's thirty-one (31) year tenure with the Employer, the grievant went from a one day suspension to discharge in thirty-nine days.

The Union recalls the testimony from Manager Jillian Hall about her attempts to help the grievant succeed in the grievant's Attorney 3 position after the issuance of the August 13, 2019 three-day suspension. The Union points out that by the time the three-day suspension had been issued to Ms. Mandel on August 13, 2019, the month of July 2019 had elapsed. The Union therefore questions the assertion that the grievant had been afforded the opportunity to improve her work performance following the imposition of the August 13, 2019 three-day suspension.

The Union points out that both of the witnesses who testified in this proceeding, Dara Greene and Jillian Hall, confirmed that discipline is to be corrective, not punitive. The Union argues that Ms. Mandel was not given an opportunity to correct her work performance from July 2019.

The Union notes that while both Ms. Greene and Ms. Hall recalled in their testimony long-standing concerns about the quality and quantity of Ms. Mandel's work product, no performance improvement plan had been offered to Ms. Mandel to assist her in meeting the work standards demanded of her position.

As to the June 1, 2017 to May 31, 2018 performance evaluation of Ms. Mandel, the Union points out that this evaluation had been canceled and bears no relation to July 2019. The Union points out that Ms. Hall had not been Ms. Mandel's supervisor when this performance evaluation was prepared. The Union also notes that Ms. Mandel was the only Attorney 3 in the Tax Appeals Division. The Union claims that there is absent from the facts of this case a progression of discipline connected to the grievant's work performance.

The Union argues that the only work performance-related discipline imposed on Ms. Mandel was the May 31, 2017 written reprimand. The Union claims that while Ms. Hall documented the grievant's work performance inadequacies, Ms. Hall did not offer assistance to Ms. Mandel to help Ms. Mandel succeed in her Attorney 3 position.

The Union claims that the Employer's failure to manage the grievant's work performance has led to this rushed and punitive removal of the grievant.

The Union points out that after the Employer issued the three-day suspension to the grievant on August 13, 2019, the Employer developed no plan to help Ms. Mandel meet the expectations of her position. The Union notes that in Ms. Mandel's June 2019 annual review the volume of work expected from Ms. Mandel monthly was increased to ten to twelve final determinations, an increase in the amount of work demanded from an already struggling employee.

The Union argues that the Employer did not act in good faith in discharging the grievant effective August 30, 2019. The Union notes that by August 2, 2019, when notice of the pre-disciplinary meeting about the August 13, 2019 three-day suspension was issued, the Employer had already known that the grievant had not met July 2019 work product expectations. The Union suggests that a better course of action would have been to add the July 2019 allegation to the May 2019 and June 2019 charges. Instead, argues the Union, the Employer acted as it did in this case to insure that Ms. Mandel

would be “out the door.” The Union claims the timelines are clear, as are the dates upon which events occurred.

This case, claims the Union, is less about the purported shortcomings of a long-term employee and more about a course of action by the Employer that was punitive rather than corrective. The Union claims the discipline issued to the grievant was rushed and failed to afford the grievant an opportunity to improve her work performance after the imposition of the August 13, 2019 three-day suspension. The Union points out that following the three-day suspension that concluded on August 16, 2019, the grievant was afforded less than one month to show improvement. This failure by the Employer to afford the grievant a reasonable opportunity to show improvement following the three-day suspension, argues the Union, comprises a violation of Article 24, section 24.06 which provides that disciplinary measures “... shall not be used solely for punishment.”

The Union urges the arbitrator to sustain the grievance, find that the discipline imposed on the grievant is not supported by just cause, and order the reinstatement of Ms. Mandel to her former Attorney 3 position. The Union urges that the Employer be ordered to make the grievant whole through the payment of all lost wages, step increases, and longevity, less interim earnings. The Union urges that the Employer be ordered to provide the Employer and Employee shares of OPERS contributions and reimburse the grievant for medical, dental, vision, or hospital expenses incurred during the period from the date of removal to the date of reinstatement. The Union urges that the grievant have restored to her seniority credits and leave balances, and be placed in the position she would have been in had the removal not occurred. The Union asks the arbitrator to retain jurisdiction over his award for sixty days.

## DISCUSSION

There is no dispute between the parties about the ultimate issue in this case, that being whether

the Employer possessed on August 30, 2019 just cause to terminate the employment of the grievant.

In support of its claim to have been in possession of just cause to remove the grievant effective August 30, 2019, the Employer not only points to the grievant's work performance in July 2019 but includes within the scope of the Employer's argument the grievant's thirty-one (31) year history of employment by the Employer in the same position, performing the same duties, within the same unit, in the same division in the Department. The Employer presents in support of the discharge of the grievant the grievant's work history, the grievant's disciplinary history, and the grievant's recent work performance. The Employer argues that when the entirety of the grievant's work history is considered, the Employer's contention that the Employer possessed just cause on August 30, 2019 to discharge the grievant is substantiated.

The Union focuses our attention on the fourteen (14) calendar days following the conclusion of the August 14, 15, and 16, 2019 three-day suspension issued to the grievant, the two weeks immediately prior to the discharge of the grievant on August 30, 2019. The Union emphasizes that the parties had agreed in Article 24, section 24.06 that discipline was not to be punitive, agreed language that requires disciplinary measures be reasonable and commensurate with the offense, and not used solely for punishment.

The Union points out to the very brief period, fourteen (14) calendar days, from the end of the August 13, 2019 three-day suspension on August 16, 2019 to the grievant's removal effective August 30, 2019. The Union argues that by August 1, 2019 the Employer had had reason to know that the grievant was not going to meet work production expectations for July 2019, and yet when the three-day suspension was issued on August 13, 2019, only failures to meet work production expectations in May 2019 and June 2019 were referenced, making no mention of July 2019. The July 2019 work performance of the grievant had been held in reserve, subsequently put forward as the reason for the

discharge of the grievant on August 30, 2019.

The Union argues that the discipline imposed in this case was not progressive and was not reasonable as it failed to afford the grievant, following her three-day suspension that concluded on August 16, 2019, a reasonable opportunity to show an improvement in the quality and the quantity of the grievant's work. The Union contends that the three-day suspension was, under the parties' collective bargaining agreement, supposed to serve as a corrective device, as required by Article 24, section 24.06. The Union argues that without a fair and reasonable opportunity to show the improvement demanded by the August 13, 2019 three-day suspension, it can be seen that the grievant had been treated in a punitive manner, and afforded no reasonable opportunity to exhibit the improvement demanded. The Union argues that the Employer's failure in this regard shows that just cause was not possessed by the Employer on August 30, 2019 for the discharge of the grievant and therefore the removal of the grievant effective that date must be vacated, the grievant returned to her former position, and the grievant made whole.

The arbitrator finds nothing illegitimate or in conflict with the parties' collective bargaining agreement in the August 13, 2019 three-day suspension issued to the grievant for failures to meet work production expectations in May 2019 and June 2019. The hearing record indicates that in each of those months the grievant completed one written final determination, meaning that while the expectation of written final determinations for those two months had been sixteen, the grievant had delivered two. In mathematical terms the quantity of work provided by the grievant for May 2019 and June 2019 amounted to twelve and one-half percent (12.5%) of the minimum quantity of work expected to be produced from the position filled by the grievant.

Prior to the August 13, 2019 three-day suspension issued to the grievant there had been other written and oral notifications directed to the grievant concerning dissatisfaction with the quantity and



quality of the grievant's work. Other complaints were raised concerning failing to report to work as scheduled in a timely and reliable manner, causing disruptions in the work place, and a written reprimand dated May 31, 2017 was issued to the grievant for neglect of duty in the form of unsatisfactory work performance.

The dissatisfaction with the grievant's work performance as expressed in the August 13, 2019 three-day suspension could not have come as a surprise to the grievant as the subject of the three-day suspension, the quality and quantity of the grievant's work, had been the subject of numerous written and verbal statements by supervisory personnel directed to the grievant. In all cases the communications and discipline issued to the grievant had had as its purpose bringing the grievant's work performance into line with standards of work performance, work quality, and work quantity expected of the position filled by the grievant.

It bears reiterating that the grievant in this case spent her entire three decade career with the Employer in the same Attorney 3 position, assigned the same duties, and operating from the same Sales and Use Tax unit and Tax Appeals Division. After thirty (30) years of performing the same work, the deficiencies in quantity and quality in the work product of the grievant cannot be explained by unfamiliarity with the work, the complexity of the work, an inability to comprehend the nature of the work, or any confusion about what is required to successfully complete the work. The arbitrator has no doubt that after thirty years the grievant understood the nature of the work assigned to her position, had been fully aware of the expectations of the Employer in terms of how much work was expected to be produced on a monthly basis, and was aware of the level of quality demanded for that work. From May 31, 2017, the date of the written reprimand expressing dissatisfaction with the work performance of the grievant, through August 30, 2019, the date of the discharge of the grievant, there is not a single indication in the hearing record upon which to conclude that the grievant even approached the

expectations of the Employer as to the work to be produced by the grievant from her Attorney 3 position.

The hearing record indicates that in May 2019 and in June 2019 the grievant produced one final written determination in each month when a minimum of eight (8) final written determinations per month were expected by the Employer. The reason or reasons for the failure of the grievant to meet the work expectations of the Employer in May 2019 and June 2019 are not disclosed in the hearing record. Other than insufficient time to show improvement, no reason has been presented as to why during the fourteen calendar days from August 16, 2019 and August 30, 2019 no work performance improvement could be exhibited.

The arbitrator agrees with the Union's assertion that the Employer may not discipline an employee for a reason and subsequently use that same reason to discipline the employee again. In this case, the August 13, 2019 three-day suspension was for the grievant's failure to meet work performance expectations in May 2019 and June 2019; the reason presented for the August 30, 2019 discharge of the grievant was the unsatisfactory work performance of the grievant in July 2019. The Union suggested in its closing arguments how the Employer could have handled these circumstances differently but the arbitrator finds no reason to conclude that the work performed by the grievant in July 2019 cannot serve as the basis of the discipline imposed on August 30, 2019.

As to the Union's fundamental argument that there had been insufficient time from the end of the three-day suspension on August 16, 2019 to the removal of the grievant on August 30, 2019 to afford the grievant an opportunity to exhibit the improvement in her work performance demanded by the August 13, 2019 three-day suspension, the arbitrator finds that after thirty years of performing the same duties, after disciplinary actions complaining of the grievant's work performance, after performance evaluations and one-on-one verbal coaching making explicit the Employer's

dissatisfaction with the grievant's work performance, there is nothing in the hearing record upon which to conclude that allowing the grievant more time to improve her work performance would produce a result different from the thirty-year employment record accumulated by the grievant by the time of her removal. The grievant, having been notified in express terms over the two years prior to her removal that her work performance was unacceptable to the Employer, produced one decision in May 2019 when eight had been expected, produced one decision in June 2019 when eight had been expected, and produced one decision in July 2019 rather than the eight that had been expected. After thirty years of performing the same work from the same position, and in many cases working on the simplest appeals, by May 2019 and June 2019 the grievant was producing one completed final decision in a month. The Employer responded with a three-day suspension for failing to meet the Employer's expectations of her position, and in July 2019 the grievant again completed one final determination for the month.

There is the cliché concerning the definition of insanity - doing the same thing over and over again and expecting a different result. The grievant in this case has been extended thirty-one years to master the job responsibilities of the position she has filled for all of those years. For whatever reason, after thirty years of performing the same work, the grievant has remained out of compliance with the reasonable expectations of her position in terms of work quantity and work quality. The arbitrator is unable to conclude that extending more time to the grievant after August 30, 2019 to improve her work performance would have resulted in the improvement of the grievant's work product when thirty years of applying herself to this work had never resulted in work performance that met the reasonable expectations of her position by the Employer.

The work record of the grievant, the grievant's active disciplinary history at the time of her removal, and the grievant's work performance during the two years and three months prior to her discharge on August 30, 2019 present an employee who has refused to provide the work expected from

her position, and this record of non-compliance with standards applicable to her position provides the Employer with the just cause necessary to order the removal of the grievant.

The Employer possessed just cause to remove the grievant from her employment by the Employer effective August 30, 2019.

The grievance is denied.

#### AWARD

1. The grievance giving rise to this proceeding is found arbitrable by the arbitrator under the language of the parties' collective bargaining agreement.
2. The grievant was removed for just cause.
3. The grievance is denied.

Howard D. Silver

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Columbus, Ohio  
May 13, 2021

CERTIFICATE OF SERVICE

I hereby certify that duplicate originals of the foregoing Decision and Award of the Arbitrator in the Matter of Arbitration Between the State of Ohio, Department of Taxation, Employer, and the Ohio Civil Service Employees Association, American Federation of State, County and Municipal Employees, Local 11, AFL-CIO, Union, Grievance Number: TAX-2019-03212-14, Grievant: Janet Mandel, were sent electronically to the following this 13<sup>th</sup> day of May, 2021:

Teri Fowler  
Advocate  
Ohio Department of Taxation  
Department of Human Resources  
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and

Jamecia Little  
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Columbus, Ohio  
May 13, 2021