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In the Matter of Arbitration Between STATE OF OHIO, DEPARTMENT OF TAXATION and OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION, LOCAL 11, A.F.S.C.M.E., AFL/CIO	OPINION and AWARD Anna D. Smith, Arbitrator Case 30-10-910521-0259-01-14 Timothy L. Pingle, Grievant Discharge

Appearances

For the State of Ohio:

Timothy Stauffer; Ohio Department of Taxation; Advocate
Valerie Butler; Ohio Office of Collective Bargaining; Second Chair
Robert H. Dudgeon; Administrator, Personal Property Tax Division, Ohio Department of Taxation; Witness
Joseph Meehan; Audit Unit Supervisor, Ohio Department of Taxation; Witness
Mary Tillman; Audit Unit Supervisor, Ohio Department of Taxation; Witness
Rebecca Eiselt; Ohio Department of Taxation; Observer
Arthur M. Suchta; Attorney, Ohio Department of Taxation; Observer

For OSCEA Local 11, AFSCME:

Dane Braddy; Staff Representative, OCSEA Local 11, AFSCME, AFL-CIO; Advocate
Timothy Pingle; Grievant
Perry M. Wise; Steward and Vice-President, OCSEA Local 11, AFSCME, AFL-CIO; Witness
Amy Toops Sappington; Witness.

Hearing

Pursuant to the procedures of the parties a hearing was held at 10:00 a.m. on December 10, 1991 at the Office of Collective Bargaining, Columbus, Ohio before Anna D. Smith, Arbitrator. The parties were given a full opportunity to present written evidence and documentation, to examine and cross-examine witnesses, who were sworn, and to argue their respective positions. The record was closed upon conclusion of oral argument at 5:30 p.m., December 10, 1991. This opinion and award is based solely on the record as described herein.

Issue

The parties were unable to reach agreement on the issue to be resolved. The Employer contends that paragraph 2 of the Last Chance Agreement prohibits the Arbitrator from determining just cause for removal. (This paragraph states, "The Employee understands and agrees that further violations of TAX work rules shall constitute just cause for Removal.") In the Employer's view, the issue to be decided is whether the Grievant violated any Department of Taxation work rules and, if not, what the remedy shall be. The Union argues for a more broadly defined issue, urging that it be whether the Grievant was removed for just cause and, if not, what the remedy shall be. In the face of continuing disagreement, the Arbitrator made a preliminary determination to hear the case under the just-cause issue and to address the Employer's objection in the written opinion.

Joint Exhibits and Stipulations

Joint Exhibits

1. 1989-91 Collective Bargaining Agreement
2. Grievance Trail
3. Discipline Trail
4. Training Attendance Records

Joint Stipulations of Fact

1. Mr. Pingle's date of employment was September 12, 1988.
2. Mr. Pingle's date of termination was May 10, 1991.
3. The position held by Mr. Pingle was that of Tax Commissioner Agent 2.
4. At the time of his removal, Mr. Pingle's record included the following prior discipline:
   a. November 15, 1990 - 10-day suspension
   b. July 19, 1990 - 5-day suspension
   c. May 23, 1990 - Verbal reprimand
   d. April 3, 1990 - Written reprimand
   e. March 15, 1990 - Verbal reprimand
   f. August 3, 1990 [sic] - Verbal reprimand.
5. At the time of his removal, Mr. Pingle was under a last-chance agreement.
6. Mr. Pingle carried 2 years, 8 months of seniority.

Relevant Contract Provisions

Article 24 Discipline

§24.01 - Standard

Disciplinary action shall not be imposed upon an employee except for just cause....

§24.05 - Imposition of Discipline

....

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

Article 25 Grievance Procedure

§25.08 - Relevant Witnesses and Information

The Union may request specific documents, books, papers or witnesses reasonably available from the Employer and relevant to the grievance under consideration. Such request shall not be unreasonably denied.

Case History

The Grievant, Timothy Pingle, was hired by the Ohio Department of Taxation on September 18, 1988 as a Tax Commissioner Agent 2 assigned to the Personal Property Tax Division. He received the Department's training and was on notice of its rules. The record contains nothing particularly noteworthy about him during the first year of his employment when he was under the supervision of Michael Sachs. Foreshadowing future events were an August 1989 verbal reprimand for absence without leave (Management Ex. 13) and a performance evaluation with two "Below Expectations" ratings in the areas of quantity of work and timeliness. The Grievant testified he was not concerned about the ratings because this supervisor had a reputation for being tough.

In February 1990, the Grievant was assigned a new supervisor, Mary Tillman, who had worked for the Department for nine years but had neither previously been a supervisor nor had she received formal supervisory training. The relationship between Ms. Tillman and Mr. Pingle became troubled. On March 15, 1990, a second verbal reprimand for tardiness was issued. On March 19, in an attempt to improve Pingle's work performance, goals and a plan to achieve them were agreed to (Management Ex. 4). In April, a written reprimand for tardiness was issued. Also during this month Tillman began writing memos to Pingle documenting noncompliance with the agreed-to plan and seeking explanations for various performance-related problems (Management Exs. 5-8). In May, the Grievant was relieved of certain other duties so he could spend more time working towards

his goals (Management Ex. 8, 9). Pingle, too, began to create a paper trail: he sought an adjustment of his goals (Union Ex. 1, June 14, 1990), documented a sick leave denial (Union Ex. 2, June 8, 1990) and unwillingness of his supervisor to provide assistance to him (Union Ex. 5, November 2, 1990), and protested a denial of a field audit request (Union Ex. 6, June 6, 1990). The Grievant's conduct remained troublesome to his supervisors: in May and July he received additional discipline for sleeping on duty (verbal reprimand) and neglect of duty, insubordination, tardiness, falsification of documents and other infractions occurring in April and May (5-day suspension). In September, Tillman reviewed Pingle's performance and found it lacking in five of seven categories, including the aforementioned timeliness and quantity.

Incidents of August and September resulted in a 10-day suspension for insubordination, tardiness and/or failure of good behavior. Only five days of this suspension were served under a Last Chance Agreement signed November 21 by which the Grievant waived his right of appeal through the grievance procedure and agreed that "further violations of TAX work rules shall constitute just cause for Removal" (Joint Ex. 3). This agreement was to expire May 23, 1991.

While the Grievant was serving this suspension, it came to the Employer's attention that a number of taxpayers had been experiencing difficulty with Mr. Pingle's work. Specifically, Taxpayer A telephoned to complain about the length of time it took to make a taxing district correction. Inaction on Taxpayer B's

refund request resulted in the tax return becoming final with the taxpayer losing the right of appeal. Taxpayer C complained about inaction in a refund request originally made in September 1989. Tillman began to collect documents in support of these allegations. She also initiated a daily appointment schedule for her subordinates by which the agents were to sign up for an hour a day of individual assistance from her. The record (Management Ex. 10) reveals that the agents made declining use of this program over time and its effectiveness was challenged by the Grievant's testimony.

When the Grievant returned from his suspension, a meeting was held to try to address the on-going problems. Pingle was offered retraining, but refused because he did not believe it would solve his problem. He was permitted to move his desk to be out of the direct view of his supervisor. He was also instructed to bring complaints he may have had about Tillman to her superior (Management Ex. 11).

As the relationship between Pingle and Tillman deteriorated and Pingle's behavior interfered with the work environment, Union officers also tried to help, counseling the Grievant on his work habits, acting as mediators and making suggestions for addressing the problems, such as transfering Pingle to a male supervisor. These efforts were unsuccessful.

Being dissatisfied with Pingle's explanation of his handling of Taxpayers A, B and C, Tillman requested discipline on December 26 (Management Ex. 27). Before a pre-disciplinary meeting was

held, however, further problems surfaced: a review of Pingle's files revealed another instance of a refund request going dead from Pingle's inaction (Taxpayer E, Management Ex. 27); and in March, Taxpayer F called about a refund requested in September, 1990 to which no reply had been received. Tillman added these to her discipline request (Management Ex. 27). She further documented his use of vulgar language in an audit meeting and added this to her discipline request (Management Ex. 41).

A pre-disciplinary hearing notice was issued March 28, citing "Neglect of Duty and/or Failure of Good Behavior, Insubordination and Posting or Displaying Abusive Material or Use of Insulting Language Toward Another Employee, Taxpayer or General Public" (Joint Ex. 3). Tillman continued to document Pingle's behavior which she testified she found inappropriate and threatening (Management Exs. 42, 43). The pre-disciplinary hearing was held April 10, 1991, with a removal order issued May 8, 1991, effective May 10, 1991.

A grievance was subsequently filed protesting the removal (Joint Ex. 2), and specific documents to prepare the Grievant's defense were requested by the Union. When these documents were not forthcoming, a second grievance (Union Ex. 3) was filed alleging violation of the discovery provision of the contract, Section 25.08. This second grievance was ultimately adjusted without resort to arbitration. The substantive matter of Mr. Pingle's removal, however, remained at issue and so was ultimately appealed

to arbitration, where it presently resides for final and binding resolution.

Arguments of the Parties

Argument of the Employer

The Employer contends that the evidence shows the Grievant was terminated for just cause under the terms of a last chance agreement and by virtue of specific rule infractions. The Grievant is guilty of neglect of duty, claims the Employer, in that despite proper training his inactions caused certain taxpayers to lose their rights of appeal in violation of the Taxpayers' Bill of Rights, subjecting the Department to potential damages. The Grievant's neglect of duty is further evidenced by his excessive delay in making a tax district change, subjecting a taxing district to revenue loss, and his excessive delay in acting on a change in property ownership. Such inactions erode the Department's credibility.

The Grievant was also guilty of insubordination, says the Employer, when he failed to respond to his supervisor's order to supply a list of all returns in his possession. When this list was finally supplied it revealed one of the refund requests that had gone dead.

The facts also establish that the Grievant was guilty of failure of good behavior by cursing in the presence of his supervisor and making threatening remarks to her.

The Employer maintains that this conduct is part of a pattern of behavior that previously resulted in progressive, but

ineffective, corrective disciplinary actions. Despite being afforded every opportunity to improve his work product and conform his behavior to acceptable standards, including a rejected offer of retraining and a last chance agreement, the conduct persisted.

The Employer urges the Arbitrator to uphold the removal, citing the force of last chance agreements as affirmed by Arbitrator Pincus in the parties' case number 31-09-880401-0007-01-06. It further argues that the Union's claim that the Employer's actions are tainted by a violation of §25.08 is unwarranted, since the Employer supplied requested documents prior to arbitration as required by the Contract and the grievance on discovery was thereupon withdrawn. The Employer therefore seeks denial of this grievance in its entirety.

Argument of the Union

The Union contends that Management did not like the Grievant and thus treated him in such a way as to violate his contractual rights and insure his dismissal. The Grievant's supervisor failed in her duty to supervise the Grievant properly. As a Tax Commissioner Agent 2, he needed close supervision, yet Ms. Tillman allowed 6-8 months to go by on refund requests. The Grievant was harrassed by an obsessive supervisor, as evidenced by the many memos Tillman issued about him. He was treated disparately: not being afforded the benefits of the Agency's tardiness policy, he was issued verbal and written reprimands. The Union further maintains that the Grievant was set up: the events resulting in his removal occurred prior to the 10-day suspension and should have

been known by Management because of Tillman's mail log, but allegations of neglect of duty were not involved in that suspension.

The Union goes on to assert that the Grievant is not guilty of insubordination. His testimony that he supplied the requested documentation by the end of the day went unrebutted by Management.

The Union says that Management has interfered with its ability to defend the Grievant because of its refusal to supply requested documents to the professional union representative in a timely fashion. If they could be made part of the arbitration record, no harm could have been done in giving them to the Union advocate.

With respect to the Grievant's prior discipline, the Union points out that different conduct was involved, and asks that the Arbitrator separate that discipline from this.

In conclusion, the Union points out that the Contract requires that discipline be corrective and nonpunitive. The Grievant, it says, was not afforded the opportunity to learn and grow from his errors, but was given discipline for punishment. The Union asks that the grievance be sustained, the Grievant reinstated, awarded all back pay and benefits, and made whole.

Opinion of the Arbitrator

The Issue

The Employer seeks a ruling on whether paragraph 2 of the Last Chance Agreement prohibits the Arbitrator from determining just cause. It does not if the agreement is invalid. Thus, if the agreement was made in bad faith (such as to set up the Grievant as

alleged by the Union) or if the Employer violated its terms or if some other condition invalidates the agreement, then it must be set aside and the removal judged on the just cause standard of the Contract. Even Arbitrator Pincus, whose opinion the Employer urges on this arbitrator, indicates that there are limits to the authority of last chance agreements, saying that he "would have closely scrutinized the open-ended status of the conditional reinstatement document if the Grievant's activities had occurred a significant time period beyond the original signing" (Parties' Grievance Number 13-09-880401-0007-01-06 at 20). On the other hand, if the Last Chance Agreement is valid and the Grievant violated its terms as argued by the Employer, then the Grievant's removal pursuant to paragraph 2 must be upheld. As discussed below, this agreement is held to be valid and the removal is upheld.

Merits of the Case

The picture that emerges from the record of this case is of an employment relationship that has degenerated into defiance and hostility, wherein the memo became a primary weapon of offense and defense as both sides created a record of events supporting their own positions. The relationship appears to be too far gone to be salvageable and, for this, both sides bear some responsibility. There is, for example, some evidence that permits the conclusion that the Employer stacked incidents of wrongdoing over several months after the Last Chance Agreement was signed. With respect to neglect of duty in processing taxpayers' refund requests (the most

egregious of the Grievant's offenses), there is also some question as to whether any real opportunity for rehabilitation was afforded the Grievant despite the implied terms of the Last Chance Agreement since, upon discovering the first cases while the Grievant was on suspension, the supervisor's focus appears to have been on zealously documenting the Grievant's conduct rather than amending it. However, even apart from his job performance, the Grievant's behavior remained objectionable to the Employer after the Last Chance Agreement was signed, and for this he must be held accountable.

One of the several objectionable incidents involved his use of the word "fucking" without provocation during a meeting with his supervisor on March 13, well within the time frame of the agreement. Ordinarily, the Arbitrator would find this insufficient cause to discharge an employee, particularly if it were shown to be common office language or the Employer were shown to be lax in enforcing its rule prohibiting vulgar language. However, when the Grievant signed the Last Chance Agreement, he waived his right to have the Arbitrator determine the appropriateness of removal as a penalty for <u>any</u> rule infraction during the period November 23, 1990 and May 23, 1991. However harsh the terms of the agreement may seem, they were agreed to by the Grievant, and the Arbitrator must defer. The Grievant now says he had to sign it or be fired. This statement makes no sense since he was negotiating a suspension, not a removal. The Grievant may now say it is not fair for him to be fired while others are not for using similar language. Assuming

the claim of disparate treatment to be true, this would be a persuasive argument were it not for the Last Chance Agreement which created a situation of inequality by the parties' mutual consent: the Employee receives an opportunity for rehabilitation and a penalty less than what other employees do and the Employer receives a promise of rehabilitation and the freedom to choose the next level of discipline for future infractions. Clearly, the Grievant chose to give up certain due process rights when he signed the agreement and he must now live with that decision. So must he also live with the consequences of using vulgar language toward his supervisor.

The discussion this far has focussed on the Grievant's failure of good behavior to underscore the force of last chance agreements, but the Grievant is also guilty of a much more serious offense that would justify discipline--perhaps discharge even without the authority of a last chance agreement: neglect of duty in the handling of five taxpayers' requests for amendments to their returns. That a number of these taxpayers lost their appeal rights as a result is shocking and indefensible under the circumstances. The Grievant may have been "only" a two-year employee in a position that relies primarily on on-the-job training, but the statute of limitations is not some obscure regulation, nor does the Grievant deny knowledge of it. Instead, he blames Management for not watching him closely enough and for advising him during training that the Department is a "tax <u>collection</u> agency." It is incredulous that he would take the latter to mean that he was to

let refund requests go dead rather than as an indication of priorities. Additionally (notwithstanding the statement of Mr. Wise, whose experience in his position as a Tax Commissioner 5 is different from the Grievant's), the Arbitrator is persuaded by the testimony of Management witnesses that it was reasonable and necessary for the Department to expect a Tax Commissioner Agent 2 of the Grievant's tenure to keep on top of the statute of limitations.

It would also be reasonable to impose corrective disciplinary action for these offenses--even discharge, given the number and seriousness of the offenses and the Grievant's record. However, the Employer's conduct in handling these infractions does give the Arbitrator some pause: the delay in going forward with prediscipline and the multiplicity of charges, e.g. If the Employer set up the Grievant, as argued by the Union, and thus made the Last Chance Agreement in bad faith, that would be reason to set the agreement aside. This position is not supported by the facts brought forth in arbitration. While it is true that the taxpayer problems arose prior to the 10-day suspension and that they were absent from the charges resulting in that suspension, nothing but supposition suggests that the Employer did not discover the first cases while the Grievant was serving that suspension. The Employer's claim on the timing of the discovery must be accepted. As a result, the presumption that the Last Chance Agreement was made in good faith and not to set up the Grievant is undisturbed.

The Union's argument of disparate treatment in the application of tardiness rules is also not supported by the record. Moreover, its plea to separate those infractions from the ones with which the Grievant is now charged lacks merit for several reasons. First, the Last Chance Agreement does not contain any limitations or exceptions to the rule infractions justifying removal. Second, the concept of progressive discipline does not mean that successive violations must necessarily be of the same rule or even closely related. Just so, on the face of it, it would seem that attendance is a contributing factor in the Grievant's problems with timeliness and quantity of work product.

The Union position on the charge of insubordination, on the other hand, must be accepted for the reasons given, but the other infractions are sufficient to sustain the removal.

The final issue raised by the Union is that of discovery. This issue was properly disposed of through the grievance procedure without prejudice to the Grievant. Like the Last Chance Agreement, the Arbitrator must leave that resolution undisturbed.

Penalty

The Grievant's conduct for the last year or so of his employment is reprehensible: he failed to respond to his Employer's efforts to improve his productivity, was repeatedly late for work, disobeyed orders, failed to respond appropriately to corrective discipline, neglected his duty in handling tax return amendments, disrupted the work place, used foul language, and intimidated his supervisor. Termination is justified.

The Employer's conduct is also blameworthy: the Grievant was threatened when he sought his supervisor's assistance, as was a Union official and the labor-management program when the Union sought to fulfill its responsibility to represent the Grievant, and the prediscipliinary process dragged for several months without hearing while material was collected on fresh charges. Such methods of dealing with recalcitrant employees cannot be condoned. To encourage future Employer compliance with the essentials of fair dealing and due process guaranteed by the Contract, the Grievant is awarded four (4) weeks back pay commencing from the date of his removal.

Award

The grievance is denied. The removal of Timothy Pingle is upheld and he is awarded four (4) weeks back pay, commencing from May 11, 1991. The Arbitrator retains jurisdiction for thirty days to resolve any dispute in the calculation of said award.

Anna D. Smith

Anna D. Smith, Ph.D.
Arbitrator

January 13, 1992
Shaker Heights, Ohio