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ARBITRATION PROCEEDING PURSUANT TO COLLECTIVE BARGAINING AGREEMENT BETWEEN THE PARTIES

In the Matter of	◆	
	◆	
OHIO CIVIL SERVICE	◆	
EMPLOYEES ASSOCIATION	◆	
AFSCME LOCAL 11, AFL-CIO	◆	**ARBITRATOR'S**
and	◆	**OPINION**
OHIO DEPARTMENT	◆	**and AWARD**
OF TRANSPORTATION	◆	
	◆	
Grievant: Cheri L. Davis	◆	
Case No. 31-09(02-12-13)01-01-07	◆	

This Arbitration arises pursuant to the collective bargaining agreement ("the Agreement") between the Parties, OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION, AFSCME LOCAL 11, AFL-CIO ("the Union") and OHIO DEPARTMENT OF TRANSPORTATION, STATE OF OHIO ("the State") under which SUSAN GRODY RUBEN was appointed to serve as sole, impartial Arbitrator. Her decision shall be finding and binding pursuant to

the Agreement. The Parties stipulated there are no procedural impediments to a final and binding Award.

Hearing was held November 18, 2013.[1] Both Parties were represented by advocates who had full opportunity to create the record and make argument.

APPEARANCES:

On behalf of the Union:

JEFF FREEMAN, Staff Representative, OCSEA.

On behalf of the State:

EDWARD A. FLYNN, Assistant Administrator, Office of Labor Relations, ODOT.

ISSUE

Was the level of discipline (removal) imposed against the Grievant commensurate to the work rule violations? If not, what shall be the remedy?

[1] A previous hearing on this grievance was held before a different arbitrator in

RELEVANT PORTIONS OF THE AGREEMENT

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ARTICLE 24 -- DISCIPLINE

24.01 - Standard

Disciplinary action shall not be imposed upon an employee except for just cause. The Employer has the burden of proof to establish just cause for any disciplinary action….

24.02 – Progressive Discipline

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

a. **One (1) or more oral reprimand(s) (with appropriate notation in employee's file);**
b. **One (1) or more written reprimand(s);**
c. **One (1) or more working suspension(s). A minor working suspension is a one (1) day suspension, a medium suspension is a two (2) to four (4) day suspension, and a major working suspension is a five (5) day suspension. No working suspension greater than five (5) days shall be issued by the Employer.**
   …
d. **One (1) or more day(s) suspension(s). A minor suspension is a one (1) day suspension, a medium suspension is a two (2) to four (4) day suspension, and a major suspension is a five (5) day suspension. No suspension greater than five (5) days shall be issued by the Employer.**
e. **Termination.**
   Disciplinary action shall be initiated as soon as reasonably possible, recognizing that time is of the essence, consistent with the requirements of the other provisions of this Article. An arbitrator deciding a discipline grievance must consider the timeliness of the Employer's decision to begin the disciplinary process.

…

…

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.

…

24.06 – Imposition of Discipline

The Agency Head or designated Deputy Director or equivalent shall make a final decision on the recommended disciplinary action as soon as reasonably possible after the conclusion of the pre-discipline meeting. The decision on the recommended disciplinary action shall be delivered to the employee, if available, and the Union in writing within sixty (60) days of the date of the pre-disciplinary meeting, which date shall be mandatory. It is the intent to deliver the decision to both the employee and the Union within the sixty (60) day timeframe; however, the showing

of delivery to either the employee or the Union shall satisfy the Employer's procedural obligation….

…

Disciplinary measures imposed shall be reasonable and commensurate with the offense and shall not be used solely for punishment.

…

…

. . .

FACTS

The Grievant has been employed by the State since June 10, 1996. At the time of her February 8, 2013 removal, she was working as a Highway Technician 2 at the Ross County Maintenance Facility.

In November 2012, the Grievant left the following voicemail for the ODOT District 9 Business and Human Resources Administrator:

> **Cheri Davis. I was calling in regards to pretty much bein' what I don't feel is treated fairly out here at Ross County. I mean I wasn't allowed to have a locker or anything to store clothing or anything in the women's bathroom, but yet there's two lockers that showed up in there with locks on them and one of the guys at one time put one in the men's bathroom with my name on it. Someone else scratched the name out and now that's currently on the hill in a dumpster. Nobody wants to give me direct answers on anything. But I don't feel like [K] or [A] should have lockers in the women's bathroom to store extra clothing if I don't have somewhere dry to put my things and lock it up. Everything I'm supposed to have is supposed to be just out on the floor. [A] has a**

locker out there, too, and [K] has a full office. [A] very seldom leaves the garage and when she does, she's never flagging or doing anything physical outside of a vehicle. I don't think it's right because I was told by [B] to get a different job because I said I couldn't lift a deer up onto a homemade gate two days ago. That's not right because he didn't tell [A] to get a different job. They just wouldn't make her pick it up. Might be petty, but I don't think so. Fair is fair. Then when the guys, they'll just drive past the deer knowing then there will be a problem with it. You can't talk to anybody out here because they're all "you're just being grouchy." No, I'm not being grouchy; I'm just being mistreated. I'm not being treated fairly and I'm tired of it.

I got a day off without pay almost a year ago because of their nonsense and people are not filling out E-78s like I got in trouble for. They go home when they want to; I lost a day's pay.

Plus, they're talking dirty out there. They're talking dirty jokes, showing videos on their phones, and everybody is laughing, then yeah.

I seen [A] grab one of the guys on his front part standing there where most of us are supposed to clock out at night. You know, how fair is that? She's allowed to do dirty gestures, but because I won't talk dirty with the guys, I'm a bad egg.

[M] and them don't want to hear it so, anyhow, fair is fair. I just don't like the way I'm being treated. So anyhow, my number is [XXX-XXXX]. Anyhow, I'd appreciate it if somebody would give me a call back because I'm really tired of not being treated fairly and her being given the world and not having to do anything and [K] following me throughout the building and she is still smoking in the building, which is nonsense, and in the vehicles, but nobody will do anything

about it and why I don't know. Why do the two of 'em run around and do what they want is beyond me because [A] doesn't have to work the way I work. [M], [K] and [B] are all involved in it. Please give me a call back. Bye.

An Administrative Investigation took place. An investigator interviewed the Grievant on December 12, 2012. In a statement the Grievant submitted December 13, 2012, the Grievant wrote:

> **I, Cheri Davis, would like to clear up some issues concerning this investigation. When the locker issue came up it upset me, I was mad and said some things I shouldn't have.**
>
> **The call…wasn't completely accurate, I helped put the locker in the mens room.**
>
> **I was really angry and said [A] grabbed [G's] crotch, that did not happen.**
>
> **I just want to be treated fairly and when [K] and [A] got lockers in the womens rest room and I didn't, it made me mad and I said things I shouldn't. I just wanted to be treated as a team member. I'm sorry for causing all of this.**

In a letter dated December 24, 2012, the investigator stated in pertinent part:

> **…the allegation that Cheri Davis made defamatory and/or false statements to D9 Administration on a voicemail message and to this investigator during her 12/12/12 interviews is founded….**

The Grievant was terminated effective February 8, 2013.[2] The termination letter provides in pertinent part:

> **…You are found to have violated Directive WR-101, Items:**
>
> > **3C – Making defamatory or false statements;**
> > **4 – Interfering with and/or failing to cooperate in an official investigation or inquiry; and**
> > **27 – Other actions that could compromise or impair the ability of the employee to effectively carry out her duties as a public employee.**

The Union filed a timely grievance that states in pertinent part:

> **[The] Labor Relations Officer told [the Grievant] her services [were] no longer needed at ODOT, after an investigation. OCSEA believes that the discipline is punitive not corrective.**

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[2] In a letter dated April 11, 2012, the Grievant had been given a one-day suspension for violation of Directive WR-101, Items:

> 2B – Disobedience/Refusal of an order or assignment by a superior;
> 2C – Failure to follow policies of the Director, Districts, or Offices.
>
> …Future infractions may result in further disciplinary action up to and including termination.

The one-day suspension was not grieved.

POSITIONS OF THE PARTIES

State Position

The severity of the incident of the Grievant leaving the voicemail was substantial. The Grievant's actions caused an Administrative Investigation and an EEO Investigation. Those investigations included three interviews of the Grievant. During her third interview, she partially recanted her previous statements. She admitted to lying about [A] grabbing a co-worker's crotch and she admitted she had participated in placing a locker with her name on it into the men's restroom.

What the Grievant did was very serious. It could have affected the marriages of co-workers. Her actions also could have resulted in disciplinary action against her co-workers. As soon as the Grievant left the voicemail, she lost any remaining trust she had with her co-workers. She made it impossible for her to ever return to that work environment.

Before making the decision to remove the Grievant, the State looked at both mitigating and aggravating circumstances. The mitigating factor is the Grievant's 16 years of employment. The aggravating factor is the totality of the Grievant's workplace conduct.

Co-workers testified at the arbitration they had been coping with the Grievant's drama for some time. They avoided her as much as possible and tried to deal with her antics. Once she left her voicemail, filled with lies, they had had enough.

The Grievant stated at the pre-disciplinary meeting, the Step 3 grievance meeting, and at the arbitration that she is sorry for all the problems she caused. She says this and then is not truthful about what she is sorry about. Her only full admission at the arbitration was that she lied about [A] grabbing a co-worker's crotch. She denies or attempts to deflect every other action to someone else.

The Union has tried to establish the Grievant has changed. The Union submitted a letter from a clinical counselor who had met with the Grievant. The Grievant did not contact the counselor until approximately five months after her removal and one month before the original arbitration hearing date. That is not the behavior of someone who is remorseful; it is the action of a person trying to act remorseful.

The State has established the Grievant's removal was commensurate to the charged work rule violations. The aggravating factors far outweigh the mitigating factor. Moreover, the aggravating

factors establish a successful return to the Ross County garage is not possible. The State requests the Arbitrator to deny the grievance in its entirety.

Union Position

The State has failed to meet its burden of proof. The Grievant's angry voicemail was spurred by her ongoing frustration over her feeling that she had been treated unfairly with regard to work assignments and a locker assignment. The final straw came when the Grievant's supervisor, [K], had two lockers placed in the women's restroom – one for herself and one for [A], the Grievant's coworker who had worked at the garage for only 15 months.

The State acted on hearsay, innuendo, rumors, gossip, false allegations, an incomplete investigation, and a total disregard for due process. Though State witnesses testified the Grievant had started rumors of extramarital affairs, not one witness testified he or she had personally heard the Grievant make such statements.

Though there was State testimony that the Grievant was unable to perform some of her job duties, she was never charged with an inability

to do her work. Moreover, she has been rated satisfactory in her performance appraisals.

[D] testified he sent a text to the Grievant asking her not to tell anyone he had put the locker in the men's restroom. This testimony corroborates the Grievant's statement and testimony as to the reason she pretended she did not know who moved the locker.

The charges of defamation and failing to cooperate in an investigation were not substantiated. The State's contention that the Grievant recanted the allegations she made in the voicemail is mostly incorrect. The Grievant did recant the crotch-grabbing allegation and she backed off the allegations of dirty jokes and talk. As the Grievant testified, she recanted the crotch-grabbing accusation only because after thinking about it, she realized that what she thought happened, based on what she saw out of the corner of her eye, may not have happened. She corrected these accusations early in the investigation. There is no evidence showing failure to cooperate in an investigation. The Grievant answered questions in three separate sessions.

In her voicemail, the Grievant stated she had not been treated fairly. She believes she has consistently been given a disproportionate

amount of the less desirable work assignments, and that [A] received the more desirable assignments. The Grievant testified the less desirable work was snow removal and litter pickup (including deer and other carcass pickup). The daily work assignment records show the Grievant was not imagining this disparity in work assignments. Over the reviewed time period, the Grievant had 130 animal removal assignments, and [A] had approximately 50. The Grievant does not recant this part of her voicemail.

The State added violation 27 – other actions that could compromise or impair the ability of the employee to effectively carry out her duties as a public employee – in an attempt to elevate the charges to a removeable offense. The State attempted to support this charge with innuendo about threats and fear in the workplace caused by the Grievant that would make it difficult for the Grievant's co-workers to function if she returned. The State seeks to capitalize on the drama that is alive and well at the Ross County garage. The State's own investigator, however, found nothing to support these perceived threats. Moreover, Union witnesses at the arbitration testified they would have no problem continuing to work with the Grievant were she to return to work.

The State did not follow progressive discipline. Discipline for first offenses of both 3C and 4 range from a reprimand to suspension. Given that the Grievant had an active one-day suspension, progression would follow to a medium suspension. Even a major suspension would be harsh. Violation 27 states that the appropriate discipline depends on the severity of the incident. Nothing in this case rises to the severity of removal. The State failed to prove any actions that could compromise or impair the Grievant's ability to carry out her duties as a public employee. The penalty was not corrective or commensurate with the alleged violations.

The State's case focuses on threats of violence, for which she was not charged. The State focuses on whether the Grievant would be a detriment were she to return to work. The real question is whether she should ever have been removed from the workforce, and the answer to that is no.

The Grievant is remorseful about the way she handled herself when she angrily reacted to the frustration that came to a head with the locker assignment incident. She has expressed a strong desire to return to her position. Through her testimony and supporting documents, she has

shown she pursued counseling to learn how to better handle herself when emotional situations arise. The State has tried to portray the Grievant as unstable; it should be noted the State never referred the Grievant to the EAP. The Grievant pursued counseling on her own.

The Grievant has made the effort to take responsibility for her part in this incident. Clearly, others contributed to the problems brewing at the Ross County garage.

The Union requests the Arbitrator to sustain the grievance, returning the Grievant to her position as HT2 in the Ross County garage, and restoring her backpay and all benefits.

OPINION

Arbitrators analyze a termination based only on the charges listed in the termination letter. Here, those charges are:

- **Making defamatory or false statements**
- **Interfering with and/or failing to cooperate in an official investigation or inquiry; and**
- **Other actions that could compromise or impair the ability of the employee to effectively carry out her duties as a public employee.**

The crux of this case is the contents of the voicemail the Grievant left for the ODOT District 9 Business and Human Resources Administrator. The record demonstrates the Grievant made the following defamatory, false (and/or so misleading as to be false) statements during that phone call:

1. **"one of the guys at one time put [a locker] in the men's bathroom…."**

   The Grievant was directly involved in doing this.

2. **"I seen [A] grab one of the guys on his front part standing there where most of us are supposed to clock at night."**

   This did not happen.

Indeed, the Grievant herself, in her November 13 statement, admitted she had made false statements:

> **I…said some things I shouldn't have.**
>
> **The call…wasn't completely accurate, I helped put the locker in the mens room.**
>
> **I was really angry and said [A] grabbed [G's] crotch, that did not happen.**
>
> **…**

These are seriously defamatory and false statements the Grievant made about her co-workers. Her defamatory and false voicemail caused

the State to instigate an Administrative Investigation and an EEO Investigation. These investigations, caused by the Grievant's serious misconduct, wasted State resources. Moreover, the Grievant's false statements relating to the workplace make it difficult, if not impossible, for ODOT administration and employees to be able to rely on the Grievant to be truthful and to conduct herself appropriately in the workplace.

The Arbitrator finds the record shows the WR-101 3C violation – Making defamatory or false statements – to be the core of the decision to terminate the Grievant's employment. While the Union legitimately objects to the lack of progressive discipline, and legitimately points to the Grievant's sixteen years of service to the State, the Arbitrator finds the State had sufficient just cause to remove the Grievant based on her seriously defamatory and false statements. While the record shows the Grievant had some legitimate workplace gripes, she seriously crossed the line when she made the decision to elaborate on her gripes with defamatory and false statements.

AWARD

For the reasons stated above, the grievance is denied.

January 8, 2014 *Susan Grody Ruben*
Arbitrator