

**SUSAN GRODY RUBEN, Esq.**  
**Labor Arbitrator**  
**30799 Pinetree Road, No. 226**  
**Cleveland, OH 44124**

**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. 30-04-20111229-0141-05-02**

**Grievant: Angela Teniente**

**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**

. . .

**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;...

...

## **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.

...

...

### **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.

...

### **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.

...

## **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.

...

...

## **FACTS**

At the time the relevant events underlying the grievance took place, the Grievant was a Tax Enforcement Agent 2.<sup>1</sup> She 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

---

<sup>1</sup> 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). 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.

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**

Department employees have a statutory requirement pursuant to ORC § 5703.081 to be in compliance with all tax rules and ordinances. The Grievant was not compliant with ORC § 5747.10 because she failed to file an amended Ohio Individual Income Tax Return within sixty days of the discrepancy determination by the IRS. By not being compliant with ORC § 5747.10, the Grievant violated ORC § 5703.081. Department employees are reminded annually of their ORC § 5703.081 duties in an email from the Tax Commissioner.

The FOP contends the issues with the Grievant's tax returns were caused by her tax preparer. The tax preparer, however, is not the individual responsible for filing the amended tax return; the Grievant is.

**The Grievant deals with taxes on a daily basis as part of her job duties. The Grievant's job included the possibility of testifying in court or before the Grand Jury of Tax Appeals. The Grievant's failure to properly file could damage her credibility in this capacity.**

**The case would not be before the Arbitrator if the Grievant had taken more responsibility to resolve her Ohio tax issue. Had the Grievant appropriately filed an amended 2009 Ohio Individual Income Tax Return within sixty days of receiving the IRS notification, or informed someone in the Department of the IRS notice, discipline would not have been imposed. Instead, it was the Department that notified the Grievant of the discrepancy and the resulting liability and interest, over four months after the Grievant had received the IRS notice.**

**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. The Grievant was given a one-day suspension, the lowest possible level of suspension.**

**The FOP contends the Work Rules and the disciplinary grid were not bargained for and therefore should not apply. First, this issue was not raised earlier in the grievance process. The Articles listed in the grievance trail pertain only to disciplinary procedure, not to management's right to implement work rules. Article 21.01 provides “the issuance of work rules and directives is not grievable.” Further, Article 6 expressly grants management the rights to “hire and transfer employees, suspend, discharge and discipline employees” and to**

**“make any and all rules and regulations.” Finally, Article 6 provides:**

**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.**

**The FOP similarly contends ORC § 5703.081 does not apply to the bargaining unit. This argument is without merit. The statute is expressly incorporated into Work Rule #2, which calls for a suspension for any “Failure to comply with Section 5703.081 of the Ohio Revised Code....” Further, arbitration is not the proper forum to address ORC § 4117 issues; rather, SERB is.**

**The State stresses the Tax Commissioner’s statement in his February 8, 2010 email:**

**ODT employees are expected to maintain high personal standards relative to filing tax returns. An employee not complying with his/her responsibility in this matter would breach his/her obligation of trust to ODT and the taxpayers of the State of Ohio, and erode ODT’s reputation for fairly administering the tax laws and regulations.**

**The Grievant failed to fulfill her obligations. Therefore, the State had no choice other than to hold her accountable in accordance with the Work Rules and the disciplinary grid.**

### **FOP Position**

**The Grievant and her husband had used the same tax preparer, a former IRS employee, since 2004. For tax year 2009, a discrepancy arose regarding the Grievant’s joint returns because the tax preparer inadvertently submitted a form**

that contained incorrect information regarding the Grievant's FAGI. It appears this occurred when the preparer omitted unemployment benefits received by the Grievant's husband. The IRS notified the Grievant of the discrepancy on May 11, 2011. The Grievant immediately instructed her tax preparer to file an amended return and to notify the Grievant if any additional monies were due. The Grievant's tax preparer filed an amended return on May 11, 2011. At that point, the Grievant believed everything was taken care of.

The Department sent the Grievant a letter dated September 8, 2011 stating the Grievant had an outstanding tax liability of \$365.71 for tax year 2009. The Grievant immediately mailed a check for the full amount due. On or about December 20, 2011, the Department sent the Grievant notice of a one-day suspension.

The Grievant did not violate ORC § 5703.081 or Work Rule # 18. The Department admits the Grievant timely filed her 2009 tax return and the amended return. The Grievant had no reason to believe she was not in compliance with State law or Department rules.

Though the Grievant was not charged with a violation of Department policy HR-007, she was in compliance with it. The policy states agents must timely file and pay any taxes due, which is what the Grievant did.

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 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 her 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.

This case amounts to a clerical error made by the Grievant's tax preparer and nothing more. The Grievant did everything in her power to comply with the tax laws and the rules of the Department. She was not trying to evade her obligations. An error was made that any of us might make due to the complexities involved in filing taxes.

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 her 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 her taxes to occur. It is extremely likely such an isolated incident will reoccur.

#### **ARBITRATOR'S OPINION**

The State has the burden of proving it had just cause to suspend the Grievant for one day. This consists of proving: 1) the Grievant did what she is accused of; and 2) if she did, that a one-day suspension is appropriate under all the circumstances.

**The record shows that although the Grievant was under the impression her tax preparer had submitted an amended State return for tax year 2009 on May 11, 2011, the State did not receive that amended return. The record also demonstrates the Grievant did not take affirmative action to confirm her tax preparer had submitted a timely amended State return for tax year 2009.**

**The Grievant had used the same tax preparer, a former IRS auditor, since 2004 with no problems. The tax preparer made a mistake with the Grievant's 2009 returns when the tax preparer failed to include the Grievant's husband's unemployment benefits received as an electrician. By letter received May 11, 2011, the IRS informed the Grievant and her husband of the under-reporting. The Grievant's husband called the tax preparer that day; she told the Grievant's husband she would rectify the error. It is unclear from the record whether the tax preparer sent the State an amended return for tax year 2009. According to the record, however, the State did not receive that amended return.**

**While it is understandable the Grievant relied on her tax preparer, it is an incomplete defense. The Grievant is aware that as an employee of the Department, she has a heightened responsibility to comply with the tax laws and is subject to discipline for noncompliance. The record shows that while the Grievant intended to comply with all tax laws, her tax preparer's performance regarding the Grievant's 2009 returns was lacking, and the Grievant did not take sufficient steps to ensure her tax preparer had accurately prepared the Grievant's 2009 return and timely submitted an amended 2009 return.**

The Arbitrator finds the Grievant's failure to take sufficient steps to oversee her tax preparer's performance does not, however, under these record facts, constitute a "Major" "Neglect of Duty," defined in the Department's unilaterally-adopted disciplinary grid in Rule 2 as "Any action that compromises or impairs the efficient and/or appropriate operations of the Department (e.g., endangers life, property, business operations or public safety." Rather, the Grievant's failure to take sufficient steps to oversee her tax preparer's performance falls more appropriately under Rule 18 – Any Violation of State of Ohio Policies and/or Departmental Policies, with which she was also charged. In the suspension notice, the Department identified ODT-HR-007 – Prompt Filing of Taxes as the Departmental Policy violated.

The Department's unilaterally-adopted disciplinary grid provides that for a Rule 18 violation, "The severity of the discipline should be reflective of the offense." The Arbitrator finds a written warning, rather than a one-day suspension, to be reflective of the offense.

Accordingly, the Department had just cause to discipline the Grievant for failing to sufficiently oversee her 2009 tax returns. The Grievant's reasonable reliance on her tax preparer, however, mitigates the harshness of a one-day suspension. The goals of progressive discipline can be adequately met under these circumstances by reducing the one-day suspension to a written warning.

## AWARD

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

The State had just cause to discipline the Grievant. For the reasons set out above, the one-day suspension, however, shall be reduced to a written warning.

DATED: March 13, 2013

*Susan Grody Ruben*  
Susan Grody Ruben, Esq.  
Arbitrator