Thomas J. Nowel, NAA
Arbitrator, Mediator, Fact Finder
Lakewood, Ohio

IN ARBITRATION PROCEEDINGS PURSUANT TO
AGREEMENT OF THE PARTIES

Arbitration Proceedings Between:	)	
	)	DOT-2023-03542-07
State of Ohio, Department of Transportation	)	
	)	ARBITRATION
and	)	OPINION AND AWARD
	)	
Ohio Civil Service Employees Association,	)	DATE:
AFSCME Local 11	)	September 25, 2024
	)	
Re: Visa Bowen Removal	)	Permanent Panel

APPEARANCES:
Jay Hurst, Labor Relations Administrator 1, Ohio Department of Transportation; and Bruce Thompson, Staff Representative, Ohio Civil Service Employees Association.

INTRODUCTION

This arbitration arises pursuant to the collective bargaining agreement between the State of Ohio and the Ohio Civil Service Employees Association, AFSCME Local 11. OCSEA is the exclusive representative of a number of bargaining units across State of Ohio departments and agencies including the Ohio Department of Transportation. The term of the collective bargaining agreement under which the discipline was administered and the grievance was processed was April 21, 2021 through February 28, 2024.

The Grievant, Visa Bowen, was classified as a Highway Technician 3 C/M assigned to District 4. On August 17, 2023, the Grievant, who was at home on sick leave, was contacted by her Manager, Lindsey Royer, regarding an overtime opportunity. During the telephone conversation, the Grievant made a number of comments which Manager Royer believed to be inappropriate and threatening. A pre-disciplinary hearing was conducted on November 8, 2023. The hearing officer determined that there was just cause for discipline. The Grievant's employment was terminated on December 20, 2023. The Union grieved the termination of employment on December 27, 2023, and the Employer denied the grievance at the various steps of the Grievance Procedure. The Union appealed the matter to arbitration. The parties to the collective bargaining agreement have mutually agreed to a permanent panel of arbitrators, and the arbitrator was selected to hear this matter pursuant to Section 25.05, Article 25, Grievance Procedure, of the CBA. The arbitration hearing was held on July 29, 2024 at the OCSEA offices in Westerville, Ohio. The parties stipulated that the grievance was properly before the arbitrator. The parties agreed to submit post hearing briefs no later than August 30,

2024. The arbitrator indicated that the award would be completed within thirty days of receipt of the post hearing briefs.

JOINT STIPULATIONS

1. Grievant was classified as a Highway Technician 3 C/M.

2. Date of Hire: July 24, 2017.

3. Date of Removal: December 20, 2023.

4. Grievant had four (4) active disciplines at the time of her removal.

    a. Written Reprimand, Rule 4C: Insolence-rude or disrespectful conduct.
    b. One (1) day working suspension, Rule 4C: Insolence-rude or disrespectful conduct.
    c. Three (3) day working suspension, Rule 4C: Insolence-rude or disrespectful conduct.
    d. Five (5) day working suspension, Rule 2A: Carelessness with tools, keys and equipment or vehicle resulting in loss, damage or an unsafe act.

    Joint Issue Statement. "Was the Grievant, Visa Bowen, removed for just cause? If not, what shall the remedy be?"

WITNESSES

TESTIFYING FOR THE EMPLOYER:
Neal Glendening, Labor Relations Officer 3
Lindsey Royer, Transportation Manager 2
Tiffany Cerana, Investigator

TESTIFYING FOR THE UNION:
Visa Bowen, Grievant

RELEVANT PROVISIONS OF THE AGREEMENT

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. 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. Abuse cases which are processed through the Arbitration step of Article 25 shall be heard by an arbitrator selected from the separate panel of abuse case arbitrators established pursuant to Section 25.05. Employees of the Lottery Commission shall be governed by ORC Section 3770.021.

24.02 – Progressive Discipline

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

a. One (1) or more written reprimand(s).
b. One (1) of 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 will be issued by the Employer.

   If a working suspension is grieved, and the grievance is denied or partially granted and all appeals are exhausted, whatever portion of the working suspension is upheld will be converted to a fine. The employee may choose a reduction in leave balances in lieu of a fine levied against him/her.
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.

   Disciplinary action shall be initiated as soon as reasonably possible, recognizing that time is of the essence, 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.

   The deduction of fines from an employee's wages shall not require the employee's authorization for withholding of fines.

If a bargaining unit employee receives discipline which includes lost wages, the Employer may offer the following forms of corrective action:

1. Actually having an employee serve the designated number of days suspended without pay.
2. Having the employee deplete his/her accrued personal leave, vacation, or compensatory leave banks of hours, or a combination of any of these banks under such terms as may be mutually agreed to between the Employer, employee and the Union.

24.06 – Imposition of Discipline

The Agency Head or designated Deputy Director or equivalent shall make a final decision on the recommended disciplinary action as soon as reasonably possible after the conclusion of the pre-disciplinary meeting. The decision on the recommended disciplinary action shall be delivered to the employee, if available, and the Union in writing within sixty (60) days of the date of the pre-disciplinary meeting, which date shall be mandatory. It is the intent to deliver the decision to both the employee and the Union within the sixty (60) day timeframe; however, the showing of delivery to either the employee or the Union shall satisfy the Employer's procedural obligation. At the discretion of the Employer, the sixty (60) day requirement will not apply in cases where a criminal investigation may occur and the Employer decides not to make a decision on the discipline until after disposition of the criminal charges.

The employee and/or Union representative may submit a written presentation to the Agency Head or Acting Agency Head.

If a final decision is made to impose discipline, including oral and written reprimands, the employee, if available, and Union shall be notified in writing. The OCSEA Chapter President shall notify the Agency Head in writing of the name and address of the Union representative to receive such notice. Once the employee has received written notification of the final decision to impose discipline, the disciplinary action shall not be increased.

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

The Employer will not impose discipline in the presence of other employees, clients, residents, inmates or the public except in extraordinary situations which pose a serious, immediate threat to the safety, health or well-being of others

An employee may be placed on administrative leave, without loss of pay (except in cases which fall within ORC Section 124.388(B), or reassigned while an investigation is being conducted except that in cases of alleged abuse of patients or others in the care or custody of the State of Ohio, the employee may be reassigned only if he/she agrees to the reassignment or if the reassignment is to a position on the same shift and days off, without loss of pay and does not exceed thirty (30) days. For cases that fall within ORC Section 124.388(B) as referenced above,

any payment due the employee under subsection (B) shall be based upon the employee's total rate plus any applicable roll call pay. For purposes of this paragraph, "without loss of pay" shall mean the employee's total rate plus any applicable roll call pay.

GRIEVANCE

Statement of Grievance: The Grievant, Ms. Bowen, was terminated from employment as a Highway Technician 3 C/M with the Ohio Department of Transportation. The Grievant was terminated without Just Cause, the department claims a violation and charged Ms. Bowen with Insolence. Her actions were the result of frustration in the inaction of her Employer in addressing multiple concerns raised over a period of numerous years. Her concerns included sexism, racism, misogyny and harassment. These concerns were never addressed completely or satisfactorily.
Resolution Requested: Return the Grievant, Ms. Bowen, to her former position as a Highway Technician 3 C/M with seniority unimpaired and make her whole for wages and benefits lost. Ms. Bowen's personnel records should be amended to reflect this, and she shall be made whole for any loss she sustained due to her unjust discharge.

BACKGROUND

The Grievant, Visa Bowen, was hired by the Ohio Department of Transportation on July 24, 2017. She was employed as a Highway Technician 3 C/M. On Thursday, August 17, 2023, the Grievant called off work as she was not feeling well. She utilized her accrued sick leave. The Grievant's supervisor, Lindsey Royer, called her around 8:41 am to determine if she would wish to work overtime during that weekend. The Grievant did not answer the call but returned a call to Ms. Royer at 12:46 pm that same day. Ms. Royer was on another call at the time but returned the call to the Grievant at approximately 12:52 pm. When asked if she was interested in working overtime during the weekend, the Grievant responded that she was not willing to do so. The Grievant then asked Manager Royer if she would confront Brian Gau, a co-worker of the Grievant, regarding remarks he had made to another employee regarding employees of a

protected class. The Grievant heard the comments and believed they were inappropriate. Ms. Royer stated that she would look into the matter. As the conversation proceeded, the Grievant became loud and stated that she wished to punch Mr. Gau in the face. The Grievant continued to speak in a loud and agitated manner and used profanity. She then referred to two other employees, with whom she had been in conflict in the past, and stated that she wished they would just die. The Grievant mentioned other co-workers in a loud and aggressive manner, and Manager Royer ended the conversation.[1]

The Grievant returned to work a day or two following the telephone confrontation with her supervisor. Following an investigation by the Employer, a pre-disciplinary hearing was held on November 8, 2023. The Grievant had been charged with violation of Department Policy 17-015(P), Item 4C, Insolence – rude or disrespectful conduct. The Hearing Officer, Darren Noirot, P.E., determined that there was just cause for discipline. On December 20, 2023 the Grievant received notice from Department Director, Jack Marchbanks, Ph.D, that her employment with ODOT was terminated.

> Ms. Bowen: This letter is to inform you that you are hereby terminated from employment as a Highway Technician 3 C/M, assigned to ODOT District 4, effective December 20, 2023. You are found to have violated Policy 17-015(P), Item: 4C – Insolence – rude or disrespectful conduct.

The Union grieved the termination of employment. Following denial of the grievance, the matter was appealed to arbitration.

[1] Joint Exhibit 3, pages 12 and 23

At the time of the termination of the Grievant's employment, there were four active disciplines in her personnel file as noted in the list of stipulations of the parties. Three of the active disciplines involved violations of Policy 4C, insolence and rude or disrespectful conduct.

During her employment with the Department, the Grievant filed a number of complaints against the Employer and/or ODOT employees regarding sexual harassment, racism and hostile work environment. Four complaints were filed with the Ohio Office of Equal Opportunity. The findings following each investigation determined that, generally, there was no probable cause. A complaint filed with the Ohio Civil Rights Commission also resulted in a finding of no probable cause as did a complaint filed with the U. S. Equal Employment Opportunity Commission in January 2024.

POSITION OF THE EMPLOYER

The Employer states that the actions of the Grievant, which led to her termination of employment, are undisputed. The Grievant was disrespectful of her supervisor. She yelled at her and made threatening comments regarding co-workers. The Grievant admitted making the threatening comments during the investigation of the matter. The Grievant stated that she wanted to punch a co-worker in the face, and also said she wished two other co-workers would die. The Employer references active prior discipline for same or similar violations of policy, a reprimand, one day working suspension, and a three day working suspension. The Employer has attempted to correct insolence and disrespectful conduct without success. In addition to the three disciplines regarding her conduct, the Grievant received a fourth disciplinary action. Her disciplinary record reflected four active disciplines at the time of the incident which resulted

in termination of employment. The Grievant was fully aware of the Department's expectations, and her training records indicate that she had notice of prohibited conduct. Manager Royer testified during the arbitration hearing that the Grievant was screaming, and her tone was angry and hostile.

The Union has argued that the Grievant's supervisor should not have called her for an overtime opportunity due to that fact she was on sick leave. The Union states that the Employer violated the collective bargaining agreement by making the call. The Employer states that the call by Manager Royer was not for an overtime assignment on the day the Grievant was home sick but rather for an opportunity during the weekend. The call was made on Thursday of that week. There was therefore, no violation of the CBA.

The Grievant's training record clearly indicates that she successfully completed training regarding workplace harassment and violence prevention. The Grievant confirmed during her testimony that she had completed the training. The Violence in the Workplace Policy prohibits any threats of violence and states that such will not be tolerated. The Grievant clearly violated the Policy.

The Union and Grievant have argued that the conduct was a result of frustration due to failure of the Employer to address numerous concerns of sexism, racism and harassment over a number of years. Nevertheless, after five internal investigations conducted by four investigators and two external investigations conducted by the Ohio Civil Rights Commission and the United States Equal Opportunity Commission, none of the investigations revealed that the Grievant was a victim of sexism, racism, misogyny or harassment. The Employer rejects the suggestion by the

Union that the Grievant's actions were a result of her being on medication as the behavior was not an isolated incident. The Union never made this argument for the prior disciplines.

In six years, the Grievant had accumulated four active disciplines at the time of her removal. The principle of progressive discipline has been followed meticulously. The Employer states that the Grievant's employment was terminated for just cause and requests that the grievance be denied in its entirety.

POSITION OF THE UNION

The Union states that the termination of the Grievant's employment was not for just cause. There is no evidence that the Grievant's conduct created a work environment that was intimidating, hostile or abusive. The conduct should never have warranted termination. Her statements were made out of frustration over the inaction of the Employer regarding incidents of sexism and racism. The Manager, Ms. Royer, stated that another employee was in the room when the phone conversation with the Grievant occurred. This employee, Mr. Kropp, was never interviewed as part of the Employer's investigation. The Grievant stated that she wished two of her co-workers would die, but the arbitrator is to note that the Grievant never stated that she wished to murder anyone. The Grievant was a victim of bullying. It is not unusual for a victim of bullying to express intense emotions including anger and frustration and to fantasize about revenge. The Grievant never formulated a plan to do harm. The Union makes reference to an incident in which co-workers poked holes in a poster, which was hanging near a time clock, where the breasts and vagina would be. They suggested that the person was the Grievant. Those involved were never disciplined. They were never held accountable.

The Union states that ODOT Policy prohibits employees from discussing a matter which is being investigated. Witnesses to an incident under investigation must not discuss the investigation. An employee who discusses an ongoing investigation is subject to discipline. During the investigation of the Grievant, Manager Royer stated to the investigator that she had only recently become aware that she was not to share the outcome of any disciplinary action. The Union states that she violated Department Policy, but there was no follow-up by the Employer.

The Union disagrees with the outcome of complaints filed by the Grievant with the Office of Equal Opportunity. In one case, an employee made a vile sexual comment to the Grievant, but there was a finding of no probable cause. The comment made to the Grievant, in this case, was far more egregious than those made by the Grievant on the day in question. The Union criticizes the outcomes of a number of the complaints filed by the Grievant. The Union suggests that a number of employees, who have made inappropriate comments to the Grievant, should have been the subject of discipline including Mr. Gau who spoke of age discrimination while in the presence of the Grievant. When he stated that a co-worker had an EEO complaint, he later admitted that he was not familiar with the EEO process . This was the most recent incident of discriminatory statements made to the Grievant prior to the telephone conversation with Manager Royer. The Union asks why the Grievant does not get the same latitude as Mr. Gau or others who have made derogatory statements in her presence over the years. Complaints were not addressed to the satisfaction of the Grievant.

The Union states that, following the telephone conversation with Manager Royer on August 17, 2023, the Grievant returned from sick leave and continued to work for another four months without an incident and before the Employer convened a pre-disciplinary hearing.

The Union states that the Employer violated the collective bargaining agreement when Manager Royer called the Grievant, while on sick leave, to offer an overtime assignment. The CBA states that an employee, on sick leave, is considered as refusing all overtime opportunities until the next scheduled shift. The call should not have been made to the Grievant. Any conversation between Manager Royer and the Grievant on August 17, 2023 should not be considered by the arbitrator.

The Union requests that the Grievant be reinstated and made whole for lost wages and benefits with seniority unimpaired.

ANALYSIS AND OPINION

It is undisputed that the Grievant became loud and, according to Manager Royer, began yelling or screaming on the telephone. Mr. Gau had made comments to a co-worker regarding issues of a protected class. The comments were not directed at the Grievant, but she took offense to the conversation. The Grievant stated to Ms. Royer that she wished to punch Mr. Gau in the face. She then referred to two other co-workers and stated that she wished they would just die. She went on to mention other co-workers in a loud and aggressive manner. The Grievant has essentially admitted to her conduct.

The Union has argued that the Manager violated the collective bargaining agreement when the Grievant was offered an overtime assignment by way of a telephone call when she

was on sick leave. The Union suggests that the Grievant's conduct should be overlooked since the call should never have taken place. Section 13.07 of the Ohio Department of Transportation section of the collective bargaining agreement states that a "no contact" with an employee is charged as a refusal. When Ms. Royer made the call, the Grievant did not answer. The Grievant returned the call later in the day. The Manager was on another call but returned the call a short time later. Section 13.07 goes on to state that an employee, who is on paid leave, is "considered as refusing all overtime opportunities until their next scheduled shift." This section of the collective bargaining agreement lists a series of paid leaves which would automatically bar an employee from being considered for an overtime opportunity. Paid sick leave is not on the list. It is unclear what the intent of the parties would be regarding paid sick leave under similar circumstances. The Employer argues that the Grievant was on paid sick leave on a Thursday, and the Manager called her for an overtime assignment for the weekend. The Employer states that the call was not in violation of the Agreement. The Employer's argument is compelling. All of this being considered, even if the call from Manager Royer was improper, the Grievant's conduct cannot be condoned and was in violation of policy whether the call was in conformance with the CBA or not.

The Union argues further that the Manager violated policy when an ongoing investigation or the outcome of such was discussed with others outside of the investigatory process. Manager Royer stated, during the investigation, that she was unaware of the policy at the time the Grievant's conduct was being investigated. It appears that the Union's argument may have merit, but the policy violation of the Manager does not set aside the seriousness of

the statements, threats and conduct of the Grievant when she spoke with Ms. Royer regarding the overtime assignment.

The Union argues that the Grievant has been the victim of bullying. She has been subjected to racist and sexist statements by her co-workers, and the Employer has failed to intervene; has failed to properly investigate; and has failed to properly discipline the involved employees. The Union criticized the outcome of the various complaints which have been filed by the Grievant since 2018 with the Ohio Office of Equal Opportunity, the Ohio Civil Rights Commission and the U. S. Equal Employment Opportunity Commission. The Union argues that they were not thoroughly investigated, and the involved co-workers were not properly disciplined.

Evidence suggests the opposite. There is no evidence to suggest that the investigations by the various agencies were not thorough and proper. Evidence suggests the opposite. This is especially true of the investigations conducted by the Ohio Civil Rights Commission and the U. S. Equal Employment Opportunity Commission, both outside agencies not directly connected to ODOT. The Investigatory Reports and Findings of the six complaints, which were filed by the Grievant during her employment at ODOT, indicate thorough and comprehensive investigations and detailed findings.[2] It is noted that the investigatory Report and Findings of the Ohio Office of Equal Opportunity, dated May 24, 2021, determined that the Grievant, herself, "made inappropriate and/or insensitive comments." The Union's arguments, regarding the investigations and findings of the six complaints, lack evidence and are not convincing.

[2] Management Exhibit No. 5

The Union argued that the statements of the Grievant and her conduct on August 17, 2023 were a result of medication she had been taking. The Grievant claimed that she had taken certain medication on the day in question, but there is no evidence that this may have caused her conduct when on the telephone with her Supervisor. It is noted that this is the fourth active discipline for same or similar violations of policy. The Employer's assertion, that the Union never raised this as a defense during the previous discipline matters regarding violations of Rule 4C, is uncontroverted.

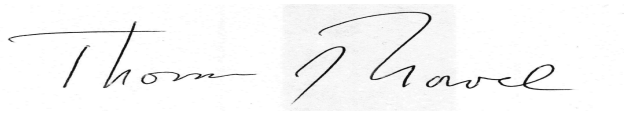
The Employer argues that the conduct of the Grievant and threatening statements made to Manager Royer are undisputed. This is accurate. The Grievant stated that she wanted to punch a co-worker in the face and stated that she wished that two other co-workers would die. The Grievant spoke in a loud, discourteous and aggressive manner and made comments about other employees. These statements are viewed as threats and cannot be condoned in the workplace. Evidence is clear that the Grievant received training regarding threats and violence in the workplace. The Employer argues that it followed the principle of progressive discipline prior to the termination of the Grievant's employment. The termination of the Grievant's employment was based on violation of Policy 17-015(P), Item 4 C – Insolence – rude or disrespectful conduct. The Grievant received a written warning for the same violation on May 26, 2020; a one day working suspension for the same violation on June 23, 2021; and a three day working suspension for the same violation on May 4, 2021. On April 5, 2023, the Grievant received a five day working suspension for a violation of Rule 2 C, carelessness with tools, etc. A five day suspension is the maximum suspension which the Employer may impose pursuant to the collective bargaining agreement.

Had this been the first violation of Rule 4 C, a mitigated reinstatement with a requirement to attend anger management training may have been an appropriate penalty. But the Grievant was provided with numerous opportunities to modify her behavior. The Employer made sufficient attempts to correct the behavior in a constructive manner by gradually increasing the consequences of her actions and behavior and by following the principle of progressive discipline as outlined in the collective bargaining agreement. The final violation on August 17, 2023 suggests potential threats of violence which cannot be condoned in this or any workplace. The Grievant was removed for just cause, and the grievance of the Union is denied.

AWARD

The Grievant, Visa Bowen, was removed for just cause. There is no violation of Article 24 of the collective bargaining agreement by the Employer. The grievance of the Union is denied.

Signed and dated this 25th day of September 2024 at Lakewood, Ohio.



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Thomas J. Nowel, NAA
Arbitrator

CERTIFICATE OF SERVICE

I hereby certify that, on this 25th day of September 2024, a copy of the foregoing award was served, by way of electronic mail, upon Bruce Thompson, Staff Representative, Ohio Civil Service Employees Association, AFSCME Local 11; Jay Hurst, Labor Relations Administrator 1, Ohio Department of Transportation; and Eric Eilerman, Ohio Office of Collective Bargaining.

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Thomas J. Nowel, NAA
Arbitrator