VOLUNTARY LABOR ARBITRATION TRIBUNAL

In the Matter of Arbitration	*	
Between	*	
	*	OPINION AND AWARD
OHIO CIVIL SERVICE	*	
EMPLOYEES ASSOCIATION,	*	Anna DuVal Smith, Arbitrator
LOCAL 11, AFSCME, AFL/CIO	*	
	*	
and	*	Case No. 30-04-070112-0137-01-14
	*	
	*	Donald Bugg, Grievant
OHIO DEPARTMENT OF TAXATION	*	Removal
	*	

APPEARANCES

For the Ohio Civil Service Employees Association, Local 11 AFSCME, AFL/CIO:

Marva McCall
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OCSEA, Local 11 AFSCME, AFL/CIO
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For the Ohio Department of Taxation:

Gregory Siegfried
Ohio Department of Taxation

Victor Dandridge
Ohio Office of Collective Bargaining

I. HEARING

A hearing on this matter was held at 9:25 a.m. on September 12, 2007, at the offices of OCSEA, Local 11 AFSCME in Westerville, Ohio, before Anna DuVal Smith, Arbitrator, who was mutually selected by the parties by direct appointment pursuant to the procedures of their collective bargaining agreement. The parties stipulated the matter is properly before the Arbitrator and presented one issue on the merits, which is set forth below. They were given a full opportunity to present written evidence and documentation, to examine and cross-examine witnesses, who were sworn or affirmed and excluded, and to argue their respective positions. Testifying for the Ohio Civil Service Employees Association, Local 11 AFSCME, AFL/CIO ("Union") were Frederick Anthony, Leslie Cassady, Marilyn Debelius, Eric Hollobaugh, Charles Kumper, Pam Shropshire-Matrunick, Timothy Stauffer, and the Grievant, Donald Bugg. Testifying for the Ohio Department of Taxation ("Management") were Peggy Biven, Dennis Corrigan, Charles Kumpar, Vincent Simon and Timothy Stauffer. A number of documents were entered into evidence: Joint Exhibits 1-3, Union Exhibits 1-2, 4, 7-12, and 13-17 and Management Exhibits 1-2. The oral hearing was concluded at 6:30 p.m. Post-hearing briefs were timely filed and exchanged by the Arbitrator on October 1, 2007, whereupon the record was closed. This Opinion and Award is based solely on the record as described herein.

II. STATEMENT OF THE CASE

This case concerns the removal on January 5, 2007, of a Computer Operator 2 employed by the Ohio Department of Taxation since June 30, 2003. At the time of his removal for harassing and/or intimidating a co-worker, the Grievant had the following active discipline:

Date	Discipline	Rule Violated
March 3, 2005	Verbal Reprimand	Unexcused tardiness
Dec. 8, 2005	Written Reprimand	Leaving work early without authorization; Neglect of duty: failure to carry out work assignment
Nov. 6, 2006	10-day Suspension	Failure of good behavior: discrimination or harassment

The incidents leading to the Grievant's removal began on November 15 at the State of Ohio Computer Center where the Grievant was working the second shift. A fellow employee, Vincent Simon, complained to the Grievant's supervisor, Pamela Shropshire-Matrunick, that the Grievant was taking naps in an empty cubicle area next to Simon's. Matrunick, in turn, told the Grievant someone had complained. Thereafter, according to Simon, the Grievant returned to the cubicle area several times and made exaggerated and loud noises, slapped the window sill and hit the cubicles' sides, laughed and coughed. The behavior allegedly reoccurred the following night. On Friday when the Grievant came back into the cubicle area and went into an empty one, Simon tried to contact his own supervisor, but could only leave voice mail for her. For approximately three hours, Simon testified, the Grievant stealthily and repeatedly returned to the cubicle area. Simon began to be concerned for his safety because the two men were working alone that evening. Simon's supervisor finally returned his call around 8:45 p.m. While they were speaking, the Grievant came up behind Simon and said, "You got the right one" after Simon mentioned a steward's name in his conversation with his supervisor. Because he was now frightened, Simon got permission to leave and was subsequently reassigned to another facility.

From the Grievant's perspective, he had been in his supervisor's office where he had learned there was a complaint against him and had figured out its source. When he left her office he walked down the hall towards Simon's cubicle and, from approximately ten to 15 feet away, said, "you got the right one," meaning that Simon had chosen someone to complain about who could file complaints as well. He then went to his own work area to write an email complaining about inappropriate email he had received some time in the past from Simon. The Grievant

testified his comment ("You got the right one") was not in response to Simon's use of the steward's name. He never heard what Simon was saying on the phone. He just wanted Simon to know he could use the same tactics Simon was using against him and he is pretty sure Simon did not take it as a threat at the time. After he made his remark, he went directly to his own work area, sent his own complaint email, but never got any follow up inquiry from the Equal Employment Opportunity officer.

Timothy Stauffer, now Executive Administrator, conducted an investigation after the incident was reported to him on Friday, November 17. He interviewed the alleged victim first, on November 20, taking handwritten notes. Also present and taking notes was Labor Relations Officer Charles Kumpar. Stauffer testified he found this witness credible and was "absolutely certain" of him. He reported his findings to Francie Adams in the human resources section. Stauffer's second interview, also conducted November 20 in the presence of Kumpar with both taking handwritten notes again, was of the Grievant's supervisor. Stauffer concluded that she bore some responsibility because she had told the Grievant there was a complaint about him. He reported this to Ms. Adams as well. Ms. Shropshire-Matrunik ultimately received a 10-day suspension for her involvement. Two days later the Grievant was interviewed in the presence of Dennis Corrigan and Union Steward Ron Kirkpatrick. As before, Stauffer had a proposed list of questions and took notes. He believed the Grievant implicated himself when he admitted standing behind Simon and saying "You got the right one." These findings, too, were orally reported to Ms. Adams.

A pre-disciplinary hearing notice was issued by Kumpar on December 15 setting date of the meeting for December 21 and citing work rules 5-F (threats) and 18 (violation of policies, specifically Anti-Harassment Policy and/or Workplace Violence Policy). Simon and Shropshire-Matrunick were named as witnesses, and an email "Summary of Events" written by Simon on November 28 was attached, as were copies of the Agency's rules and the Grievant's prior discipline. The hearing went forward on December 28, Charles Kumpar presiding. Also present

was the Grievant and his Union representative, and Corrigan and Leslie Cassady for Management, the latter of whom was recommending discipline. Kumpar took notes but did not issue a written report. In arbitration he testified he orally recommended that the Grievant be disciplined based on the sole written statement attached to the pre-disciplinary hearing notice, that being Simon's of November 28.

On January 3, 2007, the Grievant was notified that he was terminated effective January 5. This action was grieved on January 12, citing lack of just cause and complaining that documents relative to the case which had been repeatedly sought by the Union since November 18 had not been forthcoming. A Step 3 hearing was held on or before March 7, Timothy Stauffer presiding. He denied the grievance on March 7, after which the Union appealed to arbitration.

Meanwhile, even after the case was scheduled for arbitration the Union continued to have difficulty getting documents and some of those provided, which were handwritten, were difficult-to-impossible for its representatives to decipher. Thus, on the eve of the scheduled arbitration hearing, the Union filed a motion to bifurcate on an issue of Management's responsibility to provide relevant documents. This issue was settled by the parties pre-hearing with, amongst else, Management agreeing to prepare transcripts of the handwritten notes. The hearing on the merits was accordingly delayed to allow that to occur. Finally, in September, the case came for arbitration as aforesaid, free of procedural defect, on the stipulated issue of: *Was Grievant Donald Bugg removed from his position as a Computer Operator II for just cause? If not, what shall the remedy be?*

III. PERTINENT PROVISIONS OF THE CONTRACT

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...

24.04 - Investigatory Interview

An employee shall be entitled to the presence of a union steward at an investigatory interview upon request and if he/she has reasonable grounds to believe that the interview may be used to support disciplinary action against him/her.

When employees have a right to and have requested a steward, stewards shall have the right to be informed of the purpose of the interview and to receive a copy of any documents the Employer gives to an employee to keep, during an investigatory meeting...

24.05 - Pre-Discipline

An employee has the right to a meeting prior to the imposition of a suspension, a fine, leave, reduction, working suspension or termination... Prior to the meeting, the employee and his/her representative shall be informed in writing of the reasons for the contemplated discipline and the possible form of discipline. When the pre-disciplinary notice is sent, the Employer will provide a list of witnesses to the event or act known of at that time and documents known of at that time used to support the possible disciplinary action. If the Employer becomes aware of additional witnesses or documents that will be relied upon in imposing discipline, they shall also be provided to the Union and the employee prior to the meeting. In the event the Employer provides documents on the date of the meeting, the Union may request a continuance not to exceed three (3) days. Such request shall not be unreasonably denied. The Employer representative or designee recommending discipline shall be present at the meeting unless inappropriate or if he/she is legitimately unable to attend. The Appointing Authority's designee shall conduct the meeting. The Union and/or the employee shall be given the opportunity to ask questions, comment, refute or rebut.

ARTICLE 25 - GRIEVANCE PROCEDURE

25.09 - 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. Proficiency tests or other assessments shall only be released pursuant to Article 17, Section 17.06.

This section applies to all steps of the grievance procedure: The Employer shall provide copies of documents, books and papers relevant to the grievance without charge to the Union, unless the request requires more than ninety (90) minutes of employee time to produce and/or copy, at which time the Union will be charged $.10 per page.

IV. ARGUMENTS OF THE PARTIES

Argument of Management

Management's position is that it had just cause for removal inasmuch as its decision was not for arbitrary or pretextual reasons and was made after an appropriate investigation. To begin with, the Grievant had forewarning that the Department has zero tolerance for threats, harassment and intimidation. He was informed through the Department's rules and policies and through serving a ten-day suspension for harming a co-worker. The Department conducted an objective and fair investigation, interviewing witnesses and collecting documents in the form of e-mails. These point to the Grievant's guilt. Moreover, the victim of the Grievant's conduct, a ten-year employee with no prior discipline, is more credible than the Grievant, a relatively short-term employee with a lengthy suspension already on his record. Other witnesses corroborate the victim's fear. The documentary evidence (in the form of e-mails) also support the charges, even the Grievant's which, claims Management, was a pre-emptive strike. Management insists that removal is the only option. Rule 18 permits termination for a first offense and the Grievant

already had a Rule 5F violation. If he is returned to the workplace he can be expected to engage in victimizing behavior again.

Management's second argument is that any alleged violation of Article 24.05 was either waived or is not properly before her by virtue of the stipulated issues and the fact that it was not cited in the grievance. But if the Arbitrator finds that it is properly before her, Management submits that there was no violation. It is incredulous, Management says, that the Union had to guess what the Grievant was charged with or that the Grievant was unaware of the facts behind the charge. He knew from the pre-disciplinary hearing notice (which was contractually compliant) giving both the names of witnesses and referencing the departmental investigators who had interviewed him. No one else was relied on at that time. The Contract does not require either a written investigation report, or a hearing officer's report, nor does it require stenographic transcripts of investigatory interview notes or pre-disciplinary hearing notes, nor does *Loudermill* require such as long as there is a full *de novo* arbitration hearing. *Local 451, Communication Workers of America, Ohio State University* (1990), 49 Ohio State 3d 1, 6. Since Leslie Cassady was the employer designee recommending discipline, there was no violation of "shall be present." The other requirements of Article 24.05 (giving the Union all documents relied on and an opportunity for its representatives to ask questions) were met. The Union was also given transcripts of notes taken at the interviews and pre-discipline meeting. However, if the Arbitrator finds there was a violation of Article 24.05, the appropriate remedy is not reinstatement, but back pay from the date of removal to the date of the arbitration. Parties' Case No. 15-00-20010917-0123-01-07 (A. Smith, 2002)

Finally, Management argues the grievance is defective in that it did not request reinstatement as a remedy and there is no violation of Article 25.09 or Article 2.01. Therefore, the only remedy appropriate is back pay through the date the record closed. All document requests were made without a grievance because the requests came before a grievance was filed under the Ohio Public Records Act, which is not contained in the Collective Bargaining

Agreement. As for discrimination, the Union failed to bring any evidence to support such an allegation.

For all these reasons, Management asks that the grievance be denied in its entirety.

Argument of the Union

The Union's position is that Management maliciously and blatantly disregarded the well-established just cause standard of Article 24.01 in at least four ways. It did not conduct a fair and objective investigation before it made its decision to discipline, relying exclusively on Simon's summary of events which was embellished and self-serving. Management even knew it was not factual. Second, it conducted no investigation whatsoever. It did no question-and-answer interviews, wrote no investigation reports, did not produce a pre-disciplinary hearing report, nor even a written discipline recommendation. Third, there was no substantial proof of guilt. Simon's testimony and that of his supervisor proves that Simon was neither verbally nor physically threatened. Simon's email did not mention banging or slapping of cubicles or windows. His only mention of fear was that the Grievant and Grievant's supervisor would fabricate a story. Additionally, the Grievant's supervisor testified she did not restrict the Grievant's access to Simon's area. Fourth, the rules and procedures for investigating complaints were not even-handedly applied inasmuch as the Grievant's complaint was ignored while Simon's was pursued.

The Union further argues that Management failed to provide documents pursuant to Article 25.09 until a month after the Grievant's removal despite the steward's attempts dating from December 20.

Citing Arbitrator Rivera's *Burley* decision (Parties' 07-00-19890612-0041-01-07), the Union submits that Management violated all four factors to be considered in procedural violations: (1) the case was prejudiced by procedural lapse, (2) there was an explicit contractual violation, (3) there was an implicit violation of due process notions of fairness, and (4) Management did not follow its own rules. In addition, the Union was unable to obtain proper

documents in a timely fashion. For this reason, it asks not only that the grievance and standard remedies be granted, but that the Grievant be awarded 6.5 percent interest on back pay.

V. OPINION OF THE ARBITRATOR

The Collective Bargaining Agreement in Article 24 requires just cause for discipline. "Just cause" as it is commonly understood in labor relations means the employer has substantial proof of wrong-doing, has afforded the employee due process and equal protection, and has considered both mitigating and aggravating circumstances.

To begin with, Management charged the Grievant with a heinous offense–threatening another employee–which, if true, would affect the employee's reputation and ability to obtain other employment. To sustain such a charge, an employer must have clear and convincing proof. Here the proof did not even rise to the preponderance standard, being based solely on the report of the co-worker allegedly threatened who had a deteriorated relationship with the Grievant since the events of prior discipline. In so-doing, it accepted the co-worker's erroneous conclusion that "You got the right one" referred to the person the co-worker had just referred to in his phone conversation (the Union steward) and that the Grievant had stealthily crept up close enough behind the co-worker to eavesdrop on his conversation whereas the Grievant was some yards outside the cubicle, had not overheard the conversation, but had just learned that a complaint against him had been made and wanted only to convey that he was not shy about making complaints either. The Grievant had a reason to keep his head low inasmuch as he was serving a working suspension as the result of a grievance settlement and knew he was on thin ice. He had every reason to keep out of trouble, but Management considered none of this, neither his lack of motivation to provoke the co-worker nor the meaning of his words. Neither did it consider that the co-worker may have exaggerated or over-reacted. In fact, the investigator was "absolutely certain" of the co-worker's veracity before he interviewed any other witness. This, in itself, breaches the just cause due process requirement for a fair and objective investigation which requires that whoever conducts the investigation do so looking for exculpatory evidence as well

as condemning evidence, a task difficult if not impossible to accomplish when one's mind is already made up. Then, to make matters worse, the same investigator served as the third step hearing officer, essentially reviewing his own pre-formed opinion.

The Union has another complaint about the investigation and that is that the interviews did not yield a question-and-answer transcript or a written investigator's report for the pre-discipline meeting. Management is correct that neither the Collective Bargaining Agreement nor just cause require a specific technique or a written report. If the employer wishes to rely entirely on oral questions-and-answers and its investigators' memories and the memories of those to whom they report, it is entirely within its rights. But it does so at its peril inasmuch as it will have to deal with the consequences of memory lapses, prevarication on what was asked and what the answers were, charges of cover-up, and the like. Here Management had only handwritten notes which it refused to produce until after the grievance was filed and which had to be transcribed for clarity, thus delaying the arbitration hearing. These notes are unquestionably discoverable under Article 25.09. Whether they had to have been produced at the pre-discipline stage as "documents known of at that time used to support the possible disciplinary action" depends first on whether the employer knew of the notes (it unquestionably did) and, second, whether they might be used to make a discipline decision. Management cannot possibly claim the notes of the interviews were not going to be a factor because the hearing officer himself attended the interview of the accuser and took a set of notes himself. He thus had access to relevant information supplied by the accuser that was denied to the Union inasmuch as neither the notes nor an investigative report was supplied until after the decision was made, the termination effectuated, and the grievance filed.

In short, the employer here appears to have been so eager to rid itself of this employee that it threw out years of custom and good practice, and ignored contractual language that has served the parties well. Despite all this, it did not even meet the burden of proof.

VI. AWARD

The grievance is granted. Grievant Donald Bugg was removed from his position as a Computer Operator II without just cause. The Grievant is to be reinstated to his former position forthwith. The removal is to be stricken from his record and he is granted full back pay less any earnings he may have had in the interim on account of his unjust dismissal. The Employer may require reasonably available evidence of interim earnings. He is also awarded full benefits, seniority, and to be made whole. The request for interest is denied The Arbitrator retains jurisdiction for a period of sixty (60) days on the sole matter of remedy.

Anna DuVal Smith, Ph.D.
Arbitrator

Cuyahoga County, Ohio
December 18, 2007

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