

SUSAN GRODY RUBEN, Esq.
Labor Arbitrator
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IN ARBITRATION PROCEEDINGS PURSUANT TO THE
COLLECTIVE BARGAINING AGREEMENT BETWEEN THE PARTIES

In the Matter of

**FRATERNAL ORDER OF POLICE,
OHIO LABOR COUNCIL, INC.**

and

**STATE OF OHIO, DEPARTMENT OF
TAXATION**

Case No. 30-04-20120106-0001-05-02

Grievant: James R. Johnson III

**ARBITRATOR'S
OPINION AND AWARD**

This Arbitration arises pursuant to the collective bargaining agreement (“the Agreement”) between the Parties, the FRATERNAL ORDER OF POLICE, OHIO LABOR COUNCIL, INC. (“the FOP”) and the STATE OF OHIO (“the State” or “the Department”) under which SUSAN GRODY RUBEN was appointed to serve as sole, impartial Arbitrator. The Parties agreed there are no procedural or substantive impediments to a final and binding decision by the Arbitrator.

Hearing was held December 13, 2012 in Columbus, Ohio. Both Parties were represented by advocates who had full opportunity for the examination and cross-examination of witnesses, the introduction of exhibits, and for argument. Both Parties submitted timely post-hearing briefs on or before January 24, 2013.

APPEARANCES:

On behalf of the FOP:

PAUL L. COX, Chief Counsel, FOP, OLC, Inc., 222 E. Town St.,
Columbus, OH 43215.

On behalf of the State:

CHARLES L. KUMPAR, Human Resources, Ohio Department of
Taxation, 30 E. Broad St., 22nd Fl., Columbus, OH 43215.

ISSUE

Did the State have just cause to issue a one-day suspension to the Grievant? If not, what is the appropriate remedy?

**RELEVANT PORTIONS OF THE PARTIES' COLLECTIVE BARGAINING
AGREEMENT**

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ARTICLE 6 – MANAGEMENT RIGHTS

The Labor Council 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 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;...

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ARTICLE 19 – DISCIPLINARY PROCEDURE

19.01 Standard

No bargaining unit member shall be reduced in pay or position, suspended or removed except for just cause.

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19.05 Progressive Discipline

The Employer will follow the principles of progressive discipline. Disciplinary action shall be commensurate with the offense. At the Employer's discretion, disciplinary action shall include:

1. Verbal Reprimand (with appropriate notation in employee's file);
2. Written Reprimand;
3. One or more fines in an amount of one (1) to five (5) days pay for any form of discipline. The first time fine for an employee shall not exceed three (3) days pay;
4. Suspension;
5. Leave reduction of one or more day(s);
6. Working suspension;
7. Demotion;
8. Termination.

However, more serious discipline may be imposed at any point if the infraction or violation merits the more severe action.

The Employer, at its discretion, is also free to impose less severe discipline in situations which so warrant.

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19.06 Suspension Options and Implementation Procedure

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

1. Actually having the employee serve the designated number of days suspended without pay; or pay the designated fine; or
2. Having the employee deplete his/her accrued personal leave, vacation, or compensatory leave banks of hours, or a combination of

any of these banks under such terms as may be mutually agreed to between the Employer, employee, and Union.

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ARTICLE 21 – WORK RULES

21.01 Copies of Work Rules

The Employer agrees that existing work rules, policies, procedures, and directives shall be reduced to writing and be made available to affected employees at each work location. To the extent possible, new work rules and directives shall be provided to the Ohio Labor Council two (2) weeks in advance of their implementation. In the event that the Labor Council wishes to present the views of the bargaining unit regarding a new work rule or directive, a time will be set aside at the regularly scheduled Labor/Management Committee meeting. The issuance of work rules and directives is not grievable. The application and availability of such rules and directive is subject to the grievance procedure.

21.02 Application

All work rules and directives must be applied and interpreted uniformly as to all affected members. Work rules or directives cannot violate this Agreement. In the event that a conflict exists or arises between a work rule and the provisions of this Agreement, the provisions of this Agreement shall prevail.

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FACTS

At the time the relevant events underlying the grievance took place, the Grievant was a Tax Enforcement Agent 2.¹ He was given notice of a one-day suspension on December 20, 2011. The notice provides in pertinent part:

This is notification that you are hereby being given a one (1) day suspension, without pay, from employment with the Ohio Department of Taxation effective at the beginning of business

¹ The Grievant's position is currently called Criminal Investigations Agent.

Wednesday, December 28, 2011 and extending through the close of business, Wednesday, December 28, 2011.

The reason for this action is violation of Departmental Workrule #2A – Neglect of Duty – Major – Failure to Comply with Section 5703.081 of the Ohio Revised Code “Dismissal of Employee for Non-compliance with Tax Laws”; Departmental Workrule #18 – Any Violation of State of Ohio Policies and/or Departmental Policies (ODT-HR-007 – Prompt Filing of Taxes); Departmental Workrule #5L – Failure of Good Behavior – Any act that may discredit, embarrass, or interfere with the mission of the Department. Specifically, you failed to comply with Section 5703.081 of the Ohio Revised Code regarding the prompt filing and payment of tax returns. You failed to accurately report income and/or timely pay an outstanding balance due on your 2009 Ohio Individual Tax Return. On July 21, 2011 you conducted a cigarette inspection at a business in Akron, Ohio. It has been alleged that you purchased liquor (specifically vodka) from this business at the time which you were there to conduct official Departmental business. The comment that you allegedly made to the taxpayer was “...I have to buy some vodka as it is cheaper here than where I live....” Additionally, during the investigatory interview held on October 31, 2011 you admitted to purchasing vodka from the business on this date.

This suspension is imposed pursuant to the provisions of Article 19 of the FOP contract....It has been determined that just cause exists for this action.

POSITIONS OF THE PARTIES

State Position

Both allegations constitute a significant breach of trust. The Grievant is accused of failing to properly amend his personal income tax return, dealing unprofessionally with a taxpayer by purchasing alcohol from the taxpayer shortly after an inspection, and transporting alcohol in a State vehicle.

Public trust is vital to the administration of a voluntary tax system. It is imperative for those who enforce the Tax Code to comply with it themselves. It is equally important that the Department treat any employee's failure to do so seriously.

The Grievant had an error on his taxes that came to the Department's attention in September 2011. There was a discrepancy between the federal adjusted gross income reported on his federal return compared to his Ohio return. Had the Grievant informed the Department of the error, the Ohio return could have been corrected. However, that is not what happened. The Grievant claims Ms. Brenda Peters was informed of the discrepancy. At no point in an email exchange between the Grievant and Ms. Peters, however, was federal adjusted gross income mentioned.

The Department does not dispute the Grievant's claims that he contacted the Department and attempted to rectify a separate error made on the initially-submitted return in February 2010. At that time, the Grievant brought an issue regarding failure to enter the amount of Ohio taxes withheld on the 2009 Ohio return. That error was corrected by the Department and is not the violation at issue in this case.

The third violation is very troubling. It involved the purchase of alcohol by the Grievant at a business at which he had just conducted a cigarette inspection. The Grievant testified he returned to the business and purchased alcohol to verify sales tax was being applied to liquor sales. The Grievant stated he has been asked to perform similar duties upon occasion when the Audit Division is

conducting an audit. The Grievant further stated he disposed of the alcohol without checking it into evidence because the business was not under investigation. Nor did the Grievant attempt to recoup the alcohol's cost.

The Grievant's testimony contradicts his testimony at his pre-disciplinary meeting and his Step 2 meeting. In those meetings, the Grievant said he was no longer on official duty when he bought the alcohol.

The Grievant's actions have embarrassed and tainted the image of the Department. His actions eroded public confidence the public has in tax enforcement.

Department employees have a statutory requirement pursuant to ORC § 5703.081 to be in compliance with all tax rules and ordinances. Additionally, the statewide policy, Authorized/Unauthorized Use of State Motor Vehicles, states the transport of alcohol in a State vehicle outside of official law enforcement duties is strictly prohibited.

According to Article 19.05 – Progressive Discipline, “more severe discipline may be imposed at any point if the infraction or violation merits the more severe action.” The disciplinary grid provides for a suspension for the first offense of violating Work Rule #2A and a written reprimand or suspension for the first offense of violating Work Rule #5L. The Union contends the discipline was not reasonable or progressive. The Grievant was given a one-day suspension, however, the lowest possible level of suspension, for both offenses when each warranted an independent one-day suspension.

FOP Position

The tax forms at issue were prepared by the Grievant's wife. The Grievant's wife called him on February 17, 2010 to let him know she had inadvertently sent their joint return prior to completing it. She had clicked "send" instead of "save," and realized immediately what she had done. The Grievant took immediate steps to correct the error and thought the matter was closed. In September 2011, the Department notified the Grievant there was an issue with his 2009 return.

ORC § 5703.081 provides the Tax Commissioner may discipline a Department employee "who fails to timely file an annual return." The Department admits the Grievant timely filed his 2009 return. The Code also provides employees may be disciplined for any other violation of the tax laws. The Grievant's Ohio tax return contained an error in the withholding amount; however, this was simply an error.

Both the Grievant and his wife did everything in their power to correct the error that occurred. On February 17, 2010, the Grievant contacted the Department's Zanesville office upon receiving the call from his wife. The internal audit administrator testified the Grievant had tried right away to resolve the error. On February 18, 2010, the Grievant's wife went to the Zanesville office and was told to fax the information to Ms. Brenda Peters in the Defendant's Columbus office; the Grievant's wife did so that day. Ms. Peters advised the couple the return had been corrected.

From February 18, 2010 until September 16, 2011, the Grievant thought the matter had been laid to rest. On September 16, 2011, the Grievant received a letter from the Department regarding 2009 tax liability. The reason for the delay was that the Department is able to reconcile state and federal tax returns only after receiving tapes from the IRS. The Grievant immediately contacted the Department and made every possible effort to fix the error. Taxpayers have 60 days to file an amended return when an error is found. The Grievant did so in a timely manner and gave a check to the Department for the monies owed.

The Grievant did not violate ORC § 5703.081, Work Rule 2-A, Work Rule 18, or Work Rule 5L. He filed his taxes on time and paid all monies due. As for the alcohol purchase, it is not unusual for tax agents to purchase liquor from establishments they are reviewing. It is done in an attempt to determine if taxes are being properly charged. Upon finding taxes had been properly charged, the Grievant disposed of the vodka.

The Department failed to use progressive discipline, as required by Article 19. The Department used a unilaterally devised disciplinary grid the FOP has never agreed to. Article 19 contains the sole method for applying discipline. The Grievant has no prior discipline and should have received at most a verbal reprimand.

The Department states this type of tax offense once warranted a ten-day suspension; the current administration wanted more flexibility. According to Department witness Delbert Harlan, Jr., the administration feels severe discipline

should be used for employees who fail to pay their taxes. The Grievant did not fail to pay his taxes.

The Agreement allows for non-progressive discipline when it is necessary in order to change an employee's behavior. The Department's own progressive discipline policy, HR-004, explains what type of behavior warrants more severe discipline. It gives as examples theft, insubordination, and fighting. The Grievant was not charged with these types of misconduct or any type of heinous crime that would merit severe discipline.

ORC § 4117.10 provides in pertinent part:

(A) An agreement between a public employer and an exclusive representative entered into pursuant to this chapter governs the wages, hours, and terms and conditions of public employment covered by the agreement.

...

...this chapter prevails over any and all other conflicting laws, resolutions, provisions, present or future, except as otherwise specified in this chapter or as otherwise specified by the general assembly.

Thus, the Department has no argument that its disciplinary grid modifies or supersedes the Agreement. The State has agreed to apply progressive discipline unless it can prove the act charged is so egregious as to allow a more severe penalty.

The purpose of discipline is to correct unacceptable behavior. It is not to be invoked merely for purposes of punishment. The premise behind progressive discipline is that both the Department and the employee benefit. The Department

is able to maintain a well-trained and productive employee. The employee is given an opportunity to redeem his reputation.

In this case, it is clear that suspension is unwarranted. A less severe form of discipline such as a verbal reprimand would obviously suffice to correct the behavior of the Grievant and protect the interests of the Department. The Grievant did not maliciously cause the error on his taxes to occur. It is extremely unlikely such an isolated incident will occur again. The Grievant was not trying to evade his responsibility to accurately report income. This was merely a case of human error where his wife clicked on “submit” instead of “save.” As to the charge concerning the liquor buy, the Grievant was simply doing his job.

ARBITRATOR’S OPINION

The State has the burden of proving it had just cause to issue a one-day suspension to the Grievant. This consists of proving: 1) the Grievant did what he is accused of; and 2) if he did, that a one-day suspension is appropriate under all the circumstances. The Grievant is accused of two distinct transgressions, each of which should be analyzed individually to determine if they merit separately and/or jointly a one-day suspension.

The Charges

1. The 2009 Tax Return

The Grievant is accused of failing:

to comply with Section 5703.081 of the Ohio Revised Code regarding the prompt filing and payment of tax returns. You failed to accurately report income and/or timely pay an outstanding balance

due on your 2009 Ohio Individual Tax Return.

ORC Section 5703.081 provides:

The tax commissioner may discipline or dismiss any employee of the department of taxation who fails to timely file an annual return required under section 5747.08 of the Revised Code for any taxable year during which the employee is employed by the department. The commissioner may condition employment or continued employment with the department upon timely compliance with any other requirement of the laws, rules, or ordinances of federal, state, or local taxing authorities and may discipline or dismiss any employee of the department who fails to timely comply with any other requirement of those laws, rules, or ordinances.

The record shows the Grievant did not fail “to timely file an annual return.”

Rather, the Department is basing its just cause for discipline on the basis the Grievant failed to comply with “any other requirement of the laws,” specifically, that he “failed to accurately report income and/or timely pay an outstanding balance due on [his] 2009 Ohio Individual Tax Return.”

The Grievant’s 2009 tax issue began when his wife, who was preparing the family’s taxes online, mistakenly clicked on “submit,” rather than “save” when she left the computer before finishing the tax return. The Grievant took prompt and thorough actions to rectify the situation. Ms. Brenda Peters, a Department supervisor responsible for employee income tax return corrections, handled the matter. On February 18, 2010, Ms. Peters advised the Grievant the matter had been successfully resolved, and informed him he would be receiving a \$62.00

refund.² Nineteen months later, however, on September 16, 2011, the Department informed the Grievant his FAGI was reported differently on his federal and State returns for tax year 2009,³ and that he owed \$402.08 to the State. The State, however, was mistaken in calculating that amount owed. Ultimately, it was determined the Grievant owed the State \$179.00, which the Grievant promptly paid.

The Arbitrator found the Grievant's detailed chronology credible and supported by written documentation.

2. The Liquor Buy

When first questioned about the liquor buy by the Department during an investigatory interview on October 31, 2011, the Grievant said he was not on official business when he bought the bottle of vodka. Rather, he explained that after he had inspected the store, he came back a few minutes later on his break and bought the liquor. When asked during the investigatory interview, "Do you understand if you did purchase liquor at a place where you were conducting Departmental business, that this action could raise some concerns and/or have the appearance of impropriety," he responded, "I guess."

² A February 18, 2010 email from Ms. Peters to the Grievant provides:

James,

I have updated your 2009 Ohio Income Tax return on the system to reflect the Ohio withholdings originally omitted from your electronically submitted return....This will update overnight and tomorrow the system should reflect the requested refund. I will check it tomorrow to make sure everything is posted correctly.

³ The record does not include an explanation of how or why this occurred.

At the arbitration, the Grievant testified differently about the liquor buy. He claimed he bought the bottle of vodka to see if the proprietor was charging the required sales tax. He further claimed he “disposed” of the bottle by later pouring it out. He never sought reimbursement from the Department for the cost of the alcohol.

The Arbitrator does not find the Grievant’s arbitration testimony version of the liquor buy credible. First, it is inconsistent with his earlier explanation during his investigatory interview. Second, if the Grievant had purchased the liquor on official business, he would have sought reimbursement from the Department for the cash he spent on it.

The Discipline

Regarding the Grievant’s responsibility for filing prompt and accurate tax returns, initially, the Grievant’s wife made an honest mistake, and the Grievant promptly took multiple steps to try to resolve the matter. He relied on a Department supervisor’s advice that the matter had been resolved. When nineteen months later, the Department determined the Grievant owed \$402.08 for tax year 2009, based on a discrepancy between the reporting of the Grievant’s FAGI on his federal and state returns, the Grievant successfully showed the Department’s calculation of tax owed was incorrect. The Grievant and the Department ultimately determined the Grievant owed \$179.00 for tax year 2009, and the Grievant promptly paid that amount. Based on this chronology, where the Department contributed to the confusion regarding the Grievant’s tax liability for 2009, there is no just cause for disciplining the Grievant for the mishaps

related to his 2009 tax return.

The Arbitrator finds the Department has proven it had just cause for disciplining the Grievant for his July 21, 2011 personal purchase of a bottle of liquor from a business at which he had moments before conducted a cigarette inspection. Such a purchase created the appearance of impropriety and may have discredited the Department in violation of Work Rule #5L – Failure of Good Behavior – Any act that may discredit, embarrass, or interfere with the mission of the Department.⁴ The record indicates the Grievant was aware he was not supposed to buy liquor for personal use from an establishment he had just inspected.

The Department's unilaterally-adopted disciplinary grid provides for a written warning or suspension for a first-offense violation of Work Rule #5L. Such options appear reasonably related to violations of Work Rule #5L. Because the Grievant's transgression of buying the liquor is exacerbated by the fact he gave inconsistent information during his investigatory interview and his arbitration testimony regarding the liquor buy, the Arbitrator holds the Grievant's violation of Work Rule #5L is independently sufficient to merit a one-day suspension.

⁴ Though the Department's post-hearing brief alleges the Grievant was also charged with transporting alcohol in a State vehicle, that charge is not contained in the notice of one-day suspension and therefore will not be considered by the Arbitrator.

AWARD

For the reasons set out above, the grievance is denied in part and granted in part.

The Department was unable to prove the Grievant violated Work Rule #2A and Work Rule #18 relating to the Grievant's 2009 tax return.

The Department proved the Grievant violated Work Rule #5L when he purchased liquor for personal purposes from a business at which moments before he had conducted a cigarette inspection.

Accordingly, the one-day suspension stands.

DATED: March 13, 2013

Susan Grody Ruben
Susan Grody Ruben, Esq.
Arbitrator