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ARBITRATION PURSUANT TO COLLECTIVE BARGAINING AGREEMENT
BETWEEN THE PARTIES

In the Matter of

OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION, AFSCME LOCAL 11

and

STATE OF OHIO DEPARTMENT OF JOB AND FAMILY SERVICES

Grievance No. 16-11-20110406-1027-01-09

Grievant: Tobias Williams

ARBITRATOR'S OPINION AND AWARD

This Arbitration arises pursuant to the collective bargaining agreement ("the Agreement") between the Parties, Ohio Civil Service Employees Association, AFSCME Local 11 ("the Union") and State of Ohio Department of Job and Family Services ("the State" or "ODJFS") under which Susan Grody Ruben was appointed to serve as sole, impartial Arbitrator. The Parties

stipulated the grievance is properly before the Arbitrator for a final and binding Award pursuant to the Agreement. Hearing was held June 27, 2012. The Parties were given full opportunity to introduce witness testimony, documentary evidence, and make argument. Timely post-hearing briefs were filed by both Parties by July 27, 2012.

APPEARANCES:

On behalf of the Union:

Rusty Burkepile, OCSEA Staff Representative.

On behalf of the State:

Tiffany Richardson, ODJFS Labor Relations Officer.

ISSUE

Did the State violate the Agreement when it considered the Grievant to have resigned on March 21, 2011? If so, what shall the remedy be?

RELEVANT SECTIONS OF THE PARTIES' COLLECTIVE BARGAINING AGREEMENT

(April 15, 2009 – February 29, 2012)

PREAMBLE

This Agreement, is hereby entered into by and between the State of Ohio, hereinafter referred to as the Employer, and the Ohio Civil Service Employees Association, AFSCME, Local 11, AFL-CIO, hereinafter referred to as the Union, has as its purpose the promotion of harmonious relations between the Employer and the Union; the establishment of an equitable and peaceful procedure for the resolution of differences; and the establishment of wages, hours, and other terms and conditions of employment.

. . .

ARTICLE 2 – NON-DISCRIMINATION

2.01 – Non-Discrimination

Neither the Employer nor the Union shall discriminate in a way inconsistent with the laws of the United States or the State of Ohio on the basis of race, sex, creed, color, religion, age, national origin, political affiliation, disability, sexual orientation, or veteran status. Except for rules governing nepotism, neither party shall discriminate on the basis of family relationship. The Employer shall prohibit sexual harassment and take action to eliminate sexual harassment in accordance with Section 4112 of the Ohio Revised Code, and Section 703 of Title VII of the Civil Rights Act of 1964 (as amended).

The Employer may also undertake reasonable accommodation to fulfill or ensure compliance with the Americans with Disabilities Act of 1990 (ADA) and corresponding provisions of Chapter 412 of the Ohio Revised Code. Prior to establishing reasonable accommodation which adversely affects rights established under this Agreement, the Employer will discuss the matter with a Union representative designated by the Executive Director.

The Employer shall not solicit bargaining unit employees to make political contributions or to support any political candidate, party or issue.

2.02 – Agreement Rights

No employee shall be discriminated against, intimidated, restrained, harassed or coerced in the exercise of rights granted by this Agreement, nor shall reassignments be made for these purposes.

2.03 – Equal Employment Opportunity/Affirmative Action

The Employer and the Union agree to work jointly to implement positive and aggressive equal employment opportunity/affirmative action programs to prevent discrimination and to ensure equal employment opportunity in the application of this Agreement.

The Agencies covered by this Agreement will provide the Union with copies of equal employment opportunity/affirmative action plans and programs upon request. Progress toward equal employment opportunity/affirmative action goals should also be an appropriate subject for Labor/Management Committees.

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ARTICLE 5 – MANAGEMENT RIGHTS

The Union agrees that all of the function, rights, powers, responsibilities and authority of the Employer, in regard to the operation of its work and business and the direction of its workforce which the Employer has not specifically abridged, deleted, granted or modified by the express and specific written provision[s] of the Agreement are, and shall remain, exclusively those of the Employer.

Additionally, the Employer retains the rights to: 1) hire and transfer employees, suspend, discharge and discipline employees...5) make any and all rules and regulations....

. . .

FACTS

The Grievant was hired by the State on December 27, 2005 as an Infrastructure Specialist 2 at ODJFS. From January 2011 through March 16, 2011, he was out on Voluntary Cost Savings Days. He was experiencing some personal and family problems during this period. As of March 16, 2011, he had zero leave balances. His supervisor, Don Womeldorff, put him on leave without pay on March 17 and 18, 2011.

In a March 18, 2011 email sent to his supervisor at 2:18p, the Grievant attached the following letter dated March 17, 2011:

> I am writing to request unpaid leave of absence immediately through August 12 2011.
>
> My request is based on personal reasons.
>
> In the event my request is denied, I will regretfully resign effective April 2nd 2011. If it is determined my only choice is to resign please contact me to work out the details of turning in my equipment as well as picking up my personal items from my [cubicle].
>
> This was not an easy request/decision on my part. The experience working for the state has been very rewarding. If this request is granted, I would be pleased to resume working for ODJFS on August 12 2011.
>
> Thank you for your consideration in this matter.
>
> Sincerely,
>
> Tobias Williams

In a March 18, 2011 email the Grievant's supervisor sent to him at 2:34p, he wrote:

> Tobias. The agency is not going [to] grant your request for unpaid leave of absence.

In a March 18, 2011 text message sent to the Grievant at 2:41p, his supervisor wrote:

> The agency is not going to grant the unpaid leave request. I sent you the email. If you resign it needs to go to bud hunt[1]. I am not authorized [to accept] resignations.[2]

In a 2:55p text message the Grievant sent to his supervisor on March 18, 2011, the Grievant wrote:

> I sent to both of u so he has it.

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[1] Bud Hunt is an Assistant Deputy Director of ODJFS.

[2] With regard to the Grievant's supervisor not being authorized to accept resignation, the State entered the following ODJFS memorandum into evidence:

> March 24, 2010
> From: Douglas E. Lumpkin
> To: All ODJFS Employees
> Subject: Delegation of Authority to Accept Resignations
>
> A recent ruling by the Tenth District Court of Appeals (Holben v. Ohio State Medical Board, 2009-Ohio-6323) [s]tates that "only an appointing authority or person with express delegation has the power to formally accept the resignation of an employee." This letter designates the following positions as having the delegated authority to accept resignations for the appointing authority:
>
> 1. All Assistant Directors; Deputy Directors; Assistant Deputy Directors; Bureau Chiefs; and Office Managers of remote offices.
>
> 2. Within the Bureau of Employee Services: Chief of Talent Services; Chief of Talent Acquisition; Chief of Civil Rights/Labor Relations; Chief of Payroll and Benefits; Labor Relations Administrator 1; and Labor Relations Officer 3.
>
> This authority may not be delegated below the levels stated. This letter of delegation shall be attached to the current JFS 05006 Signature Authorization/Delegation form for those given this authority. All new JFS 05006 forms for these positions shall include the specific statement "delegated authority to accept resignations."

The Grievant sent a 2:57p text message to his supervisor that same day, saying:

> So I'm assuming [I'll] get something saying denied – and like my letter says I regretfully resign. But – bud was copied on the email I sent to u. Let me know when you want my laptop, etc.

The Grievant's supervisor texted him back at 3:14p that day:

> I cannot accept resignations. Bud level and above. If you could just email him based on the request being disapproved. Thk out the next 2 weeks and equipment d

The Grievant texted back his supervisor immediately at 3:14p:

> I will work out the next 2 weeks and equip pick up delivery

The Grievant's supervisor texted the Grievant back at 3:28p:

> We need an official resignation letter. H r says this is not official. Sorry about the hassle.

On March 21, 2011, ODJFS Labor Relations Officer 3 Nancy Jansco-Kocarek telephoned the Grievant at 9:38a and spoke to him for two minutes. At 9:43a that morning, she called him again and spoke for six minutes. According to Kocarek, she told the Grievant, "I accept your resignation." According to the Grievant, Kocarek did not say that, but rather instructed him to fax in an official signed letter of resignation. The Grievant did not send ODJFS a signed letter of resignation that day or any subsequent day.

Ms. Kocarek emailed the Grievant at 10:04a that day:

> Subject: our phone discussion 3/21/2011
>
> Tobias, as your supervisor explained to you on Friday, March 18, 2011, the agency will not approve your request for an unpaid leave of absence.

Ms. Kocarek emailed the Grievant again at 10:16a that day:

> As you requested, below is a list of individuals that you may contact with questions about your benefits:
>
> [name], Payroll Manager, [phone number]
> [name], FMLA Coordinator, [phone number]
> [name], Disability Coordinator for OIS, [phone number]
> [name], Payroll and Benefits for OIS, [phone number]

The Grievant texted his supervisor at 11:52a that day:

> So now that it[']s done what was the hurry getting me out of there if u can't hire anyone [until] july anyway? Never made sense to me

The Grievant's supervisor responded by text at 11:54a that day:

> Gotta start the hiring asap. Can't start it without a vacant slot. I will be working on it next week. July probably but if it gets fast tracked most likely may

At 7:11p that day, the Grievant's supervisor texted the Grievant:

> What ever [you're] sending in today. It needs to go to bud hunt and only copy me. Thanks

On March 25, 2011, the Grievant emailed Ms. Kocarek:

> After consulting with some people I know have my best interest in mind I was asked if I've ever spoke[n] to my union. The answer

> was no, not in the entire 8+ years I've been around. It was strongly recommended that I don't quit my job based on what someone else wants me to do, and I had to agree.
>
> After discussing with my union rep I am not turning in a signed resignation as you said was needed for it to be official. I've explain[ed] in detail the things going on my life (way beyond what I've shared with anyone at ODJFS) to my union rep and they recommend I seek a medical opinion before I take this extreme step. That's what I'm going to do. I'm working today to setup that appointment. I'm attempting to set it up as soon as monday next week. If that's available that's when [I'll] go and update you from there.

In a letter dated March 28, 2011, HCM Manager Cheryl Holloway sent a "separation letter" to the Grievant that provided in pertinent part:

> This letter is to acknowledge your separation from ODJFS. In order to document your payroll records accurately, you are not authorized to work beyond the date listed below....
>
> LAST DAY OF EMPLOYMENT: Friday, March 18, 2011.
>
> ...

On March 31, 2011, Ms. Kocarek emailed the Grievant at 4:47p:

> Tobias, your resignation from ODJFS was officially accepted on Monday, March 21, 2011. I verbally accepted your resignation on the phone when I spoke with you.
>
> Additionally, in lieu of not receiving any further written, signed resignation confirmation from you, ODJFS accepted the texted resignation that you sent to Don Womeldorff on March 18, 2011, as your official resignation from ODJFS.
>
> You are no longer an employee of ODJFS.

> If you have not already done so, please make arrangements with Don Womeldorff to turn in any and all State equipment that you may still have in your possession.
>
> If you have any further questions, please contact me directly.

At 5:06p that day, the Grievant emailed Ms. Kocarek:

> I was told from yourself as well as Don that it was not official unless I sign a written "signed" resignation. You both told me what I submitted was not official, so I'm not sure what logic you use to determine it[']s official now (other than you wanting it to be)
>
> I[']ll file the proper paper work with the union and include all of our dialog[ue].
>
> As far as the equipment, it[']s been made clear by Don that ODJFS is in urgent need of it so I have no problem turning it in until this is resolved.
>
> Don can email me to arrange to get it, or if you prefer send me a fedex account number and I can go to a fedex drop and send it to you.
>
> Thanks

The Union filed a grievance dated April 7, 2011, which provides in pertinent part:

> Statement of Facts:
>
> The grievant's CB rights were violated when management harassed, intimidated and coerced the grievant into submitting his resignation when that was not his intention. Prior to his approved VCSD's ending he was in the process of requesting days to deal with personal issues since he was unaware and unadvised of other leave options such as FMLA or Disability. He had no choice but to follow management's instruction and resign against his will. At that time he was told that his resignation was not accepted. He

was unable to return to work [due] to medical issues but had every intention [of] returning to work once he was physically and mentally able. The grievant is currently seeking medical attention. Although nothing has changed, management now states that they have accepted his resignation and he is not permitted to return to work. He was treated unfairly and not advised of his options. No document was signed for resignation[. He] was advised that resignation had to be signed to be official and accepted.

Remedy sought:

To return the grievant to his position with ODJFS as Infrastructure Specialist 2 and to be made whole in every other way. To remain the Akron tech with same responsibility as previously had.

POSITIONS OF THE PARTIES

Union Position

The Agreement is silent on the question of acceptance of employees' resignation. Consequently, the question is subject to standards found in Ohio law and arbitral precedent.

Davis v. Marion County Engineer, 60 Ohio St.3d 53, 55 (1991) ("Davis") holds that "[A] public employee may rescind or withdraw a tender of resignation at any time prior to its effective date, so long as the public employer has not formally accepted such tender of resignation."

The Grievant's supervisor testified he received an email on March 21, 2011 from Ms. Kocarek stating she had verbally accepted the Grievant's resignation. No such email was proffered at the hearing.

On March 18, 2011, the Grievant submitted a conditional resignation effective April 2, 2011. On March 25, 2011, one week after the Grievant had submitted his conditional resignation, and after no formal acceptance by ODJFS of his resignation, the Grievant rescinded his resignation.

The Grievant's supervisor testified Ms. Kocarek told him ODJFS needed an official resignation letter from the Grievant; the Grievant's supervisor conveyed this to the Grievant in a text message.

The Grievant testified that on March 21, 2011, Ms. Kocarek told him on the telephone his resignation was not official until ODJFS management received a written, signed resignation. Ms. Kocarek gave the Grievant a fax number he should use to send his resignation.

Thus, the record shows two different managers told the Grievant he needed to submit a signed, written resignation for it to be official. The record also shows the Grievant rescinded his resignation in a March 25, 2011 email to Ms. Kocarek.

In OCSEA and ODRC, Case No. 27-25-961202-1169-01-09 (1999) (Gt. Brenda Moyer) ("Moyer"), Arbitrator Brookins, in the absence of contract language, relied on Davis, supra, and held:

> Defining valid acceptance as a formal, affirmative action ensures that employees are clearly – though not necessarily directly – notified that their resignations have been accepted. Ultimately,

> then, employer should embrace some type of affirmative act which constitutes formal acceptance of employees' reignations.

Id., at 17. In that case, Arbitrator Brookins denied the grievance based on the fact the grievant had voluntarily resigned, changed her mind, and submitted a tardy rescission to her previously-accepted resignation.

In the instant case, the Grievant submitted his resignation by email on March 18, 2011. Later that same day, he was informed his email was not an official resignation. Management never formally accepted the Grievant's resignation. There was no act of affirmative acceptance of the resignation, either written or verbal. Management specifically informed the Grievant that only a written, signed resignation would serve.

On March 25, 2011, the Grievant rescinded his resignation in writing. He informed ODJFS he had changed his mind and would not be submitting the written, signed resignation it required to make his resignation official. ODJFS had not affirmatively accepted the Grievant's resignation by March 25, 2011. The Grievant's rescission predated any affirmative acceptance.

ODJFS has not filled the position held by the Grievant. It could still put the Grievant back to work by acknowledging he rescinded his resignation. The Grievance should be sustained and the Grievant be restored to his former position and assignments. The Grievant should be made whole, with no loss of pay, minus deductions, including Union dues, with full seniority, all benefits

provided by the Agreement and Ohio law, including but not limited to sick leave, vacation, personal leave, and health insurance coverage for the period of unemployment, including health care costs incurred, with Employer PERS and Benefits Trust conributions owed, and restoration of lost FMLA hours for the purpose of determining FMLA eligibility.

State Position

Pursuant to Article 5 – Management Rights – acceptance of resignations is an exclusive right of the State. The Agreement is silent regarding the method for accepting resignations. Therefore, the State did not violate the Agreement when it verbally accepted the Grievant's resignation on March 21, 2011 and later reminded him of that verbal acceptance in a March 31, 2011 email.

The grievance alleges violation of Article 2 – Non-Discrimination. The testimony of Ms. Kocarek and Cheryl Holloway, Manager of Payroll/Benefits, established ODJFS accepted and processed the Grievant's resignation no differently from other employee resignations and according to ODJFS practice. Thus, there is no Article 2 violation.

The grievance also alleges violation of Article 24 – Discipline. The State did not issue any discipline to the Grievant, however. Additionally, the Union

stipulated at Step 3 that the grievance was an issue grievance, not a removal grievance. The Union has the burden of proving the State violated the Agreement; the Union cannot carry its burden.

ODJFS acted consistent with Ohio law. Resignations may be accepted verbally, as well as in writing. Davis, supra. According to the Ohio Supreme Court:

> While the better practice for all concerned would require that the tender of resignation, acceptance of resignation, or withdrawal of resignation prior to acceptance be set forth in writing, we find it would be unwise to totally foreclose any of these actions from being accomplished orally.

Id., at 55.

The Grievant tendered a written resignation to ODJFS via email and via text message. ODJFS then engaged in several affirmative actions to indicate to the Grievant that his resignation was accepted. First, an ODJFS designee spoke to the Grievant on March 21, 2011 at 9:43a to verbally inform him that his resignation was accepted. Second, both Parties testified ODJFS management engaged in several conversations with the Grievant to coordinate the pick-up of the State equipment in the Grievant's possession. Third, management informed the Payroll Unit of the resignation and acceptance thereof, and the Payroll Unit processed the resignation. Ms. Holloway testified she sent a letter to the Grievant to inform him of his last day of employment

and to inform him of the action needed for the Grievant to receive his last paycheck. Finally, it was reasonable for management to believe the Grievant had resigned, due to the depletion of his leave.

The Grievant's actions also confirm he understood his resignation was accepted on March 21, 2011. First, after speaking with Ms. Kocarek, he sent a text message to his supervisor inquiring as to when he should turn in his State equipment. Second, he sent a second text message to his supervisor that same day stating, "So now that it's done what was the hurry getting me out of there…." Finally, the Grievant made no attempt to come to work or call off at any point after speaking with Ms. Kocarek on March 21, 2011.

The Union contends the Grievant's separation from ODJFS was processed prematurely. Payroll's letter sent to the Grievant stated the Grievant's last day of employment was March 18, 2011, despite the Grievant's resignation letter stating an effective date of April 2, 2011. According to OAC Section 123:1-34-01(A)(3), however,

> [a]n employee who fails to return to service from a leave of absence without pay and is subsequently removed or voluntarily resigns from the service is deemed to have a termination date corresponding to the starting date of the leave of absence without pay.

The Grievant testified he attempted to rescind his resignation in a March 25, 2011 email. However, the Grievant's resignation had already been

accepted; therefore, ODJFS had no obligation to re-employ the Grievant. In Moyer, supra, Arbitrator Brookins relied upon Davis, supra, which held:

> [A] public employee may rescind or withdraw a tender of resignation at any time prior to its effective date, so long as the public employer has not formally accepted such tender of resignation.

Id., at 55. The Grievant submitted his resignation on March 18, 2011. Ms. Kocarek verbally accepted the resignation on March 21, 2011. The Grievant and ODJFS acknowledged the acceptance of the Grievant's resignation in their subsequent actions. The Grievant is not entitled to employment with ODJFS because his attempted rescission of his resignation came after ODJFS had accepted his resignation.

ODJFS followed Agency practice in accepting the Grievant's resignation. Per the ODJFS Directive on this subject, LRO 3's such as Ms. Kocarek may accept resignations, but front-line supervisors such as Mr. Womeldorff may not. ODJFS thus had an employee of appropriate authority accept the Grievant's resignation.

Additionally, there is not just one rigid method of accepting resignations. As an Agency with more than 3000 employees, there must be flexibility in the manner in which employees tender resignation and also in the manner in which management accepts resignations. At ODJFS, it is common practice for Agency designees to accept resignations both verbally and in writing.

Further, technology has become an integral part of ODJFS operations. The Grievant clearly intended to resign by means of email and text messaging. Similarly, Ms. Kocarek's verbal acceptance over the telephone was not contrary to ODJFS practice, or in violation of any policy, rule, or law.

After the acceptance of the resignation, the necessary information was given to the Payroll Unit to process the resignation. After the resignation was processed, an acknowledgement of separation letter was sent to the Grievant; a few weeks later, he received his final paycheck. The method used to accept and process the Grievant's resignation is the same method used in accepting and processing all resignations at ODJFS.

The Union has not met its burden of proof. The Grievant's self-serving testimony revealed only that he had not attended work nor had any intention of returning to work based upon the ultimatum he gave ODJFS. The Union contends because the Grievant's resignation letter was not "official," he did not resign. However, the Union failed to present any evidence revealing a rule or policy that states an employee must submit an "official" signed resignation in order to resign. The Grievant submitted a resignation letter and repeatedly demonstrated his clear intent to resign, including his follow-up text message that stated, "like my letter says I regretfully resign," and his text message regarding his return of State equipment.

Although the Grievant was told by his supervisor that he needed to submit an additional resignation letter, the Grievant knew this information was incorrect when Ms. Kocarek verbally accepted his emailed and texted resignation. Further, the Grievant's supervisor testified his experience with accepting and processing resignations was very limited.

The Grievant testified he had been deeply depressed when he submitted his resignation. The Grievant, however, had not applied for disability, nor had he informed management he was experiencing personal problems and needed to know his employment options. The Grievant testified he did not see a doctor until April 11, 2011, more than 3 weeks after he submitted his resignation, although he had been on some type of leave since mid-January 2011.

The Grievant testified he did not report to work after submitting his resignation because his supervisor told him not to come to work. Regardless of this alleged conversation, ODJFS policy requires employees to have some type of leave available to cover all absences or be considered absent without leave, a disciplinable offense.

The grievance should be denied in its entirety.

ARBITRATOR'S OPINION

The Union has the burden of proving the State violated the Agreement when the State considered the Grievant to have resigned on March 21, 2011. Trouble is, the Agreement is silent on the manner by which an employee submits a resignation and the manner by which the States accepts a resignation.

In Moyer, supra, Arbitrator Brookins recognized the contract's silence on this subject. He therefore found it appropriate to look to Ohio law, specifically, Davis, supra. I shall do the same.[3]

In Davis, supra, cited by both instant Parties, James Davis, a highway supervisor tendered a letter of resignation on Friday, April 3, 1987. The letter stated the resignation was to be effective Friday, April 10, 1987. Upon the Marion County Engineer's request, Mr. Davis recommended two possible replacements for his position. The County Engineer interviewed three possible replacements on Friday, April 3, 1987, and an additional six the following Monday, April 6, 1987. Also on Monday, April 6, 1987, Mr. Davis told the County Engineer he (Mr. Davis) had changed his mind about resigning. The County Engineer refused to accept Mr. Davis' attempt to rescind his resignation. On Wednesday, April 8, 1987, Mr. Davis gave a letter to the

[3] Presumably, the analysis of the instant alleged contract violation relates to Article 5 – Management Rights.

County Engineer rescinding the resignation. The County Engineer again refused to permit the rescission. Mr. Davis continued to work through Friday, April 10, 1987. On Monday, April 13, 1987, Mr. Davis came to work; the County Engineer told him he was no longer employed. On Monday, April 20, 1987, the County Engineer hired a replacement for Mr. Davis.

The Ohio Supreme Court found in Davis, supra, that Mr. Davis' rescission had been timely and he was therefore entitled to get his job back. The Court held:

> In our view, the crucial factor in determining the legal effectiveness of a withdrawal of resignation from public employment prior to its effective date is the manner of acceptance conveyed by the employer to the employee. In this vein, we are of the opinion that acceptance of a tender of resignation from public employment should be more than simply the receipt of the letter of resignation. Acceptance of a resignation should be in writing, and should encompass some type of affirmative act that clearly indicates that the tender of resignation is accepted by someone empowered by the public employer to do so....Absent acceptance in this manner, the public employee should be free to withdraw his or her tender of resignation prior to its purported effective date.
>
> While the better practice for all concerned would require that the tender of resignation, acceptance of resignation, or withdrawal of resignation prior to acceptance be set forth in writing, we find it would be unwise to totally foreclose any of these actions from being accomplished orally. In cases or controversies involving an oral tender, acceptance or withdrawal of resignation, clear and convincing evidence must be proffered to support the validity of such actions if performed in such manner. Thus, while the presence of a memorandum or writing will undoubtedly assist a board or a court in determining the legal effect of a tender, acceptance or withdrawal of resignation from public employment,

> we wish to underscore that a memorandum or writing of any of the foregoing actions is not required, but merely preferred.
>
> Therefore, we hold that a public employee may rescind or withdraw a tender of resignation at any time prior to its effective date, so long as the public employer has not formally accepted such tender of resignation. We further hold that acceptance of a tender of resignation from public employment occurs where the public employer or its designated agent initiates some type of affirmative action, preferably in writing, that clearly indicates to the employee that the tender of resignation is accepted by the employer.

Id., at 55-56.

Based on Moyer, supra, which is based on Davis, supra, the dispositive factual matter for the Arbitrator to determine is whether Ms. Kocarek "initiate[d] some type of affirmative action...that clearly indicate[d]" to the Grievant that she had "accepted" his "tender of resignation" during their telephone conversation on March 21, 2011. The Arbitrator finds the Union has carried its burden of proof that she did not.

First, the record is clear that during one of their two March 21, 2011 telephone conversations, Ms. Kocarek gave the Grievant the fax number he should use for sending his signed, written resignation letter. If Ms. Kocarek had, during one of the two telephone calls, "initiate[d] some type of affirmative action...that clearly indicate[d]" to the Grievant she had "accepted" his "tender of resignation," there would have been no need for her to give him a fax number.

Second, the record is clear that Ms. Kocarek, in response to the Grievant's request, emailed him the contact information for the ODJFS FMLA Coordinator and Disability Coordinator. If Ms. Kocarek had, during one of the two telephone calls, "initiate[d] some type of affirmative action…that clearly indicate[d]" to the Grievant she had "accepted" his "tender of resignation," there would have been no need for her to give him this contact information, as a resigned employee has no access to FMLA leave or disability benefits.

Third, Ms. Holloway's "separation letter" to the Grievant is dated March 28, 2011. Such a letter, sent three days after the Grievant's March 25, 2011 rescission email, is not a timely or effective "affirmative action" regarding the State's acceptance of the Grievant's March 18, 2011 resignation. Nor is it convincing evidence of what Ms. Kocarek said to the Grievant regarding his resignation in her March 21, 2011 telephone calls with him.

Fourth, it is inequitable and indeed, suspect, for ODJFS to have responded to the Grievant's March 25, 2011 rescission of his resignation by – almost a week later on March 31, 2011 – an email "reminding" him ODJFS had accepted his resignation 10 days earlier in a March 21, 2011 telephone call. It also is irregular for that same March 31, 2011 email to state ODJFS had "accepted" the Grievant's "texted resignation that you sent to Don Womeldorff on March 18, 2011, as your official resignation from ODJFS," given that the

ODJFS Memorandum entered into the record by the State provides that Mr. Womeldorff, as a front-line supervisor, was not authorized to accept resignations. Indeed, Mr. Womeldorff informed the Grievant on March 18, 2011 about this lack of authority.

Fifth, the Grievant's cooperation in returning the State equipment in his possession is not evidence of his intent to resign. Rather, as the Grievant wrote in an email:

> As far as the equipment, it[']s been made clear by Don that ODJFS is in urgent need of it so I have no problem turning it in until this is resolved.

Sixth, ODJFS faults the Grievant for not reporting to work or calling off during the week following his March 18, 2011 resignation. It contends this is further evidence of his intent to resign and that he could have been removed for being absent without leave. The record, however, indicates the Grievant's supervisor instructed him not to report to work. Moreover, if the State believed the Grievant was absent without leave, it could have removed him for that. It did not.

Ultimately, no one other than the Grievant and Ms. Kocarek know what Ms. Kocarek said to the Grievant on the telephone on March 21, 2011. The weight of the record, however, is that she did not, pursuant to Moyer and Davis, "initiate some type of affirmative action…that clearly indicate[d]" to the

Grievant she had "accepted" his "tender of resignation."[4] Accordingly, the Union has carried its burden of proof.

AWARD

For the reasons set out above, the grievance is granted.

The Grievant shall be reinstated to his former position, with his former duties in his former location. If his former position, duties, and/or location are not available, the Parties will meet to determine an appropriate assignment for the Grievant.

For purposes of determining any pay and/or benefits, the Grievant shall be treated as if he had been laid off March 18, 2011 and recalled effective no later than October 1, 2012.

The Arbitrator shall retain jurisdiction regarding remedy only through and until November 1, 2012.

September 12, 2012 — Susan Grody Ruben
Arbitrator

[4] The State entered into the record a resignation letter attached to a November 22, 2011 email from another ODJFS employee as an example of an acceptable ODJFS resignation letter, even though it was not signed by the employee. What distinguishes the record copy of that resignation letter, however, from the instant situation is that ODJFS LRO Tiffany Richardson handwrote on the letter:

> [Name of employee],
>
> Please consider your resignation accepted.

She then signed and dated the employee's resignation letter. While Moyer and Davis do not require a written acknowledgement to an employee of the State's acceptance of a resignation, the instant matter demonstrates it certainly is an effective practice for there to be such a written acknowledgement.