#1 922

ARBITRATION DECISION

March 3, 2007

In the Matter of:

State of Ohio, Department of Transportation, District 4	)	
and	)	Case No. 31-04-(05-06-01)-0028-01-16 Sandra Rienzi, Grievant
Ohio Civil Service Employees Association, AFSCME Local 11	)	

APPEARANCES

For the State:

Edward A. Flynn, Advocate
Buffy Andrews, Second Chair, OCB
John Dean, Second Chair, OCB
Greg Zemla, LRO, District 4
James DeMarco, Trans. Manager 3
Frank Phillips Jr., District Manager
John Shore, Legal Investigation, ODOT
Lester Reel, Dir. Legal Office, ODOT
Martin Baker, Highway Worker 2
John Ball, Highway Technician 1
Brian Stephens, Highway Technician 1
Danilo Petrovic, Highway Technician 1
Dozier Taylor, Highway Technician 4
Paul Tucci, Highway Technician
Bobbi McNeil, Steward

For the Union:

Michael Moses, Attorney for OCSEA
Lynn Kemp, Staff Representative
John Gersper, Staff Representative
Dennis Falcione, Staff Representative
Sandra Rienza, Grievant
Jeffrey Shearl, Highway Worker 3
James Mashburn, Transportation Specialist
Richard Ward, Highway Technician 1
Stephen Stair, Highway Worker
Bill Haywood, Pres., Summit County Chptr.
Melissa Rowan, Highway Technician 2
Jack Peters, Highway Technician 2
Jeffrey Eboch, District Steward
Gary Apanasecwicz, Pres., Portage County

Arbitrator:

Nels E. Nelson

BACKGROUND

The grievant, Sandra Rienzi, was hired by the Ohio Department of Transportation on May 18, 1987. During her employment with the department, she worked on all aspects of highway maintenance and repair, including snow and ice removal. The grievant's evaluations and the testimony of both state and union witnesses indicate that she was a very good worker. At the time of her discharge, the grievant was a Highway Maintenance Worker 2.

The grievant was very active in the Ohio Civil Service Employees Association. The positions she held in the union include steward, chief steward for Summit County ODOT, Assembly Delegate, and President and Executive Board Member for Chapter 7700. Both the union's and state's witnesses testified that the grievant was a capable and effective union steward.

The record indicates that there was an ongoing controversy in District 4 concerning overtime assignments during snow and ice removal. The grievant filed numerous grievances over the issue. The complaints related to the use of supervisors and managers, which the union believed reduced the overtime available for members of the bargaining unit.

The events leading to the grievant's discharge began on January 21, 2005, as a major winter storm approached Ohio. At 11:45 a.m. on that day, the grievant complained to Frank Phillips, the District Manager, that his plan to use exempt employees to plow the predicted 12 to 16 inches of snow would mean that bargaining unit employees would be limited to 12 hours of work rather than being able to work 16 hours. The grievant told Phillips that if he proceeded with his plan, she would file a grievance.

The grievant left work at the end of her regular shift at 2:30 p.m. but returned to the Boston Heights garage at 10:00 p.m. for the start of her 12-hour snow and ice shift. When she arrived at the garage, she learned that despite the very cold temperatures and the approaching storm, employees would be doing patching work. The grievant discussed her dissatisfaction over the patching job and the use of exempt employees to do snow and ice work with John Ball, a Highway Technician 1; Brian Stephens, a probationary Highway Technician 1; and Dozier Taylor, an extra from Portage County.

During the discussion, an incident was alleged to have occurred involving Stephens and the grievant. Stephens claims that when he refused to join employees in walking off the job at 6:00 a.m., the grievant stated, "I hope you don't get run over." He reported that he felt threatened and ill as a result of the grievant's comment. The grievant responds that the conversation with Stephens related to a potential strike at the Ohio Turnpike Commission by another union and that her comment was a commonly used expression and was not intended to be a threat. Whatever was the case, Stephens was upset and left work at 2:30 a.m.

At approximately 11:00 p.m., the grievant arrived at the patching job along with a number of employees from the other garages. The record indicates that the grievant and others continued to discuss the overtime issue and how the employees should respond to what they saw as a problem. The employees returned to their respective garages at approximately 1:30 a.m. to prepare for the approaching storm.

At approximately 3:00 a.m., James DeMarco, a Transportation Manager 3, who supervised the Boston Heights garage and was in charge of the district that night, called Phillips. He told him that he felt that something was happening but he was not sure what

it was. When a number of employees indicated that they were sick and were going home, DeMarco called Phillips to update him. Phillips told him to contact Tom Lagana, a Transportation Manager, for help in calling in people to man the trucks to remove the snow that had begun to fall at 3:15 a.m..

The record indicates that 10 of the 18 employees scheduled to work left prior to the end of their shift. The employees who left, the times they left , and the reasons they gave are as follows:

Name	Time	Reason
Brian Stephens	2:30 a.m.	Sick
Sandra Rienzi	4:30 a.m.	Sick
Jeffrey Shearl	6:00 a.m.	Carpal Tunnel
Tara Maroney	6:00 a.m.	Tired
Paul Tucci	6:00 a.m.	Tired
Danilo Petrovic	6:00 a.m.	Sick
Martin Baker	6:00 a.m.	Sick
James Mashburn	6:00 a.m.	Flu
John Ball	6:00 a.m.	Sick
Richard Ward	6:00 a.m.	No reason given

At 10:30 a.m., Stephens met with Phillips to discuss his conversation with the grievant. He told Phillips that the grievant was upset about management employees working on snow and ice removal and that she felt that employees needed to retaliate. Stephens complained that when he refused to join the planned job action, the grievant threatened him and he went home because he was ill and did not want to be involved in what was going on.

At 12:30 p.m., Phillips contacted Les Reel, ODOT's Chief Investigator. He told him that there was a work stoppage and a possible case of workplace violence. After a number of discussions, involving a variety of individuals, Reel and John Shore, another Investigator, were assigned to investigate the events in the district.

At 3:40 p.m., Robert Bossar, the District 4 Human Resources Administrator, contacted the grievant. He told her that she was being placed on administrative leave. Gordon Proctor, the Director of Transportation, followed up Bossar's verbal notice with a letter to the grievant indicating that while she was on administrative leave, she was barred from ODOT property and was required to contact Bossar each day and to remain ready to report to work.

Reel and Shore began their investigation on January 25, 2005. On that day and the following three days, they interviewed the employees who were scheduled to work the shift beginning at 10:00 p.m. on January 21, 2005, as well as other employees who they felt might have useful information about the events at issue. Initially, all of the employees denied that there was a work stoppage or that the grievant had attempted to organize one.

During the afternoon of January 27, 2005, Martin Baker, who had been interviewed earlier that day, contacted Phillips and indicated that he wished to be re-interviewed. When Baker was re-interviewed, he indicated that the grievant had initiated the plan for everyone to go home at 6:00 a.m. and he admitted that he had participated. He also reported that after the work stoppage, the grievant told him not to say anything and warned him, "if I go down, we all go down."

Reel interviewed Danilo Petrovic for a second time on February 3, 2005. At that time, Petrovic acknowledged that he had been untruthful at his first interview when he claimed that there was no work stoppage. He went on to indicate that the grievant had organized the work stoppage and that he had participated because he did not want to be singled out for not going home. Petrovic reported that the grievant had contacted him

after the incident to urge him to stick to his original story.

John Ball was interviewed on January 25 and 26, 2005. At his first interview, he denied that there had been a work stoppage. However, the next day, he stated that the grievant had organized a walk-out for 6:00 a.m. and that he felt pressured to participate because of his relatively limited seniority.

Daniel Tucci also changed his account of the events at issue. On January 26, 2005, he claimed that there was no work stoppage. However, on February 3, 2005, he suggested that the grievant had planned for everyone to leave work at 6:00 a.m. and he acknowledged that he had participated.

James Mashburn, Jeffrey Shearl, and Tara Maroney offered a different version of the events of January 21-22, 2005. Mashburn, who was an extra, never wavered from his claim that he was not a participant in any job action and that he did not witness the grievant promoting, planning, or organizing a work stoppage. Shearl insisted that he left work because of problems related to carpal tunnel syndrome and that no one asked him to leave at 6:00 a.m. Maroney told the investigators that she did not hear any complaints about managers working overtime, denied the grievant told her to go home, and claimed that she went home because of fatigue.

The grievant was interviewed by Reel and Shore on March 9, 2005. She denied planning or participating in a work stoppage. The grievant told the investigators that she went home because she was sick. She reported that on the afternoon of January 22, 2005, she went to the emergency room where she was treated for gastritis and dehydration.

A pre-disciplinary hearing was held on May 18, 2005. The grievant was charged with violating items 4, 26, and 30B of Directive No. WR-101 by organizing a work

stoppage during a snow and ice event and by being untruthful during her investigative interview. Two days later, Mickey Paljich, the hearing officer, found just cause for discipline and on May 27, 2005, the grievant was removed by Proctor.

The union immediately filed a grievance on behalf of the grievant. It stated that the grievant left work on January 22, 2005, at 4:30 a.m. due to illness with the approval of her supervisor. The union complained that the state did not conduct a full, fair, and impartial investigation and that the grievant never received the work rule she was alleged to have violated. It charged that the grievant's removal violated Article 24, Sections 24.01, 24.02, and 24.50, and Article 44, Section 44.03, of the contract. The union asked that the grievant be reinstated with full back pay and benefits and no loss of seniority; that any record of the discipline be removed from her file; and that she be upgraded in the Highway Technician series

The step three grievance hearing took place on June 14, 2005. On July 27, 2005, Jim Miller, an Administrator from the Office of Collective Bargaining, who served as the hearing officer, found that the grievant organized and participated in a work stoppage. He stated that this constituted just cause for her removal.

The grievance was appealed to arbitration by the union. The arbitration hearing was held on October 25, 2006; November 27 and 29, 2006; and December 1, 11, and 15, 2006. Written Closing Statements were received on January 30, 2007.

RELEVANT CONTRACT PROVISIONS

Article 24 - Discipline

24.01 - Standard

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

cause. The Employer has the burden of proof to establish just cause for any disciplinary action.

* * *

24.02 - Progressive Discipline

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

Disciplinary action shall include:

A. One or more oral reprimand(s) (with appropriate notation in employee's file);
B. one or more written reprimand(s);
C. working suspension;
D. one or more fines in an amount of one (1) to five (5) days, the first time an employee shall not exceed three (3) days pay for any form of discipline; to be implemented only after approval from OCB;
E. one or more day(s) suspension(s);
F. termination.

* * *

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 44 - Miscellaneous

44.03 - After the effective date of this Agreement, agency work rules or institutional rules and directives must not be in violation of this Agreement. Such work rules shall be reasonable. The Union shall be notified prior to the implementation of any new work rules and shall have the opportunity to discuss them. Likewise, after the effective date of this Agreement, all past practice and precedents may not be considered as binding authority in any proceeding arising under this Agreement.

ISSUE

The parties agreed that the issue is:

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

STATE POSITION

The state argues that there was just cause for the grievant's removal. It indicates that she did not like ODOT's application of the overtime distribution policy and filed a number of grievances regarding overtime worked by seasonal, extra, and exempt employees. The state suggests that the union did not pursue the grievances because they had no merit. It claims that the grievant's dissatisfaction regarding the overtime issue led her to orchestrate the walkout on January 22, 2005.

The state contends that the events establish the grievant's intent to provoke the work stoppage. It states that the grievant arrived at work at 10:00 p.m. on January 21, 2005, and told Stephens, Ball, and Taylor that the union needed to take a stand and that they should tell other employees that they should leave work at 6:00 a.m. The state charges that when Stephens said that he would be staying, the grievant "unleashes verbal abuse and a threat against [him]." (State Written Closing Statement, page 3)

The state maintains that the grievant further developed her plan at the patching site. It claims that she walked from group to group attempting to enlist participants in her plan. The state asserts that she approached Shearl and Tucci, stating, "here's the plan," and that she told Taylor that "we need to put management in their place." It charges that "these comments further establish that the Grievant and no other was the mastermind behind the unthinkable walkout by ODOT employees." (State Written Closing Statement, page 5)

The state argues that the grievant should have filed a grievance. It states that Phillips told her at 12:45 p.m. on January 21, 2005, that she should file a grievance. The state claims that DeMarco and Taylor suggested the same course of action. It asserts that the grievant did not pursue a grievance because she knew it would have no merit.

The state rejects the union's argument that the sick-out had no impact on operations because the employees who left were replaced. It points out that employees who went home at 6:00 a.m. had to leave their routes 45 to 60 minutes prior to that time and that their replacements would have to do their pre-trip inspections, refuel, and load salt before returning to the road. It observes that on January 22, 2005, there were 11 accidents in the district and that at least 10 of the accidents were on routes assigned to those who left work.

The state discounts the fact that only six inches of snow fell in Summit County on the day in question. It reports that the forecast was for 12 to 16 inches of snow and claims that this was what the grievant knew when she planned the work stoppage. The state adds that "6 inches is still quite a bit of snow fall and 11 accidents is still a high number." (State Written Closing Statement, page 7)

The state challenges the union's argument that the grievant had no notice of the rules regarding work stoppages. It points out that Phillips, DeMarco, and Greg Zemla, the District 4 Labor Relations Officer, testified that she was made aware of the rules and that she even asserted that she had a copy of them before her supervisors. The state notes that Shearl, who testified for the union, acknowledged that the rules were posted. It stresses that the new work rules were not necessary because Work Rule 26, which did not change, covers any action that would endanger the public safety.

The state argues that the requirements of Article 44, Section 44.03, were met. It recognizes that this section requires it to notify the union prior to the implementation of any new work rule. The state observes, however, that John Gersper, a union staff representative, testified the union received its copy of the work rules at a statewide Labor-Management Committee meeting in November 2004. The state claims that the work rules were subsequently distributed for signature because of the grievant's claims in the instant case.

The state rejects the union's contention that when the grievant and her coworkers left work, it was nothing more than a refusal of overtime. It maintains that Section 13.07 of the Agency Specific Agreement and a Settlement Agreement dated November 28, 2001, relate to refusing overtime assignments. The state stresses that they are not relevant in the instant case because the employees who left work had already accepted their assignments.

The state discounts the union's argument that the snow and ice schedule does not relate to weekend assignments. It states that the schedule clearly separates an employee's regular schedule from the schedule during a snow and ice event. The state claims that the statements and testimony of all of the witnesses reveal that they knew their snow and ice schedules and understood that the snow and ice schedule was in effect at the time of the work stoppage.

The state questions the union's attempt to show that the consistent refusal policy applied in the instant case. It observes that Zemla and Taylor testified that it did not apply and that Dennis Falcione, a union staff representative, on cross-examination agreed with them. The state acknowledges that Lynn Kemp, a union staff representative, claimed that

the second paragraph of the third part of Section 13.06 applies when an employee leaves during a snow and ice event and that the action should be coded RL and should not count as a refusal. It emphasizes, however, that Gersper stated that employees on overtime assignments do not use leave when they go home but are charged with the entire shift as though it was an overtime opportunity.

The state contends that it is "extremely important" to note that not one witness testified that overtime was offered on January 21, 2005. It points out that each witness testified that he was scheduled to work from 10:00 p.m. to 10:00 a.m. so there was no overtime offered that could have been refused. The state notes that since the contract refers to "an employee who is offered but refuses ...," it is clear that overtime must be offered.

The state challenges the union's charge that ODOT's investigation was faulty and that the investigators used "Gestapo type tactics." It claims that the initial focus of the investigation was on the possibility of a workplace violence situation involving the grievant and Stephens. The state observes that Bobbi McNeil, the union representative at Ball's interview, testified that while Reel was blunt with Ball, he did not act inappropriately.

The state reports that the interviews began on January 25, 2005. It states that the investigators it interviewed Ball, Petrovic, Stephens, Tucci, and Shearl. The state indicates that Reel and Shore believed that "some of the witnesses were not being truthful and let those witnesses know what they believed." (State Written Closing Statement, page 12)

The state notes that on January 27, 2005, Baker contacted Phillips and requested a

second interview. It points out that when Baker met with Reel, he acknowledged that his first interview was not accurate and he proceeded to identify the grievant as the driving force behind the sick-out. The state claims that Baker's statement, which described the grievant's planning and recruitment efforts, mirrors the accounts of Stephens and the others who were truthful.

The state reports that Ball was also interviewed a second time. It indicates that at the beginning of his second interview, he stood by his previous statement. The state stresses, however, that after taking a break, at which time McNeil urged him to tell the truth, Ball changed his account to match what was said by Stephens and Baker.

The state indicates that Petrovic also requested a second interview. It points out that at his second interview he described the grievant as complaining nonstop about the patching assignment and management "messing with [employees'] overtime." The state notes that Petrovic identified the grievant as the organizer and chief recruiter of employees to leave work at 6:00 a.m.

The state reports that it decided to conduct final interviews on February 3, 2005, with all of the employees who left work early on January 22, 2005. It claims that at that time, Tucci "could not get the words out quickly enough to admit he was a participant [in the work stoppage]." (State Written Closing Statement, page 14) The state maintains that his description of the events mirrored those of Ball, Baker, Stephens, and Petrovic. The state emphasizes that only Shearl, Mashburn, and Maroney stuck to their original stories.

The state argues that the union's investigation of the incident lacks credibility. It states that it consisted of questioning Ward, Shearl, Ball, Rowan, Petrovic, Baker, and

Tucci. The state charges the questions the union asked reveal that it was attempting to shift the blame for the work stoppages away from the grievant. It maintains that the investigation was not an attempt to find out what actually happened because the grievant already knew what had taken place.

The state contends that Jeffrey Eboch, a District Steward, was one of the least credible witnesses. It notes that he denied making any comments to McNeil about encouraging employees to lie during their interviews. The state indicates that on direct examination Eboch testified that the grievant was the sole of author of the union's grievance research questions but later stated that he and the grievant wrote them together and, finally, that they were the result of a committee.

The state argues that its witnesses were "extremely credible." It points out that Stephens, who was a probationary employee at the time of the incident, kept a journal and recorded the events as they took place. The state notes that Phillips also took notes and testified that he had no problems with the grievant. It observes that McNeil, as a "union sister," had absolutely no reason to lie about the grievant. The state acknowledges that Ball, Baker, Petrovic, and Tucci voluntarily changed their initial statements but stresses that their subsequent statements did not change.

The state maintains that Taylor was a credible witness. It acknowledges that the statement of Bill Shipley, a Mechanic, implicates Taylor to some extent but insists that Shipley's statement should be given little weight because it is not supported by the other evidence. The state stresses that it is clear that Taylor told employees that they needed to file a grievance.

The state questions the grievant's credibility. It states:

> The Grievant testified that she did not know of any planned walk out yet she then states that she was the one who informed Management of other's plans. The Grievant also shows motive for her to be the organizer of a walk out. On page 5, of her interview, she acknowledges she would make a comment like "Management is taking her motherfucking overtime and it was time the Union took a stand." Page 7, the Grievant acknowledges Stephens made the comment about him needing the coin. This establishes that she did approach Stephens and it contradicts her statement on page 6, paragraph 1, where she does not recall a conversation. Furthermore on page 8, she acknowledges making a comment about Stephens getting run over by a car, even though she attempts to minimize her comment. Page 9, paragraphs 6, 12 and 13 acknowledges that she continued being upset and vocal throughout her shift. Page 10, paragraph 1, acknowledges she had a plan although she goes on to try and divert the plan of leaving to Baker. She goes on to say that Tucci and Petrovic heard Baker; however neither put this in either of their statements. Page 10, paragraph 4, establishes she knew it was wrong to go home during a "clipper." Also establishes she knew the forecast was for a severe storm. Page 10, paragraph 5, states that Petrovic, Tucci and Ball heard the conversation. Once again, not in any of their statements. Page 11, paragraph 5, states she never spoke to Ferryman even though most statements say she did. Page 12, 3rd paragraph from bottom. Again, shows she was still upset and complaining shortly before she left. (State Written Closing Statement, pages 18-19)

The state maintains that the most damning evidence is the reason the grievant gave for leaving work at 4:30 a.m. It reports out that while she claims that she left work because she was extremely sick and that she went right to bed, the record shows that she used her cell phone from 4:17 a.m. to 6:16 a.m. The state acknowledges that the grievant went to the hospital at 5:55 p.m. but claims that she was on her cell phone constantly until 10:18 p.m. and notes that the voice mail she left for Stephens at 5:18 p.m. did not suggest that she was ill. It stresses that from 4:36 a.m. to 10:18 p.m., the grievant either dialed or received 50 calls on her cell phone, which it asserts is "pretty active for someone on her death bed." (State Written Closing Statement, page 20)

The state contends that it successfully refuted the arguments presented by the union at the step three grievance hearing. It points out that the union's claim that

employees left work early on February 21, 2005, and were not disciplined overlooks the fact that it was a holiday. The state notes that the union tried to establish at the step three hearing that Stephens was not intimidated by the grievant because he offered to clean tar from her boots after the patching work on January 21, 2005, but reports that Stephens denied this at the hearing.

The state rejects the union's argument that there was disparate treatment. It acknowledges that the union's step three presentation included 67 discipline waivers. The state notes, however, that management can accept or reject waivers and impose more or less discipline based on whether the employees are cooperative and whether they have filed grievances. It observes that in the instant case, the three employees who were untruthful about participating in the work stoppage received 15-day suspensions.

The state argues that the lawsuit filed by the grievant is further evidence that she is a manipulative person. It acknowledges that the grievant filed a lawsuit as a result of an EEO charge regarding an alleged rape by a co-worker. The state points out, however, that the EEOC's notice of dismissal was mailed on August 8, 2006, but the suit was not filed until November 5, 2006, two weeks after the first day of the arbitration hearing. It claims that the "lawsuit was yet another act of intimidation [and] ... an act of desperation, knowing that this grievance was also about to fail." (State Written Closing Statement, page 23)

The state rejects the union's argument that State Employment Relations Board has administrative control over employees who organize or participate in a work stoppage. It contends that SERB is another forum and has no control over ODOT's administrative actions. The state claims that Section 4117.23 of the Ohio Revised Code clearly

separates SERB's actions from an employer's actions by stating that its actions are in addition to those of an employer.

The state concludes that it is clear that the grievant organized and participated in a work stoppage that put ODOT and the public in a bad way and left it no option other than to remove the grievant. It asks the Arbitrator to deny the grievance.

UNION POSITION

The union argues that there was not just cause to discharge the grievant. It contends that the grievant did not participate in, plan, or promote an unlawful work stoppage and did not violate Rules 2, 26, 30A, or 30B of Directive WR-101.

The union maintains that after six days of witness testimony, the state failed to prove that the grievant violated Rule 4, which bars employees from interfering with or failing to cooperate in an official investigation. It acknowledges that the grievant contacted other employees but claims that she was only trying, as a steward, to ensure that bargaining unit employees had adequate representation. The union further notes that many of the calls were initiated by the employees.

The union charges that the state failed to provide substantial proof that the grievant violated Rule 26, which prohibits actions that could harm, or potentially harm, the employer, a fellow employee, or a member of the general public. It states that the grievant was legitimately ill when she left work at 4:30 a.m. on January 22, 2005, and that she produced unrefuted documentation of her illness. The union further indicates that the grievant informed the watch person that she was leaving work and followed up with a call to DeMarco, her supervisor.

The union contends that the state failed to substantiate the grievant's alleged

violation of Rule 30B, which prohibits organizing, leading, coordinating, promoting, or planning a work stoppage. It suggests that there was no work stoppage because the work of clearing the roads never stopped. The union claims that testimony and evidence show that there were at least the same number of drivers on the road after 6:00 a.m. as before 6:00 a.m.

The union argues that the clear and convincing standard of proof is appropriate. It observes that the grievant is a long-tenure employee with no prior discipline. The union claims that "where an employer does not prove that the grievant engaged in a work stoppage of any type, any misconduct by virtue of discussing methods of challenge to employer action on overtime distribution are subject to strict scrutiny to avoid infringement on First Amendment protections." (Union Written Closing Statement, page 34) It further claims that even if more general work rule violations are proven, it "merely establishes cause for the imposition of discipline significantly less than dismissal." (Ibid.)

The union maintains that the grievant had no contractual or other legal obligation to stay at work beyond 4:30 a.m. on January 22, 2005. It points out that the grievant had permission from DeMarco to leave work and he did not order her to continue to work or declare an operational need for her to work. The union notes that she had a valid, documented medical reason for leaving work, which she submitted at the arbitration hearing. It stresses that the grievant fulfilled any requirement to render services to the employer since she had accepted 91% of the overtime opportunities and, under a grievance settlement dated November 28, 2001, she could not be disciplined unless she had an acceptance rate below 75%.

The union charges that the employer violated Article 13.07 of the Agency Specific Agreement. It states that the contract clearly distinguishes between "required" and "expected" overtime. The union indicates that under the grievance settlement the grievant's record of refusal never approached the point where discipline could have been imposed. It states that "ODOT did not meet the standard of proof to establish leaving in the middle of the assigned overtime shift exempted these facts from the application of the Grievance Settlement Agreement, as the vast majority of witnesses testified that the consequence for leaving mid-shift involved charging of hours and changing one's position on the overtime roster, not discipline." (Union Written Closing Statement, page 35)

The union maintains that the grievant was not given notice of the revision of WR-101 prior to her discharge. It indicates that Rules 30A and 30B, which relate to work stoppages, slowdowns, or cessation of work, are entirely new rules. The union claims that no one in ODOT management could testify that he met with employees, including the grievant, to issue the new rules prior to the date of the alleged incident.

The union challenges DeMarco's testimony that he posted the new work rules at the Boston Heights garage on January 13, 2005. It observes that he stated that he posted the rules on the union bulletin board but it insists that its bulletin board is reserved for its business. The union asserts that management cannot use its bulletin board to make employees aware of new work rules.

The union disputes DeMarco's statement regarding the issuance of the work rules. It points out that he initially claimed that he handed the rules to the grievant on a specific date but admitted on cross-examination that he was unsure when he gave them to her.

The union adds that it is "extremely significant" that the work rules were distributed to employees in District 4 in April 2005. It stresses that the grievant testified that she did not see the new rules until after she was placed on administrative leave.

The union contends that an employer must provide clear and unequivocal notice of a work rule it intends to use as the basis for discipline. It cites OCSEA and Department of Youth Services; Case No. 35-03-(89-08-10)-0047-01-03; June 29, 1990, where Arbitrator David Pincus found an employee guilty of misconduct but reinstated him because the record regarding the conveyance of a new rule was so muddled as to raise "serious notice concerns." The union asserts that the instant grievance would be sustained under standard adopted by Arbitrator Pincus.

The union argues that WR-101 is unreasonable and unlawful. It indicates that the conduct that the state is attempting to regulate is already addressed by Chapter 4117 of the Ohio Revised Code and Section 4117-13-05 of the Ohio Administrative Code. The union claims that this means the rule "is unnecessary, and therefore, not reasonable." (Union Written Closing Statement, page 37)

The union maintains the Chapter 4117 of the Ohio Revised Code contains an exclusive statutory provision to declare that a work stoppage is unauthorized and to impose penalties on employees. It claims that "the employer is not free to unilaterally establish alternate procedures and penalties where it asserts that an unauthorized work stoppage has occurred, but must resort to the statutory procedures which also include the filing of unfair labor practice charges under O.R.C. Section 4117.11(B)(7)." (Union Written Closing Statement, page 37) The union cites El Rancho Unified School Dist. v. NEA, 115 LRRM 2235, (Calif. Supreme Ct., 5/31/83), in support of this point.

The union charges that WR-101 fails to meet the reasonable rule standard. It states that to meet this standard a rule must be clear and "more than a declared intent by the Employer to punish employees engaging in work stoppage by circumventing SERB's unauthorized strike determination procedure with a broad, catch-all work rule targeting all promotion or participation in an 'unauthorized' work stoppage." (Ibid.) The union further indicates:

> Work rules which may result in discipline must be clearly defined as to scope, purpose and manner in which they are to be enforced, especially, when intruding in an area specifically addressed in statutory language that is the province of the government agency which has primary responsibility for enforcing the collective bargaining law, and, particularly, the regulation of strikes and work stoppages. (Ibid.)

The union insists that the rule at issue must be subject to strict scrutiny. It indicates that any rule restricting the "promotion" of an unauthorized work stoppage involves a restriction on a right protected by the provisions of Chapter 4117 of the Ohio Revised Code and the Ohio and U.S. Constitutions regarding protected rights and free speech. The union claims that even the statutory notice provisions of the Ohio public sector bargaining law have been declared to be constitutionally suspect in Electrical Workers, UE v. SERB & Ohio Turnpike Commission, 162 LRRM 2542 (Cuyahoga Co. Ct. App., 5/18/98).

The union argues that the state did not conduct a full, fair, and impartial investigation. It accuses ODOT and its investigators of having made up their minds in the first three days of the investigation that the grievant was guilty of planning and promoting a work stoppage. The union charges that the investigators badgered witnesses and ignored evidence that would have implicated someone other than the grievant.

The union contends that the grievant was the object of disparate treatment. It

points out that Shearl, Mashburn, and Maroney got 15-day suspensions; Baker, Petrovic, Ball, and Tucci received five-day suspensions; and Ward served a three-day suspension. The union complains that only the grievant was terminated even though others were implicated in planning and promoting leaving work at 6:00 a.m.

The union maintains that the discipline imposed on the grievant was not reasonably related to the seriousness of the alleged offense. It claims that "there was no actual harm to the public or other employees, as the evidence showed that there was a full complement of trucks plowing, and all routes were covered." (Union Written Closing Statement, page 39)

The union charges that the state did not employ progressive discipline. It claims that the grievance settlement sets forth conditions for the percentage of overtime opportunities that must be rejected accepted before discipline can be imposed, beginning with a reprimand. The union asserts that the grievance should be sustained on this ground alone.

The union maintains that if the Arbitrator finds the grievant engaged in any misconduct worthy of discipline, there is an extensive evidentiary record supporting mitigation. It points out the grievant has long tenure, a record of excellent job performance, and no prior discipline. The union claims that these factors deserve significant weight in the determination of the appropriate discipline.

The union contends that the history of acrimony between labor and management was exacerbated by the chaotic conditions on the weekend in question. It states that the clashing testimony reflects management's extreme overreaction and its rush to judgment before the investigation got under way. The union claims that "the state of the evidence

... as well as the state of labor-management relations cry out for a moderate, reasoned approach to discipline." (Union Written Closing Statement, page 40)

The union highlights the grievant's record of union activity. It points out that she was a steward for 15 years and, as such, was respected by employees and management. The union notes that the grievant served as a union representative on many committees where her participation was valued. It adds that testimony showed that she was a strong advocate on contractual and safety issues.

The union concludes that the state failed to meet its burden of proving that the grievant was guilty of misconduct warranting her discharge or any discipline whatsoever. It asks the Arbitrator to reinstate the grievant with full contractual benefits and to retain jurisdiction for 60 days from the date of his award to resolve any disputes or problems in the implementation of his award.

ANALYSIS

The state argues that there was just cause for the grievant's removal. It charges that she violated items 4, 26, and 30B of Directive No. WR-101. Item 4 prohibits "interfering with and/or failing to cooperate in an official investigation or inquiry;" item 26 bars "action that could harm or potentially harm the employee or a fellow employee or a member of the general public;" and item 30B bans "organizing, leading, coordinating, promoting, or planning work stoppage or other cessation or services." The penalty for violating items 4 and 26 depends on the severity of the misconduct and the penalty for a violation of item 30B is removal.

The record strongly supports the conclusion that the grievant violated item 30B. The statements provided by Baker, Ball, Petrovic, Stephens, and Tucci during the

investigation and their testimony at the arbitration hearing leave no doubt that she organized, planned, and promoted the work stoppage on January 22, 2005. They agreed that the grievant developed the plan of leaving work at 6:00 a.m. and that she solicited the participation of other employees.

The Arbitrator acknowledges that Maroney, Mashborn, and Shearl denied that they participated in a work stoppage and rejected the claim that the grievant organized a work stoppage. The Arbitrator, however, believes that their testimony is less credible than that of the other witnesses. While Maroney, Mashborn, and Shearl have the obvious motive of denying participating in a work stoppage and defending a co-worker, Baker, Ball, Petrovic, Stephens, and Tucci have no reason to admit to being involved in serious misconduct or to accuse a co-worker of a very serious violation of the work rules.

The record indicates that the grievant also violated item 26. When the grievant organized a work stoppage in the face of an approaching winter storm, she engaged in "action that could harm or potentially harm ... a member of the general public." In fact, the evidence suggests that the departure of 10 of the 18 employees on the shift contributed to the 10 accidents reported on the roads scheduled to be plowed by the employees who left work. Even if none of the accidents were directly caused by the work stoppage, leaving the roads less than properly treated had the potential to cause significant problems for the public.

The Arbitrator must discount the union's attempt to minimize the impact of the work stoppage. Its claim that the work of clearing the roads never stopped and that there were at least the same number of drivers on the road after 6:00 a.m. as before that time is not accurate. While it is true that employees were called in to replace the ones who left

work, the roads were left untreated during the considerable time it took each of the drivers to get from their routes to their garages and then for the replacements to get back to the routes.

The Arbitrator does not question the union's argument that under the contract the grievant was not required to stay at work beyond 4:30 a.m. The union is correct that the record indicates that the grievant told her supervisor that she was sick and that she had his permission to go home. Furthermore, it properly pointed out that the grievant submitted a report showing that she arrived at the emergency room at Cuyahoga Falls Hospital at 5:55 p.m. on January 22, 2005, where she was diagnosed as suffering from gastroenteritis and dehydration and was given intravenous fluids and an anti-emetic. However, the grievant was not charged with violating item 30A by participating in a work stoppage but violating 30B by organizing a work stoppage.

The evidence also establishes that the grievant violated item 4 by interfering with the investigation of the work stoppage. The grievant's statements and her testimony indicate that she was not truthful in her account of the events of January 21 and 22, 2005. In addition, the testimony of a number of witnesses reveals that the grievant urged them to stick to their stories about what had occurred rather than advising them to be truthful. Her claim that she contacted other employees simply to confirm that they had union representation is belied by their testimony.

There is no merit in the union's argument that the state's termination of the grievant violated Section 13.07 of the ODOT Agency Specific Agreement or the grievance settlement dated November 28, 2001. The settlement states that employees are subject to discipline only after they have refused four overtime opportunities and have

refused at least 25% of all overtime opportunities. While the grievant could not be disciplined under this settlement for refusing overtime because she has worked 91% of the overtime she was offered, the grievant was not charged with refusing overtime but with organizing a work stoppage and interfering with the subsequent investigation.

The Arbitrator must reject the union's suggestion that the discipline imposed on the grievant cannot stand because she did not get proper notice of the revision of WR-101, which added items 30A and 30B. The Arbitrator recognizes that while Phillips, DeMarco, and Zemla testified that the grievant was made aware of the rules prior to January 21, 2005, she insisted that she did not see the new rules until after she was placed on administrative leave. However, the prior version of WR-101 included item 26 which would cover organizing a work stoppage during a snow storm as contrary to public safety and welfare. Furthermore, common sense would indicate that an employee who orchestrates a work stoppage is guilty of very serious misconduct.

The union's argument that WR-101 is unreasonable and unlawful because it conflicts with Section 4117.23 of the Ohio Revised Code and Section 4117-13-05 of the Ohio Administrative Code must be dismissed. While Section 4117.23(A) of the ORC states that a public employer may notify SERB of an unauthorized strike and Section 4117(B) of the ORC and Section 4117-13-05 of the OAC provide for penalties to be imposed on employees who engage in such strikes, nothing suggests that an employer cannot discipline an employee for organizing a work stoppage during the term of a collective bargaining agreement.

The Arbitrator cannot accept any suggestion that the state's rules against organizing a work stoppage must be rejected because they restrict free speech. The union

cited Electrical Workers, UE v. SERB (& Ohio Turnpike Commission), 162 LRRM 2542 (Cuyahoga Co. Ct. App., 5/18/98), in support of its claim that "any rule regarding planning or promoting a work stoppage inherently involves a restriction on speech, and must be subjected to strict scrutiny." (Union Written Closing Statement, page 38). The issue in that case, however, was the statutory strike notice provisions of Chapter 4117 of the ORC, which is an entirely different matter than speech related to organizing a work stoppage.

The Arbitrator believes that the union's claim that the state did not conduct a full and fair investigation is unjustified. The state interviewed all of the employees scheduled to work the shift that began at 10:00 p.m. on January 21, 2005, as well as other employees who might have had information regarding the events of that night. Each of the employees was afforded the right to union representation during the interviews. While Reel and Shore aggressively sought to determine what happened, there was no evidence that their behavior was inappropriate.

The Arbitrator cannot accept the charge that the grievant was the object of disparate treatment. In cases involving unauthorized strikes, employers generally try to identify the leader or leaders of the action and discharge them. Employees who are determined to have played lesser roles or who merely participated in the work stoppage are given less severe penalties.

This is precisely what the state did in the instant case. It determined that the grievant orchestrated the work stoppage and discharged her. Baker, Ball, Petrovic, and Tucci, who were only participants and acknowledged their roles in the incident, received five-day suspensions. Maroney, Mashborn, and Shearl, who continued to deny that they

were involved in the work stoppage, were given 15-day suspensions, which were reduced to 10-day suspensions at mediaton.

The Arbitrator must reject the union's complaint that the state failed to use progressive discipline. While Article 24, Section 24.02, requires the use of progressive discipline, it is universally recognized that in the case of very serious misconduct an employer is not required to follow the usual sequence of increasingly severe discipline. In the instant case, the grievant committed an offense that is regarded as just cause for immediate termination. The fact that the grievant organized the work stoppage as a major winter storm was approaching the state and undermines any possible suggestion that the penalty imposed was too severe.

The Arbitrator cannot accept the union's request for mitigation. He recognizes that the grievant had long service and very good evaluations and that her co-workers and supervisors testified that she was a good worker. He also acknowledges that Zelma and others stated that the grievant behaved in a professional manner in her work as a union steward. These facts, however, do not offset the seriousness of her misconduct on January 21 and 22, 2005.

While the grievant and other employees may have had complaints and concerns about the distribution of overtime during snow and ice events, the solution was to file a grievance. When the grievant resorted to direct action and organized a work stoppage in the face of a major winter storm, she provided the state with just cause for her discharge.

AWARD

The grievance is denied.

Nels E. Nelson
Arbitrator

March 3, 2007
Russell Township
Geauga County, Ohio